Federal and Indian Reserved Rights to Groundwater [outline]

Robert S. Pelcyger

Follow this and additional works at: http://scholar.law.colorado.edu/groundwater-allocation-development-and-pollution

Part of the Administrative Law Commons, Agriculture Law Commons, Dispute Resolution and Arbitration Commons, Energy Law Commons, Environmental Law Commons, Evidence Commons, Hydrology Commons, Indian and Aboriginal Law Commons, Law and Economics Commons, Litigation Commons, Natural Resource Economics Commons, Natural Resources Law Commons, Natural Resources Management and Policy Commons, Oil, Gas, and Energy Commons, Oil, Gas, and Mineral Law Commons, Political Science Commons, State and Local Government Law Commons, Taxation-State and Local Commons, Water Law Commons, and the Water Resource Management Commons

Citation Information
http://scholar.law.colorado.edu/groundwater-allocation-development-and-pollution/16

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.
Robert S. Pelcyger, *Federal and Indian Reserved Rights to Groundwater* [outline], *in* *GROUNDWATER: ALLOCATION, DEVELOPMENT AND POLLUTION* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1983).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.
FEDERAL AND INDIAN RESERVED RIGHTS TO GROUNDWATER

Robert S. Pelcyger
Fredericks & Pelcyger
Boulder, Colorado

Groundwater: Allocation - Development - Pollution

a short course sponsored by the
Natural Resources Law Center
University of Colorado School of Law
June 6-9, 1983
I. Reserved Rights in General

A. Distinctive Characteristics

1. Priority Date - date is no later than date withdrawal was established
2. Measure
3. Principal Authorities:
   a. Winters v. United States, 207 U.S. 564 (1908);
   b. Arizona v. California, Applied Winters Doctrine to Reservations other than Indian, 373 U.S. 546, 595-601 (1963);

B. Doctrinal Basis

1. Indian Reserved Rights
2. Federal Reserved Rights
3. Principal Authorities:
   a. Worcester v. Georgia, State law does not apply to Indians or Indian Land, U.S. (6. Pet.) 515 (1832);
   b. United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690 (1899);
   c. United States v. Winans, 198 U.S. 371 (1905);
d. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973);

e. Bryan v. Itasca County, 426 U.S. 373 (1976);

f. Kleppe v. New Mexico, 426 U.S. 529 (1976);

g. California v. United States, 438 U.S. 645 (1976);

h. United States v. New Mexico, 438 U.S. 696 (1978);


II. Reserved Rights to Groundwater

A. The Cappaert case (United States v. Cappaert, 426 U.S. 128 (1976)

1. What did it hold?
2. Where does it lead?
3. Hydrologic connection between ground and surface waters

B. Pre-Cappaert Lower Court Decisions


C. Recent Post-Cappaert Decision - Groundwater was owned by State, so Fed. must apply to State + doctrine of prior appropriation applies only to groundwater on the reservations.

Wyoming District Court's decision in the Big Horn River Adjudication (May 10, 1983, not reported)

D. Congressional Treatment of Indian Rights to Groundwater


E. Summary and Conclusions

1. Indian Reservations
2. Federal Reservations
3. Primary-Secondary Distinction (see below)

Real question on Fed. Res. Res - is groundwater necessary for the purpose for which land was withdrawn.

Usa new-Mexico: Only when needed for primary purpose; if secondary purpose must apply for state permit. (unique here, Nat'l forests) Water Quality: same test as quantity (purpose of reservation)
III. Alternative Rules for the Application of Reserved Rights to Groundwater
   
   A. Prior Appropriation
   B. Overlying Uses
   C. Apportionment
   D. Safe Yield Limitation
   E. Relationship to Surface Flows
   F. Ground Water Hydrologically Connected to Surface Water
   G. Fossil Water not Hydrologically Connected to Surface Water
   H. De Minimus Exception for Essential and Small Domestic Uses?

IV. Jurisdictional Considerations
   
   A. Groundwater Basins Confined to Reservations
      1. State Jurisdiction
      2. Federal Jurisdiction
      3. Tribal Jurisdiction
   
   B. Groundwater Basins That Are Not Confined to Reservations
      1. State Jurisdiction
      2. Federal Jurisdiction
      3. Tribal Jurisdiction

---

Kootenai Case 380 F. Supp. 582(2)
when non-Ind. purchased riparian rights adjacent to Flathead Lake, they had an implied right to use water