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Federal Proprietary Water Rights for Western Energy Development: An Analysis of a Red Herring? (with S. Fairfax)

A. Dan Tarlock, *Chicago-Kent College of Law*

FEDERAL PROPRIETARY RIGHTS FOR WESTERN ENERGY DEVELOPMENT: AN ANALYSIS OF A RED HERRING?

A. Dan Tarlock & Sally K. Fairfax**†*

The purpose of this article is to state the case against what we consider to be a disruptive legal theory that may be used for the acquisition of water rights for Western energy development. There is a small, diffuse movement to expand the doctrine of federal reserved rights in order to facilitate development of publicly owned energy resources. This movement, which has attracted energy developers both in and out of the federal government, is the unintended beneficiary of efforts by environmentalists to secure water for the non-commodity purposes of federal land management. Ironically, the success of environmentalists in expanding the reserved rights doctrine has now given energy developers an arguable claim to federal water rights for their own purposes. One important document in the drive for the ex-

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* A.B. 1962, L.L.B. 1965, Stanford University; Professor of Law, Illinois Institute of Technology, Chicago—Kent College of Law, Visiting Professor, University of Michigan, Spring 1982.

** A.B. Hood College; M.A. 1969, New York University; M.A., Ph.D. 1974, Duke University; Associate Professor, College of Natural Resources, University of California, Berkeley, California.

†This article began as a detailed, critical analysis of the Department of Interior Solicitor's Opinion M-36914 which attempted to expand the doctrine of federal reserved rights and to circumvent the limitations imposed on the recognition of these rights by the courts with the assertion that federal land management agencies could claim federal non-reserved rights. Our original conception was overtaken by two events. First, in mid-1980, it became clear that the doctrine of federal non-reserved rights would be limited by the Department of the Interior in response to the protests of the Western states. This was confirmed in the Supplement to Solicitor's Opinion M-36914, 88 INTERIOR DEC. 253 (1981), issued by the Carter Administration's last Solicitor, the distinguished natural resources attorney Clyde O. Martz. As a result of the Department's internal retreat from the doctrine, our focus shifted to a broader discussion of the role of federal water rights generally in Western energy development. This remains our focus despite the second event. On September 11, 1981 the current Solicitor overruled Opinion M-36914's assertion of federal non-reserved rights. 88 INTERIOR DEC. 1055 (1981). This Opinion is, in many ways, as flawed as the original assertion of the doctrine. However, we have not changed the article, which was completed long before the latest twist and turn of Interior policy. The role of reserved rights in Western water allocation is still important, and neither the current Administration nor Congress has addressed the important issues. In addition, although what we have to say about federal non-reserved rights is not currently relevant, we believe that this article generally will be relevant to future revivals of interest, which in the cycle of American political life are bound to occur in expanded theories of federal water rights.

pansion of federal water rights is a flawed 1979 Solicitor's Opinion[1] (the Opinion), which was written for the purpose of claiming as much water for environmental land management purposes as appeared to be politically possible. The Opinion, partially reversed in 1981, gives energy developers a basis for claiming that they too are entitled to federal water. Although the possibility of expanded reserved rights is still of minor practical importance, the theoretical issues are ripe for analysis.

This article argues that the doctrine of federal reserved water rights should not be expanded to embrace development by federal lessees and other permittees for the following three reasons. First, the bases of federal reserved water rights asserted by the former Solicitor in the Opinion, which support energy developers' arguments for extension of that doctrine to private energy development, are ill-founded. The history of reserved rights is traced to demonstrate that application of the doctrine should be limited to a narrow spectrum of claims excluding energy development, even though its extension to such development would be constitutionally supportable. Second, while the Western states have forced the Department of the Interior to back away from much of the Opinion,[2] its theories are down but not out. These theories may have a significant influence in the outcome of current debate over Western energy development; in addition, attempts to claim federal water rights for energy development could be disruptive of private and state energy planning. Therefore, the Opinion's theories must be rebutted in the context of developing a coherent basis for the reserved rights doctrine generally. Third, it is bad policy to make federal water rights available for the development of Western energy resources. We do not pretend to be water or energy experts. However, it seems apparent that there is no need for the use of federal water rights to effectuate this country's energy policy goals.[3] Not only are federal water rights unnecessary to meet national energy goals, but the use of those rights to encourage the development of publicly owned resources is a subsidy that will further distort the pricing of such resources[4] and frustrate a rational energy

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[1] Solicitor's Opinion No. M-36914, 86 INTERIOR DEC. 553 (1979) [hereinafter cited as Solicitor's Opinion].

[2] *See infra* note 167.

[3] *See infra* notes 171-74.

[4] At the present time, many oil company executives are cool toward a massive federal subsidy program to develop synthetic fuels, in part, because sufficient development capital would be available from conventional sources if the market were ready for the production and distribution of these fuels. *See* Atlas, *Big Oil Cool Toward Federal Assistance on Synthetic Fuels*, Chi. Tribune, Dec. 24, 1980, § 3, at 5; Bartlett & Steel, *Shale Oil's Potential Still Untapped*,

policy, which must ultimately rely on price as a primary rationing device.[5] Energy planners already have enough uncertainty to assess without having to speculate on the impact of energy-related reserved rights claims.

I. INTRODUCTION

The widely stated goal of the United States' energy policy is to decrease dependence on foreign oil and gas and increase reliance on domestic energy sources.[6] To achieve this goal, the nation is relying on a combination of three related macro-policies to encourage simultaneous conservation and development of new supplies. The first macro-policy is a movement toward pricing fuel sources at their current replacement cost. Second, a variety of energy use standards are aimed at energy conservation. Third, and most important to the present discussion, are the efforts to accelerate the development of domestic reserves and alternatives. Like all macro-policies, energy policy is not wholly consistent. Policy-makers have not yet determined the relative weight attributable to the benefits of rapid development of alternatives to oil and gas. Many look to nuclear energy as an alternative source because solar energy, promising in many settings, is not yet a proven primary energy source. However, the future of nuclear energy is confused by the many uncertainties regarding its safety.

Assessment of the alternatives is further obscured by the complex relationship between current energy policy and the environmental programs that were rapidly adopted in the 1970's. Pollution control regulations, especially those enacted pursuant to the prevention of significant deterioration ("PSD") provisions of the Clean Air Act,[7] limit both the location and the feasibility of many potential energy extraction and conversion facilities in the Far West.[8] In addition, while Congress and the Executive branch seek to promote the accel-

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id., Dec. 16, 1980, § 1, at 1.

[5] *See* Wall St. J., Feb. 27, 1980, at 1, col. 6. *See generally* R. EDEN, M. POSWER, R. BENDING, E. CROUCH & J. STANISLAW, ENERGY ECONOMICS: GROWTH, RESOURCES AND POLICIES (1981).

[6] The three leading assessments of national energy policy are: (1) NATIONAL ACADEMY OF SCIENCES, COMMITTEE ON NUCLEAR AND ALTERNATIVE ENERGY SYSTEMS, ENERGY IN TRANSITION 1985-2010: FINAL REPORT (1979); (2) NATIONAL ACADEMY OF SCIENCES, COMMITTEE ON NUCLEAR AND ALTERNATIVE ENERGY SYSTEMS, ENERGY IN AMERICA'S FUTURE: THE CHOICES BEFORE US (1979); and (3) D. YERGEN, ENERGY FOR THE FUTURE (1979).

[7] 42 U.S.C. §§ 7470, 7470-91 (1976 & Supp. III 1979).

[8] *See generally* B. ACKERMAN & A. HASSLER, CLEAN COAL/DIRTY AIR OR HOW THE CLEAN AIR ACT BECAME A MULTI-BILLION DOLLAR BAILOUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT (1981); Currie, *Nondegradation and Visibility Under the Clean Air Act*, 68 CALIF. L. REV. 48 (1980).

erated development of publicly owned energy sources, they are simultaneously advocating both direct reservations of those resources and indirect withdrawals, in the form of a strict rational planning process, as a prerequisite to any substantial public land allocation choice.[9]

The general incoherence of our energy policy is exacerbated by the revival of a traditional and never completely dormant regional conflict over the proper federal role in resource development. The Western United States plays a key role in the implementation of any domestic reserve exploitation policy because of the rich coal, oil and gas, oil shale and geothermal resources located in the eleven contiguous Western states and Alaska. The central theme of the Sagebrush Rebellion, for example, is that federal environmental controls deprive the Western states of control over their destinies.[10]

Thus, although the goal of our energy policy is fairly easily stated, and its major component parts indentifiable, albeit without precision, the program is in fact a quagmire of conflicting sub-parts and priorities, most of which have a long history of intertwined rhetoric and uncertainty antecedent to our relatively recent energy "crisis." In this

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[9] *See* Anderson, *Public Land Exchanges, Sales, and Purchases Under the Federal Land Policy and Management Act of 1976*, 1979 UTAH L. REV. 657; *Symposium: Federal Land Policy and Management Act of 1976*, 21 ARIZ. L. REV. 267-597 (1979).

[10] The principal objective of this rebellion is to shift control over 174 million acres of land under the jurisdiction of the Bureau of Land Management from the federal government to the states. There is nothing new in this potential issue. For a lucid account of the failure of the late Senator McCarren's efforts in the late 1940's to divest the federal government of public domain ownership, see E. PEFFER, THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND RESERVATION POLICIES, 1900-1950, at 247-93 (1951). The case of former Secretary of Interior, Cecil D. Andrus, against Western "states' rights" is set forth in The Wall St. J., Dec. 5, 1979, at 22, col., 4. Current "states' rights" enthusiasts, including the new Secretary of the Interior, would be well to ponder Professor Peffer's conclusions about the failure of Senator McCarren to achieve a final disposal of the public domain suitable for grazing between 1946 and 1950:

> The really important contribution of McCarren's attempts to revive the nineteenth-century concept of a public domain destined to pass into private ownership has been to demonstrate the degree to which the public, and the West itself, have rejected that idea, and how closed in fact the public domain has become.
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> The controversy has confirmed what was revealed by the response to the Hoover recommendation of 1929 that the remaining public land be ceded to the states: how unlikely it is that the collective owners, including the majority of those directly affected, would agree to any material change in status of the large reserves. The predominant opinion is that lands suspected of future values, especially for water conservation, recreation, minerals, or homesteading, should be retained in public ownership until those values have been determined.
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> The foregoing statements are not intended to convey the conclusion that the future will be free of periodic upsurges of resentment against the conditions imposed by federal ownership of such a large extent of the Western land. However, that the public domain always has been, is now, and will continue to be a political football is immaterial. The game will go on, but the field has been fenced off.

E. PEFFER, *supra* at 292-93.

article, we enter the energy debate focusing on a very much related topic, water, which has long constituted a crisis of its own in many areas of the country.

Geologic processes have conspired to locate most of the public energy resources in generally arid terrain and substantial amounts of water will be required for their development.[11] Scarcity of water has always been a primary determinant in the development of the Far West. Historically, the region has tried to overcome this deficiency by putting water into the hands of private users as quickly as possible and by convincing the federal government to build irrigation projects and multiple-use reservoirs. Under this system, energy developers have been able to put together the necessary water rights packages through use of market transfers and federal contracts.[12] As the West has matured, however, "way of life" and "heritage" have become increasingly important to Westerners. Many people are now viewing with some alarm, or at least concern, the consequences of allocating and reallocating substantial amounts of water to energy development, without considering the opportunity costs of this choice.[13] As a result, the substantial new demands on the region's limited water resources caused by energy development add new stresses in addition to those resulting from rapid growth in the West, to the competition among users of the Western water. Throughout the West, the future of the region is being debated, the issue frequently being whether a policy of regional stability should be pursued or whether the region should free itself from an over century-old tradition of capital dependence on other regions of the country and Europe by becoming the OPEC of post-petroleum America.[14]

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[11] *See* Harte & El-Gasseir, *Energy and Water*, 199 SCIENCE 623 (1978).

[12] Water availability and uncertainty are greatly overrated as constraints to energy development. Recall that old western adage, "Water flows uphill to money." The Intermountain (electric) Power Project purchased water rights from irrigators in Utah at $1,750/acre-feet, many times greater than the value of water in crop production. Panhandle Eastern Pipeline Company is paying all of a $5 million low-interest loan to repair an irrigation district storage reservoir in exchange for twenty-five percent of reservoir yield, about 5,000 acre-feet/year. Burlington Northern and Tenneco propose to develop large irrigation projects in conjunction with their synthetic fuel operations. It is not that energy companies can flash "big bucks" around and get anything they want, but rather that, with some patience, imagination and willingness, they can avoid injury to third parties or compensate them for damage and otherwise make a project attractive to a skeptical public. . . .

D. Abbey, Water Use for Coal Gasification: How Much is Appropriate? (Oct. 1979) (Informal Report LA-8060-MS, Los Alamos Scientific Laboratory).

[13] *See* F. TRELEASE, WATER LAW, POLICIES, AND POLITICS: INSTITUTIONS FOR DECISION MAKING 199-201 (1980).

[14] For an analysis of OPEC strategies with a view toward their adoption by third world coun-

Control of water allocation is necessary to implement either a pro or anti-energy development policy. Proponents of regional stability tend to be content with existing water-use allocation patterns which favor irrigated agriculture.[15] In response to the fear that the consequences of policies favoring stability would be a "lock up" of water, proponents of rapid energy development have, at various times, explored the possibility of obtaining preferences for water beyond those conferred by normal bidding in the market for new and existing supplies.

Throughout most of the history of the Far West, the existence of federal proprietary rights was generally considered a mere theoretical possibility, irrelevant to actual water allocations. Although the federal government originally owned the land and minerals in the Far West,[16] those who ventured into the area believed that the federal government, as an incident of its disposal policies, had relinquished any claims to waters on public lands.[17] Settlers also believed that the federal government's interest in water resources was limited to its role in protecting navigation, which in the post-railroad West was

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tries who strike it rich, see K. HOSSAIN, LAW AND POLICY IN PETROLEUM DEVELOPMENT (1979).

[15] *See* F. TRELEASE, *supra* note 13.

[16] Federal land ownership is concentrated in Alaska and the eleven Western states which lie in whole or in part west of the Rocky Mountains. Fifty-four percent of the land of Arizona, California, Colorado, Idaho, Montana, New Mexico, Nevada, Oregon, Utah and Washington is federally owned. The last major acquisition by the federal government other than Alaska, the Gadsden Purchase, was made in 1853. M. CLAWSON & B. HELD, THE FEDERAL LANDS: THEIR USE AND MANAGEMENT 16-22 (1957). National forests alone account for over one-half of the annual run-off in the eleven contiguous Western states. *See* G. ROBINSON, THE FOREST SERVICE: A STUDY IN PUBLIC LAND MANAGEMENT 243 (1975).

[17] This article uses "public lands" to refer to all those lands retained by the federal government whether or not open to some form of entry under the various homestead and mineral exploitation laws. When almost all lands were open to entry or mineral exploitation, the terms "public lands" and "public domain" referred to federally owned lands open to entry. Lands not open to entry were described by a three-part classification. A withdrawal was a temporary removal of lands from some or all of the public lands laws relating to disposition pending the second step, classification. *See* United States v. Grimaud, 220 U.S. 506 (1911). Classification, as the term implies, was a decision whether or not to allow some or all types of entry or to remove it from all or some types of entry and reserve it for a specific use or uses. A dedication to a specific use or uses until the reserving agency or Congress changed its mind was a reservation. A reservation now implies a permanent dedication to a use which can be enjoyed by the public generally. Sometimes the shock of a reservation is eased by allowing limited types of entry until a future cut-off date, as was done with the Wilderness Act of 1964, 16 U.S.C. § 1133 (1976). The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701(e) (1976) contains the current definition of public lands:

> any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except—
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> (1) lands located on the Outer Continental Shelf, and
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> (2) lands held for the benefit of Indians, Aleuts, and Eskimos.

very limited indeed. The almost universal assumption was that all water rights for mineral development, or any other use on private or public lands, had to be perfected under state law.[18] This theory gained acceptance at a time when the general policy of the federal government was to dispose of the public lands entirely.[19] However, this supposition persisted for a long period of time, during which public lands policy evolved first from a policy of retention and disposition, then to retention,[20] and ultimately to retention and management,[21] because neither Congress nor the Executive did anything to challenge the idea of state control of the water on public lands.

This theory continues to be a basic tenet of Western water rights, despite the development of a common law of federal proprietary rights by the Supreme Court beginning in 1899. These rights were created to guarantee that the government's wards, the Indian tribes, had sufficient water to become integrated into the White irrigation society.[22] Many thought that the Indians were the sole beneficiaries of the judicially created reserved water rights, but in 1963 these rights were expressly extended to include water on all reserved public lands.[23] Neither the Executive nor Congress has known what to do with these non-Indian federal proprietary rights, and federal policy has swung from an initial disclaimer to an active assertion of those rights.[24] In recent years, reserved rights have been the subject of proposed legislation, major Supreme Court opinions, studies by national commissions[25] and a controversial Opinion issued by a former solicitor of the Department of the Interior,[26] bolstered by an inter-agency

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[18] In Lake Shore Duck Club v. Lake View Duck Club, 50 Utah 76, 81, 166 P. 309, 310-11 (1917), the Utah Supreme Court stated the prevailing understanding: "The very purpose and meaning of an appropriation is to take that which was before public property and reduce it to private ownership."

[19] *See generally*, V. CARSTENSEN, THE PUBLIC LANDS: STUDIES IN THE HISTORY OF THE PUBLIC DOMAIN (1968); E. PEFFER, *supra* note 10; R. ROBBINS, OUR LANDED HERITAGE: THE PUBLIC DOMAIN, 1776-1870 (2d ed. 1976).

[20] The definitive account of this era is E. PEFFER, *supra* note 10.

[21] Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-82 (Supp. III 1981). *See generally* Symposium, *The Federal Land Policy and Management Act of 1976*, 21 ARIZ. L. REV. 272 (1979).

[22] Winters v. United States, 207 U.S. 564 (1908).

[23] Arizona v. California, 373 U.S. 546 (1963).

[24] The history of federal policies may be found in Morreale, *Federal State Conflicts Over Western Waters—A Decade of Attempted "Clarifying Legislation,"* 20 RUTGERS L. REV. 423 (1966); TASK FORCE 5A — PRESIDENT'S WATER POLICY IMPLEMENTATION, REPORT OF THE FEDERAL TASK FORCE ON NON-INDIAN RESERVED RIGHTS (June 1980).

[25] *See, e.g.*, NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 464-69 (1973) (Final Report to the President and to the Congress of the United States).

[26] *See supra* note 1.

task force.[27] Federal policy will most likely substantially change again during the Reagan administration, but the theories that have been advanced, especially in the 1979 Solicitor's Opinion, have survived previous periods of political neglect and are likely to continue.

Federal reserved rights are super-riparian rights.[28] They arise not

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[27] TASK FORCE 5A, *supra* note 24.

[28] In seeking to explain the emerging law of federal reserved rights, Weil wrote: "And if the proprietary rights of the United States are recognized beyond actual use, it can only be because the common law of riparian rights is regarded in force in all jurisdictions as to the United States itself, at least." 1 S. WEIL, WATER RIGHTS IN THE WESTERN STATES § 207 (3d ed. 1911). For a fuller exposition of federal riparian rights as the basis for federal reserved rights, see Keichel & Green, *Riparian Rights Revisited: Legal Basis For Federal Instream Flow Rights*, 16 NAT. RESOURCES J. 969 (1976).

However, reserved rights are a more drastic intrusion on settled expectations compared to riparian rights. The Solicitor's Opinion attempted to minimize the potential disruption of settled expectations caused by the assertion of reserved rights by analogizing them to the riparian rights that exist in the few Western states, now chiefly California and Nebraska, that follow the dual system of water rights. But the case relied upon for the analogy, In re Waters of Long Valley Creek Stream System, 25 Cal. App. 3d 339, 599 P.2d 656, 158 Cal. Rptr. 350 (1979), was reversed on appeal and the holding illustrates the crucial differences between reserved and riparian rights. Riparian rights may be trimmed through the judicial process and the legislature in the name of more equitable sharing among claimants, but the present scope of the reserved rights doctrine does not permit equitable adjustments. A reserved right entitles the government to the minimum amount of water necessary to fulfill the purposes of the reservation which may be the total amount available. There is no balancing of the federal government's need against the interests of those claiming under state law. Cappaert v. United States, 426 U.S. 128 (1976). But all riparian rights are correlative, and when appropriators are involved, there must be a balancing of all competing interests, as *In re Waters of Long Valley Creek Stream System* illustrates. The case grew out of adjudication of a creek system on the eastern slope of the Sierras. A rancher was awarded riparian rights to irrigate 89 acres presently under irrigation, but the decree eliminated his future rights to water for 2,884 acres. The intermediate court of appeals upheld the decree, but the supreme court reversed in a four-three decision. The state argued that the California constitutional provision, art. X, § 2, which switched from the natural flow to the reasonable use theory of riparian rights, authorized the elimination of future riparian rights, but the court refused to so construe the section to avoid a due process problem. A riparian's right to future amounts was recognized, although only in theory because the court held that the decree could recognize the right but provide that unexercised riparian rights had a junior priority to all other rights being adjudicated or any priorities awarded before the right is exercised. 25 Cal. 3d at 358-59, 599 P.2d at 668, 158 Cal. Rptr. at 362. The result would be the opposite for an implied reserved right. All rights subsequent to the date of the withdrawal are inferior to the reserved right whenever it is exercised. The majority's decision is wrong but not surprising in California. *See* Joslin v. Marin Municipal Water Dist., 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967). The state clearly has the power to cut riparian rights back to amounts actually used on the cut-off date, but as the three dissenters correctly point out, the California Constitution protects riparian rights used or unused. CAL. CONST. art. X, § 2. Only wasteful riparian rights may be cut back, Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 3 Cal. 2d 489, 45 P.2d 972 (1935), and no court has held that unused riparian rights are *per se* wasteful.

Our characterization of reserved rights as "riparian rights plus" is made merely to establish that the federal government has a legitimate basis to claim proprietary rights incident to a reservation. We disagree with the statement in the Solicitor's Opinion that, "[o]riginally, the

by a diversion and application of water to a beneficial use but by the reservation of public land for a water-related purpose. Like riparian rights, they may be claimed as the need develops. In order to integrate them into the law of prior appropriation, the courts have given them a priority date determined by the time of the creation of the reservation, not the relatively short relation-back date allowed under state law. The measure of the right is the minimum amount necessary to fulfill the purposes of the reservation, rather than state law definitions of beneficial use.[29] Given the attributes of these rights, it is not surprising that various developers and their supporters in government have sought them as a water source that avoids the complicated problems of acquiring water rights under state law.

In this article, we examine the historical and theoretical foundations of the doctrine of reserved rights and its potential role in energy development. We also argue for a theory of federal proprietary rights that will substantially exclude the use of reserved rights for energy development at the present time. Our thesis is that the doctrine of federal reserved non-Indian water rights should be limited to situations in which resort to state water law would result in insufficient water to implement a congressionally sanctioned, water-dependent management program on withdrawn or reserved lands which benefits the public generally. Our concept reflects current thinking in the federal government, Congress and the courts, although a coherent justification for this theory has yet to be announced. As pressure for accelerated development of coal, oil shale and synthetic fuels grows, there will be renewed interest in federal proprietary water rights and a concomitant need for clarification of the doctrine and its parameters.

Until recently, there has been little pressing need to probe the basis of federal reserved rights. Actual use of the doctrine has been appropriately modest and potential conflict between federal rights and

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common law riparian rules of natural flow applied to the public lands. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899)." Solicitor's Opinion, *supra* note 1, at 565. The Court has never so held. Trelease, *Uneasy Federalism — State Water Laws and National Water Uses*, 55 WASH. L. REV. 751, 764 n. 65 (1980). All that need be said is that given the common law of riparian rights, the federal government's claim to proprietary rights for reserved lands is not a shocking break from precedent. Dean Trelease has disputed the proprietary basis of the doctrine, F. TRELEASE, FEDERAL STATE RELATIONS IN WATER LAW (1971) (National Water Commission Legal Study No. 5), but we think that the eminent scholar misses the point about reserved rights. "When those acting for the people of the United States put reserved water to use, they do so because the people own the water." E. HANKS, FEDERAL STATE RIGHTS AND RELATIONS § 102.1 (R. Clark ed. Supp. 1978).

[29] Cappaert v. United States, 426 U.S. 128 (1976).

state control has been largely a theoretical issue. The federal government has neither chosen to assert systematically the full extent of whatever non-Indian reserved rights it may possess, nor to integrate these proprietary claims into day-to-day operations of the management agencies within the Departments of Agriculture, Interior and now Energy.[30] A comprehensive system of federal proprietary rights has never been contemplated and is not now considered central to the comprehensive planning and management mission of the federal land management agencies. Their mission has always included the promotion of energy development by private patentees and lessees. The present energy "crisis" does not so fundamentally alter the agencies' mission that it requires a call for a modification of a modest federal reserved rights policy. The doctrine of reserved waters should not be seen as a major tool of water allocation. Rather, it has a more modest purpose. Nineteenth century property law constructed formidable barriers to keep governments from holding property to the exclusion of private claimants.[31] These barriers are the source of the articulated doctrine that governments hold water resources in a sovereign as opposed to a proprietary capacity.[32] The doctrine provided that governments could hold property for their limited and unique service functions but could not displace potential private claimants. It is now accepted that governments should have the power to hold resources for general public use to exclusion of private claims.[33]

Public finance theory identifies the provision of "merit goods" as a

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[30] BUREAU OF LAND MANAGEMENT, REPORT TO THE FEDERAL NON-INDIAN RESERVED RIGHTS TASK FORCE (1979). One reason for this is the high cost of claiming reserved rights. *See* GENERAL ACCOUNTING OFFICE, RESERVED WATER RIGHTS FOR FEDERAL AND INDIAN RESERVATIONS: A GROWING CONTROVERSY IN NEED OF RESOLUTION (1978). The Department of Justice has spent $3.5 million preparing for a reserved rights trial in Nevada, and the Bureau of Land Management spent approximately $1.7 million in 1979 to participate in an adjudication, on an *ad hoc* basis, in Colorado Water Court, divisions 4, 5 and 6. *But see* Note, *Indian Reserved Water Rights: The* Winters *of Our Discontent*, 88 YALE L.J. 1689 (1979), which questions the feasibility of alternatives to adjudication for the related reserved rights of the Indians.

[31] Geer v. Connecticut, 161 U.S. 519 (1895). The holding that state laws which prevented the export of game outside the state were not an unconstitutional restraint on interstate commerce was overruled in Hughes v. Oklahoma, 441 U.S. 322 (1979). *See* Hellerstein, *Hughes v. Oklahoma: The Court, the Commerce Clause and State Control of Natural Resources*, 1979 SUP. CT. REV. 51. The evolution of American law from Roman notions that resources such as water were *res communes*, and thus had to be widely shared, to theories of exclusive ownership is traced in Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761, 801-09 (1979).

[32] For an echo of the theory, see the dissenting opinion of Justice McQuade in State Dep't of Parks v. Idaho Dep't of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974).

[33] *See id.;* Colorado River Water Conservation Dist. v. Colorado Water Conservation Bd., 197 Colo. 469, 594 P.2d 570 (1979). *See generally* Tarlock, *The Recognition of Instream Flow Rights: "New" Public Western Water Rights*, 25 ROCKY MTN. MIN. L. INST. 24-1 (1979).

proper governmental function.[34] The recognition of federal reserved rights was an early attempt to correct the flaw in nineteenth century property law that made it difficult for governments to protect diffuse majority interests through the provision of merit goods. There is no need to seek other uses for the doctrine. Of course, *a priori* there is no reason why the doctrine of reserved rights should be limited, as we argue. However, because water is scarce in the West, and is an essential element in all resource planning decisions, any doctrine that is so unbounded as to impede planning by private and public bodies must be viewed with deep suspicion. Judicially dealt wild cards introduce high costs and few benefits into the nation's efforts to define a reasonable process for managing our public lands for energy development, commodity production and environmental purposes. Moreover, a new theory of water entitlements is not what energy planning needs. Entitlements will not create water where none is available. The possibility of substantial new entitlements will deflect attention from the crucial questions that the states and the federal government must yet address.[35] Water resources must be assessed basin-by-basin and proposed energy development projects must be assessed technology-by-technology. In this manner the water efficiency of alternative extraction and production processes may be compared and, one hopes, more rational allocation decisions made.[36]

More generally, a new theory of water entitlements does not appear to be what the land managers require. As part of the 1977-78 water policy initiatives, the Carter administration proposed to require land management agencies systematically to identify and quantify potential reserved rights claims for their non-energy management functions.[37] Whether such proposals will be followed by the Reagan administration remains to be seen. Unfortunately, aggressive quantifications programs are difficult to justify. Federal land management

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[34] R. MUSGRAVE & P. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE (2d ed. 1976).

[35] *See* H. INGRAM, N. LANEY & J. MCCAIN, A POLICY APPROACH TO POLITICAL REPRESENTATION: LESSONS FROM THE FOUR CORNERS STATES 101-32 (1980).

[36] *See* Harte & El-Gasseir, *supra* note 11.

[37] The opening move was a "hit list" of 33 previously authorized projects which were removed from an appropriation bill. *See* Scheele, *President Carter and the Water Projects: A Case Study in Presidential and Congressional Decision-Making*, PRES. STUDIES Q. 348 (1978). In the summer of 1977, a series of option papers prepared by task forces under the leadership of the Water Resources Council, the Office of Management and Budget, and the Council on Environmental Quality were published in the Federal Register. 42 Fed. Reg. 36788-95 (1977); 42 Fed. Reg. 37940-61 (1977). *See generally* Hillhouse & Hannay, *Practical Implications of the New National Water Policy*, 25 ROCKY MTN. MIN. L. INST. 22-1 (1979). The President's proposed water policy reforms may be found in FEDERAL WATER POLICY INITIATIVES, H.R. Doc. No. 347, 95th Cong., 2d Sess. (1978).

agencies are now under great stress trying to implement statutes that attempt to join general planning requirements with special purpose legislation,[38] while responding both to judicial decisions further constraining their activities and to the latest manifestation of Western sectionalism, the Sagebrush Rebellion.[39]

Since federal proprietary rights cannot be viewed as a necessity to federal land management, our definition of the proper scope of reserved rights is narrow. Moreover, the energy crisis does not generate much theoretical or empirical justification for ignoring what emerges from our analysis as the reasonable parameters for the concept. There has been no showing that state law discriminates against the use of water for environmental purposes.[40] Nor is there evidence to suggest that federal energy policy is likely to be frustrated by a lack

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[38] General or multiple use planning requirements are specified in slightly varying forms in statutes such as the Bureau of Land Management "organic act," the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1782 (1976 & Supp. II 1978 & Supp. III 1979), and in Forest Service legislation such as the Multiple-Use Sustained-Yield Act of 1960, 90 Stat. 2962 (current version at 16 U.S.C. §§ 528-31 (1976)); and the Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA), 16 U.S.C. §§ 1600-14 (1976) and the National Forest Management Act of 1976 (NFMA), 90 Stat. 2949, both of which were amended by the Forest and Rangeland Renewable Resources Research Act of 1978, 16 U.S.C. §§ 1641-47 (Supp. II 1978), and the Renewable Resources Extension Act of 1978, 16 U.S.C. §§ 1671-78 (Supp. II 1978). The broad mandate to consider, weigh and assess multiple use factors found in those statutes frequently is or appears to be at odds with more explicit directives such as the Wilderness Act, 16 U.S.C. §§ 1131-36 (1976 & Supp. II 1978); the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-87 (1976); the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-40 (1976 & Supp. II 1978); and the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-43 (1976), *as amended by* the Endangered Species Act of 1978, 92 Stat. 3751.

[39] The "Sagebrush Rebellion" references an effort by disgruntled Westerners, particularly commodity users of western public lands, to highlight inadequacies and inequities in federal resource management and to transfer parts of the federal holdings to state ownership management. *See supra* note 10. As such, the movement has a long line of antecedents, most notably the ostensible "great land grab" of the post-World War II period. *See generally* E. PEFFER, *supra* note 10, at 247-341; W. VOIGT, PUBLIC GRAZING LANDS 43-239 (1976); S. DANA & S. FAIRFAX, FOREST AND RANGE POLICY 183-89 (2d ed. 1980). Although the land transfer component of the movement is arguably more credible in the post-election period, wholesale shifting of land between jurisdictions does not appear to be a realistic possibility. The political self-consciousness and efficacy of the Western states is clearly in evidence, however, in the discussion of dozens of related and less dramatic issues. The outcome of such diverse debates as the MX missile controversy, the Proposed Energy Mobilization Board, and the numerous venue restriction proposals, as well as the Solicitor's Opinion discussed below (*see* notes 90-94 *infra*, and accompanying text) will continue to be shaped by the growing power of Western regionalism.

[40] Discrimination against environmental purposes, if it still exists, results from two concepts generally characteristic of water allocation law in the Western states: the notion that water must be diverted from the water course, hence removed from the water-dependent riparian ecosystem, and the definition of beneficial use, which has historically precluded allocations for ecosystem maintenance. *See generally* Tarlock, *Recent Developments in the Recognition of Instream Uses in Western Water Law*, 1975 UTAH L. REV. 871.

of water[41] that can be embellishment of the concept.

Hence, the major theme in our argument is that the federal reserved right doctrine should be put beyond the reach of energy developers. We share the concern of many Westerners about the costs of rapid energy development, but we are not neo-Luddites. We recognize that putting energy development at the mercy of state water law has its risks. The anti-coal slurry pipeline statutes of Montana[42] and Wyoming[43] illustrate the use of state sovereignty in an attempt to deny other regions access to Western water resources. In addition, many have seized upon the law of prior appropriation as a means of preserving the status quo.[44] We still share Dean Trelease's conclusion that "water law is a poor tool with which to do the job."[45] We argue only that when there is a clear conflict between broadly defined state water allocation preferences and federal energy policy, the issue should be confronted and resolved by Congress through legislation that relies on the supremacy clause. There are no constitutional constraints on the federal government's promoting energy development through either federal allocation of Western waters or federal proprietary rights.[46]

In the absence of such congressional action, however, and until the evidence of state frustration of federal energy policy is clearer, there are good reasons to defer to Western water law. The end product of the evolution of state water law is the creation of a system of private property rights that is flexible enough to respond both to new private demands and to public demands for the use of water for energy development. Also, the Western states have shown a limited inclination to discourage energy development in favor of preservation of the sta-

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[41] Some have suggested that federal policies make no difference in supply levels. Other studies argue that federal coal leasing policies hinder development. The General Accounting Office has charged that the Department of the Interior's initial efforts to resume coal leasing after a ten-year hiatus are deficient, judged by the standard of federal lands contributing significantly to meeting the nation's need for more coal. ENERGY MGMT., (CCH Weekly Newsletter Issue No. 397, at 7, Sept. 2, 1980. *See* Watson, *The Federal Coal Follies — A New Program Ends (Begins) a Decade of Anxiety*, 58 DENVER L.J. 65 (1980).

[42] MONT. REV. CODES ANN. § 85-2-104 (1981).

[43] WYO. STAT. § 41-3-115(b) (1977). The legislature approved one project subject to gubernatorial veto. *Id.* § 41-2-301 (Supp. 1981). After extensive hearings, the governor vetoed the project because of unanswered questions about its economic, environmental and social impacts. *See* F. TRELEASE, *supra* note 13, at 199-201. *See generally* Martz & Grazis, *Interstate Transfers of Water and Water Rights — The Slurry Issue*, 23 ROCKY MTN. MIN. L. INST. 33 (1977).

[44] *See* F. TRELEASE, *supra* note 13, at 199-201.

[45] *Id.* at 216.

[46] *See* Note, *Federal Acquisition of Non-Reserved Water Rights After New Mexico*, 31 STAN. L. REV. 885 (1979); Trelease, *Arizona v. California: Allocation of Water Resources to People, States and Nation*, 1963 SUP. CT. REV. 158.

tus quo. In short, it is reasonable to presume that state water law is consistent with federal policy.

The limited role we suggest for non-Indian reserved rights is not, however, wholly consistent with the existing understanding of the law. First, the theoretical justification, which is self-limiting, has never been articulated by the Supreme Court or by commentators. Second, in the past two years Congress and the Executive have considered a substantial expansion of the role of federal proprietary rights in public lands allocation and Western water allocation beyond the parameters we suggest.

To explain our argument, this article will trace the history of the reserved rights doctrine, explore in depth the 1978 Supreme Court opinion in *United States v. New Mexico*,[47] which limits the doctrine, and briefly outline the efforts of the Executive branch to expand the doctrine and circumvent *New Mexico*. The article will then turn to an analysis of recent efforts to invoke the doctrine for the benefit of energy developers. Such a long prologue to the topic of this article is necessary because, despite all the commentary on the doctrine, there has seldom been a frank recognition that it is wholly grounded in federal common law and, as such, modifiable at the sole discretion of congressional or executive agencies. Therefore, there is a need to articulate a rationale for the doctrine that can guide the efforts of all three branches of government in their delineation of the role of the doctrine in the water allocation conflicts of the coming decade. The law of federal proprietary rights must be integrated into the long, rich, but not wholly satisfactory pattern of federal and state institutional arrangements for water allocation.

II. The Origins of the Doctrine

Westerners have invested so much intellectual energy in denying federal proprietary rights that their existence is widely viewed as an exception to state control. For example, Justice Rehnquist's analysis of the doctrine in *New Mexico* rested on the assumption that reserved rights are "an exception to Congress's explicit deference to state water law in other areas."[48] A more accurate view is that they result from the federal government's indifference to its potential rights. Indeed, given the extent of federal ownership of Western lands, it is the pervasiveness of state control of Western waters that is surprising.

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[47] 438 U.S. 696 (1978).

[48] *Id.* at 715.

A. *Public Domain Policy as a Context for Western Water Law*

The federal government became the proprietor of the territory that was to become the eleven Western states and Alaska in the late eighteenth and early nineteenth centuries. Between 1850 and 1912 these states gained statehood, but the federal government retained much of the land. Given the federal government's extensive ownership of these lands, the existence of federal proprietary rights would seem to follow logically from its status as a riparian property owner.[49] Federal reserved rights follow from the most traditional reading of the property clause: the federal government's claim of rights incident to its land are only those which the law affords a private landowner.[50] It is only because of the history of disposition of the public domain that federal proprietary water rights on retained public lands now seem surprising and out of place.

This section of the article traces the history of public domain policy between1850 and 1980, as well as the relationship between federal land policy, the growth of Western water law, and the development of the doctrine of federal reserved water rights. Our argument in this section is that the federal government, the states and the Supreme Court have, in different ways, misinterpreted this history to the detriment of a coherent and rational theory of reserved rights.

Even before the federal government officially began to acquire the public domain in 1781,[51] the Western frontier was undergoing settlement. Federal public lands policy consistently focused on the most desirable method for disposing of federal lands. Debates occupied Congress for a major portion of the nineteenth century concerning whether to sell the land or give it away, whether to sell it for cash or on credit, and if sold on credit, on what terms. There was, however, fundamental agreement on the basic notion that the federal government should not and would not retain title to the Western lands. Although there is a history of scattered mineral reservations dating from 1785,[52] retention policy did not emerge as an issue until the

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[49] *See supra* note 28.

[50] *See infra* notes 55-56.

[51] Seven of the thirteen original states claimed title to contiguous Western areas formerly belonging to the Crown. The other six states insisted that those "western reserves" be ceded to the federal government for mutual benefit. Altogether, the state cessions comprised approximately 233 million acres in what is now Ohio, Indiana, Illinois, Michigan, Wisconsin, Minnesota, Alabama and Mississippi. *See* S. DANA & S. FAIRFAX, *supra* note 39, at 6-7.

[52] The general land ordinance which established the rectangular survey system as the fundamental land allocation and management tool also reserved one-third of all gold, silver, copper and lead minerals. *See* Swenson, *Legal Aspects of Mineral Resources Exploitation*, in P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968).

1870's and 1880's. Public concern about the destruction of forests led to a major shift in policy. An 1891 statute authorizing designation and retention of forest reserves marked a change from policies of exclusive disposition to that of simultaneous disposition and retention. From 1891 to 1934, the federal government continued to encourage settlement through the enactment and administration of the various homestead laws, while withdrawing and reserving large parts of the public lands for national forests, parks and other public purposes.[53]

Many of the early reservations were explicitly water-related. Thus, it would seem reasonable that the federal government, as a rational landowner, would seek to maintain or enhance the value of the use of its land held in trust for the "whole public" through the claim of appurtenant water rights. Without directly superseding state law, the federal government could have forced private landowners to share the water arising on the public domain under the common law of riparian rights or it could have chosen to take its place in line by perfecting state appropriations. Although somewhat cumbersome, the first option would not have been shocking, at least in California, Oregon, Washington and the Dakotas. These states devised a dual system of appropriative and riparian rights on the theory that federal patents carried riparian rights with them.[54] Had the federal government wished to develop a law of federal water rights to supersede state law, it could have easily done so.

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[53] The Kinkaid Act, ch. 1801, 33 Stat. 547-548 (1904) (repealed 1976); the Enlarged Homestead Act, ch. 160, 35 Stat. 639 (1909) (repealed 1976); and the Stock-Raising Homestead Act, ch. 9, 39 Stat. 862 (1916) (repealed 1976) attempted to adapt the homestead concept to arid Western areas where 160 acres would not support a family by expanding a homestead to as much as 640 acres. In the same period, the National Park Service was founded (1916), the U.S. Forest Service was established (1905), and 16 million acres were added to the Forest Reserves in a single year (1907). By 1923, the National Forest Service contained 161 million acres. B. HIBBARD, A HISTORY OF PUBLIC LAND POLICIES 534 (U. Wis. ed. 1965). Theodore Roosevelt also withdrew 66 million acres of land believed to contain coal. *Id.* at 523.

[54] The three theories are represented by the three states of California, Colorado and Oregon. Colorado rejected the common law on the theory that it was inapplicable to the arid West, but California and Oregon made a more complicated adjudgment of riparian rights to the fact of little rain. California asserted that although the federal government owned the public domain, the state, by virtue of its territorial sovereignty, could decide that rights appertained to federal as well as private property. Because California adopted the common law of riparian rights, Lux v. Haggin, 69 Cal. 255, 10 P. 674 (1886), the federal government was "given" riparian rights. California eventually adopted the rule that federal patents carried riparian rights subject only to appropriative rights in existence at the time that the patent was issued. *See* Note, *Federal-State Conflicts Over the Control of Western Waters*, 60 COLUM. L. REV. 967 (1960). Oregon adopted the simpler theory based on the correct rule that federal law governed the disposition of federal property. The Desert Land Act was said to create a uniform rule of prior appropriation but this theory was rejected by Justice Sutherland in California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935). *See infra* notes 82-85.

The federal government's power to supersede state law by virtue of its ownership of the public lands has long been a controversial and confusing concept. It is clear, however, that the federal government can manage its retained lands free from the restraints of state law. The modern theory, based upon the shift in federal policy from that of disposition to retention, is that the federal government is not only a proprietor of the public domain, but is a sovereign proprietor,[55] and as such is not required to perfect the water rights it needs under state law. One need not accept the full implications of this theory to conclude that a combination of the property and supremacy clauses has always entitled the federal government to supersede the state law of water rights regardless of the classification of ownership.[56] The Supreme Court has consistently allowed the federal government to claim superior proprietary water rights where they were necessary to carry out federal purposes on retained lands.[57] Hence, the federal government has always possessed riparian rights plus additional powers.

B. *Early Theories of Federal Proprietary Rights*

Careful scholars such as the great Samuel Wiel constantly cautioned the states that the federal government might claim proprietary rights just as it claimed ownership of subsurface minerals.[58]

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[55] Kleppe v. New Mexico, 426 U.S. 529 (1976).

[56] The theoretical foundations of the reserved rights doctrine need not rest on the Court's assertion in Kleppe v. New Mexico, 426 U.S. 529 (1976), that federal power over article IV federal lands is without limitation. Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 282, 351 (1976), argues that "every single precedent was misunderstood." In a less than complete analysis of the relevant precedents, and with little or no discussion of the evolution of public domain policy, Engdahl argues that starting with Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845), the Court has followed a theory that state jurisdiction over federal lands is the norm subject to three exceptions: (1) the principle of the necessary and proper clause, (2) the principle of intergovernmental immunities, and (3) "of course, the rule giving the United States complete control over the creation of private rights in its property." *Id.* at 341. For our purpose, it is sufficient to note that Engdahl finds this third rule a complete justification for the reserved rights doctrine. *Id.* at 344 n. 251. Proponents of the "Sagebrush Rebellion" dispute vigorously the federal government's power to retain the public lands and to pre-empt state law. A discussion of the Western states' creative reading of *Pollard* is beyond the scope of this article. The arguments are previewed in Wilkinson, *The Field of Public Land Law: Some Connecting Threads and Future Directions*, 1 PUBLIC LAND L. REV. 7-8 (1980).

For a brief discussion of possible limitations on federal exercise of the property power, *see* Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817 (1980).

[57] The leading case is Camfield v. United States, 167 U.S. 518 (1897). *But cf.* Leo Sheep Co. v. United States, 440 U.S. 668 (1979) (limiting the reach of the Unlawful Inclosures of Public Lands Act of 1885, and by implication the holding of *Camfield*).

[58] *See* 1 S. WEIL, WATER RIGHTS IN THE WESTERN STATES § 86 (3d ed. 1911).

However, before Congress seriously considered or asserted such claims, the federal government's disposition policies of the pre-1870 era fueled the expectation that all proprietary water claims had been forever waived.

Federal claims appeared to be waived because the gold miners arrived in California before the federal government could define and implement a policy with respect to its rapidly expanding domain. After the Civil War, it was suggested that the miners were simply trespassers and should be ejected so the government could run or lease the mines to pay off the war debt. Such drastic action, which was earlier upheld in California,[59] was inconsistent with the Jeffersonian dream of peopling the West with hardy yeomen and did not prevail as federal policy. Instead, a number of theories and fictions were used to protect the interests of growing numbers of Western settlers.

Thus, the foundation for a theory of estoppel against federal assertion of proprietary rights was laid.[60] In many ways the history of public domain policy is the history of *post hoc* legitimization of trespassers. Mineral and water policy followed this pattern. Instead of ejecting the miners as trespassers, Congress did the opposite. In three statutes enacted between 1866 and 1877, mining and water rights were transformed from trespasses to fees or permanent easements and profits on the theory that the federal government had acquiesced to the acquisitions of private rights in public resources. The Acts of 1866,[61] 1870[62] and 1877[63] all recognize state water law as the source of private rights in water arising on the public domain or on land patented to private individuals. This statutory triptych forms the core of the states' argument that the federal government not only refused to grant federal water rights incident to federal patentees, but went several steps further and relinquished all control over Western waters. The states' arguments are set forth below.

First, Western states argued that congressional acceptance of state declarations of "ownership" in the acts of their admission into the

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[59] Boggs v. Merced Mining Co., 14 Cal. 279, 374 (1859). The effect of war on American public lands policy is an oft-mentioned but little studied topic. Beginning in the Revolution when Military Bounty Lands were promised to soldiers in lieu of a salary, wars have had a tremendous effect on land management decisions, particularly when Congress has decided to liquidate the war debt by raising grazing fees.

[60] *See* McCurdy, *Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study in Judicial Resource Allocation in Nineteenth-Century America*, 10 L. & Soc. Rev. 235 (1976).

[61] Act of July 26, 1866, ch. 262, 14 Stat. 251 (1866).

[62] Act of July 9, 1870, ch. 235, 16 Stat. 217 (1870).

[63] Desert Land Act, ch. 107, 19 Stat. 377 (1877).

Union created a compact between the federal government and the states by which the federal government relinquished all claims. This argument has been thoroughly rejected and is not raised in present day states' rights controversies.[64]

Second, the states have also urged a constitutional theory that denies any federal power over Western water allocation to overcome any defects in the compact argument or the statutory waiver argument below. The states have argued that the equal footing clause, ambiguous though it may be,[65] requires that the Western states be given exclusive control over all waters arising within their boundaries. Early in the nineteenth century, the Supreme Court held that this theory gives all states presumptive title to lands underlying navigable water.[66] However, in *Arizona v. California*,[67] the Court correctly rejected the extension of the equal footing doctrine to give the states control of the waters within their boundaries on admission to the Union; nevertheless, the brevity of the Court's analysis invites lawyers to continue to push the argument.[68] Justice Rehnquist fueled the possibility of a quick equal footing "fix" in *United States v. California*[69] by treating the argument seriously,[70] but his remarks are pure dicta and are incorrect. The equal footing clause does not guarantee the states exclusive control over Western waters, if only for the simple reason that, like Orwell's pig, by asserting the clause they seek to be more equal than the original thirteen states.[71] Because they followed the common law of riparian rights, the original states never asserted actual "ownership" of the waters within their borders.

This leaves Westerners with the statutory waiver argument. This theory does little more than attempt to extend an idea created for a

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[64] *See* Morreale, *supra* note 24, at 446-55, for a definitive analysis of the compact theory, which concludes that the compact theory "flies in the face of history, theory, language, and logic." *Id.* at 455. *See also* Goldberg, *Interposition — Wild West Water Style*, 17 STAN. L. REV. 1 (1964-1965).

[65] U.S. CONST. art. IV, § 3 was adopted after the convention struck out an express equality provision. Nonetheless, the Court has held that the concept of a union in states must mean "a union of States, equal in power, dignity, and authority, each competent to exert that attribute of sovereignty not delegated to the United States by Constitution itself." Coyle v. Smith, 221 U.S. 559, 567 (1911).

[66] Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845).

[67] 373 U.S. 546, 597-98 (1963).

[68] Walston, *Reborn Federalism in Western Water Law: The New Melones Dam Decision*, 30 HASTINGS L. REV. 1645, 1655 (1979), asserts "when the original thirteen states formed the Union, they retained certain attributes of sovereignty, including control of the beds and shores of their navigable waters and, apparently, of the waters themselves."

[69] 438 U.S. 645 (1978).

[70] *Id.* at 654-55 (citing Kansas v. Colorado, 206 U.S. 46 (1907)).

[71] Martz & Grazis, *supra* note 43, at 45.

limited purpose by Justice Stephen J. Field while he was sitting on the California Supreme Court. To protect the claims of the miners, Justice Field used local custom to elevate those claims to vested private property rights, for the purpose of foreclosing the *retroactive* superior title of the federal government.[72] However, the statutory waiver theory would not serve to preclude federal reserved rights, since such rights merely co-exist with private rights.

The Act of 1866, which confirmed Field's theory of private rights in public resources, is the most important of the many relief laws passed for the trespassing miners. The Act provides:

> That whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.[73]

Similar legislation, enacted in 1870,[74] ratified the solution of the Act of 1866 for all post-1870 patents.

The Supreme Court first applied the Act of 1866 to enforce the doctrine of prior appropriation between two appropriators, neither of whom claimed under a federal patent.[75] In 1879, however, in the case of *Broder v. Water Co.*[76] the Court applied the Act in a manner consonant with its intended purpose. *Broder* held that a prior appropriator, claiming under state law, should prevail against one who based his claim solely on a federal patent issued after the water had been put to a beneficial use under state law by the appropriator. As Justice Miller explained: "We are of the opinion that the section of the act . . . was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one."[77]

The Act of 1866 and the Corollary Act of 1870 do not support the argument that the federal government waived all future proprietary claims to Western waters. They only support the conclusion that the federal government elected to protect those holding existing rights obtained under state law, as against federal patentees' future riparian rights which are claimed to be superior to the earlier uses vested

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[72] *See supra* note 60.
[73] Act of July 26, 1866, ch. 262, 14 Stat. 251 (1866).
[74] Act of July 9, 1870, ch. 235, 16 Stat. 217 (1870).
[75] *E.g.*, Atchison v. Peterson, 87 U.S. (20 Wall.) 507 (1874).
[76] 101 U.S. 274 (1879).
[77] *Id.* at 276.

under state law.[78] The two Acts say nothing about the federal government's future proprietary claims to water on lands it might retain, because in this era of disposition of federal lands, it was assumed the United States would retain no lands. Thus, it cannot be concluded that Congress, in enacting the Acts of 1866 and 1870, intended to divest itself of all claims over Western waters, because the issue simply was not considered.

C. *Justice Sutherland and the Severance Theory*

Because the Acts of 1866 and 1870 provide no basis for the waiver theory, the states primarily base their exclusive control argument on the final of the three Acts, the Desert Land Act of 1877.[79] This Act, unlike the other two Acts, was prospective. It represented Congress's initial and unsuccessful attempt to adapt the Homestead laws to conditions in the arid West by encouraging the private reclamation of lands. Under the 1877 Act, homesteaders who reclaimed arid land by means of irrigation were given larger tracts of land than the 160-acre tracts available under the original 1862 Homestead legislation. Congressional optimism regarding private irrigation programs proved unfounded and touched off "wild speculation and ditching which was a method of feigning reclamation by plowing a few furrows or by cutting a ditch one foot deep where eight feet were needed."[80] With respect to water, the Act provides:

> All surplus water over and above such actual appropriation and use, . together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.[81]

Despite the ambiguous nature of the legislative history, the foregoing section was given the broadest construction possible in Mr. Justice Sutherland's opinion in *California Oregon Power Co. v. Beaver Portland Cement Co.*[82] The case held that the Act was not limited to Desert Land Act entrymen, but effected a severance of all Western waters from the public lands.

California Oregon Power Co. arose out of a fight between a power company, a riparian owner on a non-navigable stream, and an in-

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[78] For an extended analysis of this conclusion, see Grow & Stewart, *The* Winters *Doctrine as Federal Common Law*, 10 NAT. RESOURCES L. 457 (1977).

[79] B. HIBBARD, *supra* note 53, at 424-55.

[80] *Id.* at 429.

[81] Desert Land Act, ch. 107, 19 Stat. 377 (1877).

[82] 295 U.S. 142 (1935).

stream appropriator, a cement company which sought to blast the stream and divert the water. The power company claimed riparian rights under an 1862 Homestead Act patent issued in 1885, while the cement company claimed rights under an appropriation permit issued under Oregon's 1909 water rights law.[83] In 1909, Oregon switched from the dual system of appropriative-riparian rights, which prevailed in the three coastal states, to a pure appropriation system. Pre-1909 riparian rights, perfected by actual use of the water, were deemed vested in order to avoid constitutional objections. Since only pre-1909 riparian rights that qualified as appropriations were vested, the 1909 law did not help the power company, as it had never diverted the water for a beneficial use. Therefore, the power company had to challenge the constitutionality of the 1909 Oregon statute. It is not clear whether the power company would have won the war if it had succeeded on this issue. Even if the legislation had been found unconstitutional, the power company still may have been unable to assert a state property right based upon its 1885 riparian right. Rather than deciding the constitutional issue, the Court held that the Desert Land Act of 1877, and presumably the Acts of 1866 and 1870, effected a severance of all waters in the public domain, not theretofore appropriated, from the land itself. The Court concluded: "From that premise, it follows that a patent issued thereafter in a desert-land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed."[84] Thus, Oregon was free to recognize whatever system of water rights it chose; however, the Court never reached the issue of whether the power company had a pre-1909 riparian right.

In order to reach the holding that the Act of 1877 effected a severance, Justice Sutherland necessarily made one crucial, highly debatable assumption and had to justify a line of precedents that implicitly recognized federal riparian rights. The assumption was that the Desert Land Act severed *all* Western waters, not just those that flowed through lands patented under the Act. Recognizing that state water rights derived from federal land title and following a dual riparian-appropriation system, California and Washington courts had determined that only Desert Land Act patentees could cut off common law riparian rights.[85] This "narrow" theory was rejected by Justice

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[83] *See* Hough v. Porter, 51 Ore. 318, 95 P. 732, 98 P. 1083, *reh'g den.* 102 P. 728 (1909); C. MEYERS & A. TARLOCK, WATER RESOURCE MANAGEMENT 154-56 (2d ed. 1980).

[84] 295 U.S. at 158.

[85] *See supra* note 54.

Sutherland because it would "subvert the policy Congress had in mind — namely to further the disposition and settlement of the public domain."[86] However, a careful reading of the legislative history of the Desert Land Act suggests that the Act, like its two predecessors, did not represent a definitive resolution of the issues concerning access to Western waters.[87] Thus, the severance theory rests more on the policies that Utah-bred Justice Sutherland had fought for as a Congressman and Senator from Utah[88] than on a final, comprehensive congressional statement of all past and future aspects of Western water allocation.

Indeed, a further weakness in the states' severance argument is the failure of the *California Oregon Power Co.* Court to deal with the federal interest in Western waters that had been announced in two important Supreme Court cases decided in 1899 and 1908. Both *United States v. Rio Grande Dam & Irrigation Co.*[89] and *Winters v. United States*[90] had suggested, but not fully articulated, that there exist federal proprietary water rights based on the property clause. Justice Sutherland did not bother to discuss *Winters,* the foundation federal reserved rights case, and he only briefly dealt with *Rio Grande.* The latter case held that under the Commerce Clause the United States could prohibit the construction of a dam across the Rio Grande River if the construction and appropriation of water would substantially diminish navigability. The Court also suggested in dictum that federal ownership of the riparian lands was also a source of federal power to regulate the dam. Justice Sutherland merely noted that the case announced two exceptions to exclusive state control, but did not further discuss *Rio Grande.* However, *Rio Grande* was, in fact, a major barrier to the severance theory, since the dictum in the case rested on a theory of post-1877 federal proprietary rights, which *California Oregon Power Co.* denied of necessity. In subsequent cases, the Court has treated the *Rio Grande* dictum on post-Desert Land Act federal rights as if it were law. Thus, by implication, the total severance theory in *California Oregon Power Co.* is simply wrong. Unfortunately, however, the Court has never fully reconciled the inconsistency between the severance theory and federal reserved water rights. As a result, the debate over federal reserved rights remains confused.

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[86] 295 U.S. at 161.

[87] *See* Grow & Stewart, *supra* note 78.

[88] J. PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 41 (1951).

[89] 174 U.S. 690 (1899).

[90] 207 U.S. 564 (1908).

Neither state formulations of the severance theory nor subsequent Supreme Court opinions have clarified the confusion. The positions taken by the federal government, such as the 1979 Solicitor's Opinion[91] on federal non-Indian reserved rights, have simply failed to resolve the debate. Rather than directly confronting the error of Justice Sutherland's opinion, the Solicitor's Opinion merely seeks to avoid the severance theory issue. As a result, despite subsequent Supreme Court opinions limiting it, *California Oregon Power Co.* remains good law. Because it potentially eliminates any federal reserved rights and certainly precludes non-Indian reserved rights recognized after 1935, the decision remains troublesome for the federal government. The detrimental effects of the failure to confront directly *California Oregon Power Co.* are illustrated by the Solicitor's tortured attempt to reconcile reserved rights with the severance theory in its 1979 Opinion.

III. Reconciling Severance Theory and Reserved Rights

A. *The Solicitor's Opinion*

The 1979 Opinion is the principal reason for our attempt to clarify this elusive doctrine. We suggest an analysis of *California Oregon Power Co.* that allows for a limited class of reserved rights consistent with the essential needs of federal land management agencies, therefore minimizing the impact of the doctrine on Western water resources planning.

The Opinion was issued in response to *United States v. New Mexico* and attempts to develop coherent theories of reserved rights and federal appropriative rights. Without expressly rejecting the severance theory, the Opinion ostensibly does so by asserting that "since the Federal Government has never granted away its right to make use of unappropriated waters on federal lands . . . the United States has retained its power to vest in itself water rights in unappropriated waters."[92] The Opinion relies on an overly technical, choppy, and often trivial reading of the Desert Land Act to reconcile *California Oregon Power Co.* with inconsistent, contrary dicta in the reserved rights and other water law cases involving the assertion of federal interests.

The Opinion rejects the *California Oregon Power Co.* reading of the Desert Land Act for six reasons:

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[91] *See* Solicitor's Opinion, *supra* note 1.

[92] *Id.* at 571.

> *First,* it applies only to non-navigable sources of water.
> *Second,* it applies only to such sources on the public lands.
> *Third,* it applies to "*surplus* water *over and above such actual appropriation and use.*" [Emphasis added.]
> *Fourth,* it makes the water available only for "irrigation, mining and manufacturing purposes."
> *Fifth,* it does not directly address federal rights to use water for congressionally authorized purposes on the federal lands, but instead is aimed at appropriation and use by the "public".
> *Finally,* the Desert Land Act applies only to certain states, originally California, Oregon and Nevada, and the then territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, and New Mexico and Dakotas (later to become the states of North and South Dakota). Colorado was added later.[93]

There are numerous problems with the Solicitor's analysis. Some of the conclusions that the Opinion reaches using these limitations as a basis reflect a misunderstanding of public domain history. Others are simply wrong. Only the fifth reason directly confronts Justice Sutherland's analysis. In the end, even assuming the six reasons are valid, the Opinion still avails little because none of the limitations the Solicitor finds in the *California Oregon Power Co.* reading of the Desert Land Act compel the rejection of the severance theory.

The limitation of the Act to non-navigable waters undoubtedly reflects the simple understanding that most waters to be used for irrigation were non-navigable under that era's standard of navigability and that Congress desired to avoid the constitutional implications of the federal government waiving its interest in assuring public use of navigable waters. This limitation is perfectly consistent with a waiver of any federal proprietary claims, those perfected under state law because proprietary water rights are not essential to the federal government's control of navigable waters and their tributaries.

With respect to the second limitation, the Opinion simply restates the holding of *Federal Power Commission v. Oregon:*[94] the Desert Land Act does not apply to reservations, as opposed to land open to entry.[95] However, neither the Opinion nor *Federal Power Commission v. Oregon* explains why this should be. The term "public lands" encompasses all land owned by the government, both land held pend-

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[93] *Id.* at 566. However, in a footnote, the Opinion does cite the view of Dean Trelease that *California Oregon Power* "now seems to be a spurious reading of the Desert Land Act." *Id.* at 568 n. 11 (citing Trelease, *Federal Reserved Water Rights Since the PLLRC,* 54 DENVER L.J. 473, 476 (1977)).

[94] 349 U.S. 435 (1955).

[95] Solicitor's Opinion, *supra* note 1, at 567.

ing disposition and land permanently reserved for the public benefit. The Desert Land Act does not purport to use the term "public lands" in a manner different from its common usage. Thus, this argument does not refute the severance theory.

The Opinion's explanation of the third limitation is that "to the extent the Federal Government was using water in connection with federal land management in 1877, it was not free for 'the appropriation and use of the public.' "[96] This conclusion is strained at best — disingenuous at worst. The federal government had almost no land to "manage," as opposed to land to "dispose of" in 1877. The concept of "management", as used in the Opinion, was unknown at that date.[97] The phrase "above such actual appropriation and use" referred only to rights vested under local custom.

The fifth argument is the strongest support for the position that the Desert Land Act of 1877, like the two previous Acts, was not a grant of water rights to the states, but a confirmation of existing rights. Still, the initial coverage of the Act is geographically comprehensive enough to support a severance theory. The issue to be resolved is simply whether the severance theory announced by Justice Sutherland extends to all potential federal proprietary claims. Since a Solicitor's opinion is basically confined to interpreting and reconciling existing cases, one can appreciate the reluctance to make a clean break with *California Oregon Power Co.* as it applies to federal non-Indian reserved rights. However, one cannot easily reconcile *California Oregon Power Co.* with the subsequent reserved rights cases unless one directly confronts the errors of that case: the failure to construe the Acts of 1866, 1870 and 1877 as speaking only to past rights under state control and the failure to recognize legislation au-

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[96] *Id.*

[97] Even though there had been episodic reservations to protect mineral, forest or other resources from private exploitation, the purpose of such actions was generally to permit subsequent sale at a higher price or to simply hold the resource for later use by the government. The idea of managing the unreserved lands never really entered the discussion. Lands were not classified according to their natural or economic (hence, manageable) characteristic until late in the 1800's, and John Wesley Powell's urgent suggestion that such a classification effort be undertaken (the then visionary Report on the Lands of the Arid Region of the United States) was, in 1877, still a year away from being published. Even in the most likely instance of lands to be managed, the 1872 Yellowstone Park reservation, the management concept implied by the Solicitor's Opinion was totally absent. It was not until 1886 that the Cavalry was sent to Yellowstone to control vandalism, trespassing and poaching. The Yellowstone Park Act of 1894 provided, after a long struggle, an alternative to the Cavalry. *See generally* H. HAMPTON, HOW THE U.S. CAVALRY SAVED OUR NATIONAL PARKS (1971). But the concept of parkland management evolved in the early twentieth century in response to the idea of forest management which developed at the same time. *See* Fairfax & Tarlock, *No Water for the Woods: A Critical Analysis of United States v. Mexico*, 15 IDAHO L. REV. 509, 536-41 (1979).

thorizing the withdrawal and reservation of land as at least an implied repeal of legislative triptych.[98] The Solicitor's refusal to do so is unfortunate because an opportunity was missed to present a coherent analysis of the federal government's position at a time when the Supreme Court increasingly seems to prefer exclusive or almost exclusive state control over Western water allocation. This preference is as simplistic as the New Deal-based reflexive preference for federal control,[99] a philosophy which the Court followed in the area of water allocation from the 1940's until *California v. United States.*[100]

B. *The Problem Restated*

Despite its flaws, *California Oregon Power Co.* remains important for its underlying message that the preference for state control of Western waters, rooted in the history of the Western settlement, is deeply ingrained in our water law as well. Recently, the Supreme Court correctly applied this teaching in *Andrus v. Charlestone Stone Products,*[101] holding that water is not a locatable mineral under the

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[98] Trelease, *supra* note 93, at 487-97; Goldberg, *supra* note 64.

[99] Leading cases include United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940); First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n, 328 U.S. 152 (1946); Fed. Power Comm'n v. Oregon, 349 U.S. 435 (1955); Arizona v. California, 373 U.S. 546 (1963).

[100] 438 U.S. 645 (1978).

[101] 436 U.S. 604 (1978). The Court wrote:

> Our opinions thus recognize that, although mining law and water law developed together in the West prior to 1866, with respect to federal lands Congress chose to subject only mining to comprehensive federal regulation. When it passed the 1866 and 1870 mining laws, Congress clearly intended to preserve "*pre-existing* [water] *right[s].*" *Broder v. Natoma Water & Mining Co.*, 101 U.S. 274, 276, 25 L.Ed. 790 (1879). Less than 15 years after passage of the 1872 law, the Secretary of the Interior in two decisions ruled that water is not a locatable mineral under the law and that private water rights on federal lands are instead "governed by local customs and laws," pursuant to the 1866 and 1870 provisions. *Charles Lennig,* 5 L.D. 190, 191 (1866); see *William A. Chessman,* 2 L.D. 774, 775 (1883). The Interior Department, which is charged with principal responsibility for "regulating the acquisition of rights in the public lands," *Cameron v. United States,* 252 U.S. 450, 460, 64 L.Ed. 659, 40 S. Ct. 410 (1920), has recently reaffirmed this interpretation. *Robert L. Beery,* 25 I.B.L.A. 287 (1976).
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> In ruling to the contrary, the Court of Appeals did not refer to 30 U.S.C. §§ 51 and 52 [30 U.S.C.S. §§ 51 and 52], which embody the 1866 and 1870 provisions; to our opinions construing these provisions; or to the consistent course of administrative rulings on this question. Instead, without benefit of briefing, the court below decided that "it would be incongruous . . . to hazard that Congress was not aware of the necessary glove of water for the hand of mining." 553 F.2d, at 1216. Congress was indeed aware of this, so much aware that it expressly provided a water rights policy in the mining laws. But the policy adopted is a "passive" one, 2 Waters and Water Rights § 102.1, p. 53 (R. Clark ed. 1967); Congress three times (in 1866, 1870, and 1872) affirmed the view that private water rights on federal lands were to be governed by state and local law and custom. It defies common sense to assume that Congress,

Mining Law of 1872. But the preference for state control is just a simple preference; it limits, but does not exclude, federal proprietary rights. Each Supreme Court post-*California Oregon Power Co.* reserved rights case contains dicta that unsuccessfully attempts to reconcile the two inconsistent ideas of exclusive state control and federal rights. Perhaps the best that can be said for the reserved rights doctrine is that the Court has seen little need to delve deeply into the issue, choosing instead to keep reserved rights within fairly narrow grounds. Thus, despite Congress's failure expressly to claim water rights, the federal agencies' requirements for water have been met, and all the while the Court has preserved the integrity of Western water law. Congress has acquiesced in the Court's handling of the issue.

Until 1955, federal reserved rights could exist simultaneously with the severance theory because the limited recognition of federal rights prior to that time did not substantially threaten exclusive state control. The states were slow to see the vulnerability of their exclusive claims to Western waters because, from their creation in *Winters v. United States,*[102] reserved rights were thought only to arise from the reservation of Indian lands. In *Winters,* the Court was called upon to determine whether an injunction should be upheld which prohibited an upstream appropriator, who claimed a Montana water appropriation subsequent to Congress's creation of an Indian reservation, from constructing a dam which would interfere with the Indian's water supply. Justice McKenna held that the government could claim the necessary waters under either the property or treaty powers of the Constitution, citing one case supporting each theory:

> Another contention of appellants is that if it be conceded that there was a reservation of the waters of Milk River by the agreement of 1888, yet the reservation was repealed by the admission of Montana into the Union, February 22, 1889, c. 180, 25 Stat. 676, "upon an equal footing with the original States." The language of counsel is that "any reservation in the agreement with the Indians, expressed or implied, whereby the waters of Milk River were not to be subject to appropriation by the citizens and inhabitants of said State, was repealed by the act of admission." But to establish the repeal coun-

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when it adopted this policy, meant at the same time to establish a parallel federal system for acquiring private water rights, and that it did so *sub silentio* through laws designed to regulate mining. In light of the 1866 and 1870 provisions, the history out of which they arose, and the decisions construing them in the context of the 1872 law, the notion that water is a "valuable mineral" under that law is simply untenable.

Id. at 613-14.

[102] 207 U.S. 564 (1908).

> sel rely substantially upon the same argument that they advance against the intention of the agreement to reserve the waters. The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *United States v. Rio Grande Ditch & Irrigation Co.*, 174 U.S. 690, 702, 19 S.Ct. 770, 43 L.Ed. 1141; *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089. . . .[103]

Despite the breadth of *Rio Grande* it was thought for more than half a century that *Winters* confirmed, under the treaty power, the Indians rights in water they already owned. *Winters* extends beyond applicability to Indians only if the treaty granted something that the federal government owned. Even if the case stands for the proposition that the government merely granted its own property, it can still be read as a limited exception to the general principle that water would be allocated exclusively by state law. Such an exception would not be unique. For example, at the time *Winters* was decided, departures from the widely accepted understanding that federal patents would not be issued for lands under navigable waters were made both to satisfy the obligations of rights vested under Mexican law before the United States acquired the land and to fulfill other interests in similar extraordinary situations.[104] A theory that excepted property needed to redress past wrongs to the Indians from state law did not obviously or necessarily imply future federal claims to water for use on its own reserved lands. Indeed, non-Indian reserved rights were not strongly suggested until 1955 in *Federal Power Commission v. Oregon.*[105] The issue there was the exclusive authority of the Federal Power Commission to approve a dam on a non-navigable river under *Appalachian Power,*[106] and to override Oregon's efforts to preserve its salmon run by vetoing the dam. The dam was to connect two federal land holdings, an Indian reservation and a 1909 power site withdrawal, located across from each other on the Deschutes River. Oregon argued that the Commission was without jurisdiction because under *California Oregon Power Co.* the state "owned" the waters to be dammed. Writing for the majority, Justice Burton rejected Oregon's argument. The Court's decision can best be explained as having located the federal government's licensing jurisdiction in federal ownership of the waters, which resulted from the act of withdrawing two

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[103] *Id.* at 577.

[104] *See* Shively v. Bowlby, 152 U.S. 1, 7 (1894).

[105] 349 U.S. 435 (1955).

[106] United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

land areas from entry.[107]

Although the *Oregon* case is suggestive of such principles, it was not until the 1963 decision in *Arizona v. California*[108] that the Supreme Court expressly held that the federal government has reserved water rights for non-Indian purposes. These inchoate federal rights were not sought by the federal government pursuant to a comprehensive scheme of federal water administration. Rather, in an *ad hoc* fashion the rights were thrust upon a somewhat surprised federal government, which had been forced to participate in the litigation by the Supreme Court.

In the past several years, concern over the impact of federal reserved rights claims has become more intense for both legal and political reasons. A 1971 Supreme Court decision holding that federal reserved rights could be adjudicated in state proceedings[109] which met the McCarran Act[110] qualifications for a general proceeding, has forced many federal agencies to display the cards they claim to hold in order to protect federal interests. Two recent organic acts for federal land management agencies, the National Forest Management Act[111] and the Federal Land Policy and Management Act of 1976,[112] impose affirmative management and planning obligations on federal agencies, which have potential water allocation consequences. These acts are concrete manifestations of increasingly aggressive federal management of the public lands. This attitude is worrisome to the Western states because many, but not all, non-Indian federal reserved right claims involve the use of water for what can be loosely called environmental purposes, and the federal government has moved toward recognizing this use of water at a faster pace than have the Western states.[113]

Because Congress and the Executive have infrequently expressly claimed reserved rights when a reservation is established, the doc-

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[107] *California Oregon Power* was distinguished on the ground that it applied only to "public lands" — lands open to entry and disposition — and not to reservations. Mr. Justice Douglas, the lone dissenter, found *California Oregon Power* controlling and concluded that the Pickett Act, 36 Stat. 847 (1910) left "water rights . . . undisturbed." 349 U.S at 456.

[108] 373 U.S. 546 (1963).

[109] United States v. District Court for Eagle County, 401 U.S. 520 (1971). *See also* Colorado River Water Cons. Dist. v. United States, 424 U.S. 800 (1976).

[110] 43 U.S.C. § 666 (1976).

[111] 90 Stat. 2949 (1976) (amended 1978).

[112] 43 U.S.C. §§ 1701-1782 (1976 & Supp. III 1979).

[113] *See* Tarlock, *Appropriation for Instream Flow Maintenance: A Progress Report on "New" Public Western Water Rights*, 1978 UTAH L. REV. 211; Tarlock, *The Recognition of Instream Flow Rights: "New" Public Western Water Rights*, 25 ROCKY MTN. MIN. L. INST. 24-1 (1979).

trine of reserved rights is federal common law. Until 1978, this common law was interpreted by the Supreme Court almost exclusively in favor of the United States. However, the Court has failed to articulate a coherent theory to integrate reserved rights with the severance theory and to justify judicial protection.[114]

The cases focused on the standards for determining when a reserved right arose, and established that standard as the "express or implied intent" of Congress. However, the Court's resort to congressional intent has been so *pro forma* as to amount to a fiction. Further, the hard question of the standard for implying congressional intent, let alone the source of the right, has been avoided because the cases have been easy. The doctrine of implied intent originated in *Winters* and was justified on the principle that Indian treaties are construed in favor of the Indians and against the government. An implied intent to reserve water rights arose without great difficulty from this standard. In *Arizona v. California,*[115] the Special Master's finding of implied intent was accepted without analysis and the *Winters* theory was extended from Indian to non-Indian reserved rights, with no consideration of whether it was justified in non-Indian cases.

The Court's formulation of the "express or implied intent" standard was stated as settled law by Chief Justice Burger in *Cappaert v. United States.*[116] In *Cappaert,* the federal government sued a group of Nevada ranchers because their groundwater withdrawals interfered with maintenance of a subterranean pool which supported the Desert Pupfish in the Devil's Hole National Monument. The Court unanimously affirmed an injunction limiting their withdrawals to a rate that would maintain the pool at the minimum level necessary to support the pupfish. The Court found that the necessary water was expressly reserved in the creation of the Monument.[117] Thus, the Court did not have to justify or set a standard for determining when water rights would be implied when land was reserved for a water-related purpose. Some commentators argue that the Court adopted a frustration-of-original-purpose standard to limit the occasions in *Winters* and *Arizona* when water could be claimed; others argue that the

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[114] The leading commentators concerned with Western problems have noted only that the property clause is a sufficient constitutional basis for federal reserved rights claims. Meyers, *The Colorado River,* 19 STAN. L. REV. 1, 65-68 (1966); Ranquist, *The* Winters *Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water,* 3 B.Y.U.L. REV. 639, 687-88 (1975).

[115] 373 U.S. 546 (1963).

[116] 426 U.S. 128 (1976).

[117] *Id.* at 139.

Court adopted a more flexible criterion, which looked to the general purpose of the reservation to determine Congress's implied intent, thus allowing courts to construe legislation liberally in favor of the government.[118]

C. *Rehnquist as a Throwback to Sutherland: Critical 1978 Cases*

The need to define the standard for implied intent was not recognized until the question was squarely presented to the Court in the 1978 decision of *United States v. New Mexico.*[119] A grasp of this case is important to the understanding of future reserved rights controversies, so we will discuss it in some detail. In *New Mexico,* a five-to-four majority reopened the controversy regarding exclusive state control of water within state boundaries to the extent that the decision directly and indirectly undermines the foundation of the reserved rights doctrine.

United States v. New Mexico grew out of a McCarran Act adjudication in southwestern New Mexico.[120] The Forest Service claimed reserved rights to instream flow in the Gila National Forest (ironically the first national forest in which a wilderness area was set aside), for aesthetic enhancement, fish and wildlife protection, and recreation and stock-watering purposes. The forest was withdrawn under two early conservation era statutes, The Creative Act of 1891[121] and the Organic Administration Act of 1897,[122] which marked the major shift toward federal retention and management of the public domain. The Court denied the claimed reserved rights by reading the two acts as narrowly utilitarian[123] in their goals. This reading excluded water claimed for environmental purposes as being unrelated to the theory that forests were exclusively established to facilitate timber management. Recent scholarship has underscored the broad purposes of the forest reserves and dates the birth of modern scientific forest management to the time when the forest reserves were transformed from the Department of the Interior's custodial jurisdiction to the Department of Agriculture and Gifford Pinchot.[124] Justice Rehnquist, stepping belatedly into the shoes of the late Justice Suth-

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[118] *Compare* Meyers, *supra* note 114, at 69, *with* Tarlock, *supra* note 113, at 229.

[119] 438 U.S. 696 (1978).

[120] *See* Note, *New Mexico's National Forests and the Implied Reservation Doctrine,* 16 NAT. RESOURCES J. 975 (1976).

[121] Ch. 561, § 24, 26 Stat. 1103 (1891) (repealed 1976).

[122] 16 U.S.C. §§ 473-82.

[123] *See generally* S. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY (1959).

[124] *See* S. DANA & S. FAIRFAX, *supra* note 39, at 81-83.

erland as the guardian of Western resource interests, not only denied the federal government's claimed rights, but established three formidable barriers to the implication of any future federal reserved water rights, especially those for energy development. First, the right must relate to the original purpose of the withdrawal of the reservation. Second, the implication must be necessary to prevent the frustration of the original purpose of the reservation. Third, the Court introduced into the law of reserved rights the distinction between the primary and secondary purposes of reservations, stating that the Court will find a reserved right to effect the former, but will draw the contrary inference when the latter is found.

The majority opinion in *New Mexico* is written on two different levels, each of which is significant to the understanding of the opinion. Justice Rehnquist framed the issue as a conventional statutory intent question: what uses of water were contemplated by members of Congress in 1891 and 1897 when the two Acts were passed?[125] But the second level, which drives his analysis of the congressional intent issue, consists of Justice Rehnquist's views about the proper general principles to be applied in the resolution of federal-state Western allocation conflicts. To understand how the two levels are integrated, *New Mexico* must be read with a companion opinion, *United States v. California,*[126] also written by Justice Rehnquist. The two opinions present a coherent, albeit incorrect, statement of the Justice's view that federal-state water conflicts should be resolved according to the strong presumption that Congress almost always intends to defer to state water law.

United States v. California also involved a federal-state water allocation problem, but the issue was entirely different from that in *New Mexico. California* turned on the application of Section 8 of the Reclamation Act[127] to a Bureau of Reclamation application to appropriate California water for a reservoir. The State of California attempted to subject the management of the New Melones Dam project, not yet funded by Congress, to some 24 conditions, including several important environmental requirements. The authority for the state's conditions was the Reclamation Act of 1902, which provides that "the Secretary of the Interior shall proceed in conformity with state law" relating to the control, appropriation, use or distribution of water used in irrigation. Section 8 is best read as an express con-

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[125] For a criticism of Justice Rehnquist's statutory construction theory, *see* Elliott, *United States v. New Mexico: Purposes That Hold No Water,* 22 ARIZ. L. REV. 19, 28-34 (1980).

[126] 438 U.S. 645 (1978).

[127] 43 U.S.C. § 383 (1976).

gressional decision to defer to state law unless Congress decides to supersede state law.[128] The facts of *California* provided a good case to apply this presumption to federal deference to state law, since the federal government failed to show how the state license conditions would interfere with the accomplishment of congressional objectives for the New Melones project or any other important federal interest. *United States v. California* reached the Supreme Court because three previous cases had substantially confused the section 8 presumptive state veto into a rule that limited state law to defining which state-created rights are entitled to compensation, should an injured holder of water rights bring an inverse condemnation action.[129] The Court took the occasion to overrule these cases and to restore the conventional understanding of section 8. *California's* holding is correct, but in the course of the opinion, Justice Rehnquist wrote a great deal of loose dicta about federal-state relations, the tenor of which is that federal interests are generally subordinated to state interests. Much of the dicta is wrong. The Justice misreads history and past Supreme Court opinions in order to apply the same notion of presumptive federal subordination to state interests as was applied in *New Mexico,* despite the fact that in *New Mexico* important federal interests were squarely at stake. No doubt, these two cases will chill the aggressive assertion of federal reserved water rights by federal land management agencies.

California's presumption of state control was applied to reserved rights in the majority's analysis of the 1891 and 1897 Acts. Section 24 of the General Land Revision Act of 1891 authorizes the President to "set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations."[130] It is clear that in authorizing the creation of forest reserves, Congress responded to three major public concerns: the protection of watersheds, the preservation of natural beauty and the prevention of the threat of pending timber famine. The aesthetic value of the forests was fully appreciated by Congress

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[128] *See* Nebraska v. Wyoming, 325 U.S. 589 (1945).

[129] The presumption was properly overcome in Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958). The Court held that section 5 of the Reclamation Act, 43 U.S.C. § 431 (1976), prohibiting the delivery of project water to tracts in excess of 160 acres owned by a single individual was a clear federal policy intended to prevail over inconsistent state laws. However, inverse condemnation dicta in *Ivanhoe* were repeated in City of Fresno v. California, 372 U.S. 627 (1963) and in Arizona v. California, 373 U.S. 546 (1963).

[130] Ch. 561, § 24, 26 Stat. 1103 (1891) (repealed 1976).

and influential supporters of the Act during this period.[131] For example, national park reserves and all of the lands set aside by Presidents Harrison and Cleveland were withheld from utilization for essentially aesthetic and recreational purposes. In 1897, Congress enacted legislation to clarify the withdrawal power in response to dissatisfaction with President Cleveland's withdrawals:

> No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of [the Creative Act of 1891], to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.[132]

Justice Rehnquist read this section to limit the water-related purposes for which forests could be reserved to only "those necessary to preserve the timber or to secure favorable water flows for private uses under state law." His interpretation of the 1891 Act was bolstered by his reading of the 1897 Organic Administration Act, which he understood, following conventional wisdom, to be a simple congressional response to Western protests against the size of purposes underlying President Cleveland's forest withdrawals. We have argued in another article that the majority reading of the history of the two Acts is not the only accurate reading.[133] We suggest an alternative, a less cramped reading, based on the history of forest policy in Congress between 1871 and 1907, which supports the conclusion that the reservation of water for fish and wildlife preservation and for recreation is consistent both with the purpose for which Congress created the reserves and with early interpretation and administration of the acts.

IV. Towards A More Coherent Doctrine

Our argument for a broad reading of the 1891 and 1897 Acts is partially based on a frank recognition that the reserved water rights doctrine is federal common law. Some have argued that water rights are not an appropriate doctrine for federal common law because "[the] incomplete nature of the *Winters* doctrine creates an uncertainty that in itself inhibits or is disruptive of the orderly, ongoing

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[131] *See* Fairfax & Tarlock, *supra* note 97, at 536 and references cited therein.

[132] Organic Administration Act of 1897, 16 U.S.C. § 475 (1976).

[133] Fairfax & Tarlock, *supra* note 97. *See also* Note, *Water Rights and National Forests - Narrowing the Implied Reservation Doctrine: United States v. New Mexico*, 40 Ohio State L.J. 729 (1979).

use of water in the West."[134] We disagree with the conclusion. Properly understood, the Court's development of the doctrine can be justified as a necessary incident to federal land management policy. In *Light v. United States,* the Supreme Court held that the property clause empowers Congress to manage the public lands in trust for the "whole people of the United States."[135] In the absence of further legislative guidance, the Court has correctly refused to utilize the trust concept to impose judicial restraints on the allocation and management decisions of Congress and its delegees. However, the Court has applied the trust concept in situations traditionally appropriate for judicial intervention. The Court's holdings rest on the assumption that it was reasonable to imply reserved rights because they are consistent with congressional purposes and have, in fact, been ratified by Congress.

To appreciate the limited scope of our proposed justification, it is useful to compare it to broader justifications that have been advanced for the doctrine. The reserved rights doctrine was originally created out of whole cloth by the Supreme Court in *Winters v. United States*[136] in order to correct a congressional omission. The federal government negotiated a treaty but neglected to deal expressly with water. Judicial intervention in favor of Indians was an easy case because of the existing obligation owed by the United States to the tribes.[137] Non-Indian uses created a much harder case because Congress has the discretion to cede all control over Western waters to the states. Nonetheless, the non-Indian reserved rights cases can be justified by the theory that the Acts of 1866, 1870 and 1877 are not a complete cession of federal control over Western waters to the states. Some have gone further and argued that judicially recognized reserved rights are a proper method for the Court to protect a limited class of uses which has been afforded incomplete protection in the political allocation process. The uses that the Court has protected since *Arizona v. California*[138] are those reserved for the benefit of the public generally, such as wildlife refuges and national

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[134] Grow & Stewart, *supra* note 78, at 476.

[135] 220 U.S. 523, 537 (1911). The constitutional issue now is how this authority will be shared between the Executive and Congress. For a review of the constitutional and statutory issues, *see* Peck, *"And Then There Were None": Evolving Federal Restraints on the Availability of Public Lands for Mineral Development,* 25 ROCKY MTN. MIN. L. INST. 3-1 (1979). *See generally* P. GATES, *supra* note 52.

[136] 207 U.S. 564 (1908).

[137] *See generally* Chambers & Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands,* 26 STAN. L. REV. 1061 (1974).

[138] 373 U.S. 546 (1963).

monuments. Congress recognized these uses as worthy of attention, but failed to provide full protection for them through necessary appurtenant water rights. According to environmentalist theory, these uses are underrepresented in the history of the public domain and, therefore, present a case for allowing the Executive to take steps to remedy past failures in order to enhance the management of the public domain for the public generally. The power of client groups to influence the executive department, Congress and judicial review are adequate answers to fears that significant long-settled Western expectations will not be honored through an excessive use of this doctrine.

While this argument contains some merit, it is troubling on several accounts. The alleged minority status of certain uses does not withstand careful scrutiny. Moreover, the procedural difficulties, which are said to disadvantage minority advocates and to justify judicial action, are belied by a careful analysis of the historical status of different uses[139] and by the considerable restructuring of the resource management decision-making process[140] that has occurred in the dec-

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[139] The aesthetic, preservation, amenity and wildlife values usually proffered for "minority" status were in fact the first to emerge in federal land management programs. Watershed protection, which it was believed *precluded* timber harvest, motivated the 1891 authorization of forest reserves. Management of the timber resource was not authorized until 1897, if then. *See supra* note 97 and references cited therein. Although it is a familiar argument that the Forest Service has recently or historically undervalued noncommodity uses of the National Forest lands [*see, e.g.*, J. SHEPHERD, THE FOREST KILLERS (1975); N. WOOD, CLEARCUT: THE DEFORESTATION OF AMERICA (1971)], this is neither wholly convincing nor sufficient to support a minority status plea. Even if such values have frequently lost out on the Forest Service's multiple use lands, they are served by numerous other wholly separate land allocations and administrative bodies especially established by Congress for that purpose. In deliberations of the National Park Service, the Fish and Wildlife Service and the Heritage Conservation and Recreation Service (formerly the Bureau of Outdoor Recreation), non-commodity values constitute the virtually unchallenged majority. Moreover, Congress has directed, by frequent explicit legislation, that a specific area or areas meeting stated criteria be managed, totally or partially, to achieve environmental goals. See, for example, the special purpose legislation cited in note 38 *supra*. Environmentalists have not won every battle on every acre but they have been forceful, effective contenders in the political process since the inception of land management. Hence, although they are frequently in the minority, i.e., outvoted on specific issues, employing a play on words to achieve minority status in the sense implied by disenfranchised racial or ethnic minorities seems misleading, disingenuous and a disservice to those groups and interests which have been profoundly disadvantaged by or excluded from the American political and social system. See J. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS (1980).

[140] The access and participation programs established pursuant to environmental impact statement requirements of the National Environmental Policy Act, 42 U.S.C. §§ 4321-61, and the more specific federal land planning statutes RPA, NFMA and FLPMA (*see* note 38 *supra*) have created unprecedented opportunities for financing all conceivable management values. *See also* Achterman & Fairfax, *The Public Participation Requirements of the Federal Land Policy and Management Act*, 21 ARIZ. L. REV. 501 (1979).

ade since Professor Sax[141] first laid the ground-work for the environmentalists' argument.

The alternative theory that we articulate is self-limiting because it can be invoked only by the Executive, acting pursuant to a presumed delegation from Congress. The competing interests that must be balanced in reserved rights claims suggest that the problem of scheduling non-Indian claims should generally be left to executive discretion. Thus, third parties should not be able to compel the government to claim reserved rights. Our theory follows from the Court's use of the public trust as it applies to land management. Under this theory, the trust is a source of legislative and executive power, not a judicial constraint on legislative and administrative action.[142] We only extend the theory to a source of limited presumed executive and legislative exercise of the federal government's constitutional power to claim the necessary water for its functions.

A. *The Environmentalist/Public Trust Approach*

Our analysis can be distinguished in several important particulars from that of some environmental groups which have argued in recent years that all resources should be subject to the public trust. The argument is that the trust doctrine, once limited to the special case of navigable waters, should be a constraint on all resource decision making. It is said that the trust imposes procedural constraints on government agencies making low visibility management decisions, which threaten to disproportionately favor private, as against public, resource use. The remedy for procedural violations during old-fashioned "give-aways" is a remand to the legislature.[143] In its more extreme form, the theory is said to impose substantive constraints on resource allocation because Congress has affirmatively mandated that environmental values be preferred to development.

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[141] Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). The events of the last decade, see note 140 *supra*, appear to be a significant factor in Professor Sax's recent restructuring of this public trust theory. *See* Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C.D. L. REV. 185 (1980).

[142] *See* Tarlock, Book Review: For Whom the National Parks, 34 STAN L. REV. 255, 267-69 (1981). The Supreme Court has characterized the power granted to Congress under the property clause as a trust for the purpose of identifying a source of unreviewable congressional discretion to allocate the federal lands. Light v. United States, 220 U.S. 523, 535-37 (1911). The best reasoned argument for the trust as a limitation on executive discretion is Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C.D.L. REV. 269 (1980). *See also* Note, *Proprietary Duties of the Federal Government Under the Public Land Trust*, 75 MICH. L. REV. 586 (1977).

[143] Sax, *supra* note 141.

Building on the pioneering work of Professor Sax, environmentalists have argued that environmental uses are minority uses in the history of the public domain. The conclusion follows that these uses are entitled to special judicial scrutiny in the executive and legislative decision making arenas, forums which traditionally slighted these uses, just as actions against racial and religious discrimination are entitled to extra judicial protection from abuse of the political process. The argument does not wash because the premise is not supported by the history of the public domain.

Environmental uses have long been recognized and have been consistently balanced against demands for exploitation. The earliest reservations of the public domain were for park purposes; and aesthetic preservation and watershed protection were dominant themes in the evolution of public lands policy from disposition to retention.[144] One may quarrel with the level of protection for aesthetic and watershed protection purposes, but recognition has been constant and substantial. The recently signed Alaskan lands bill is only the most recent example of congressional concern for these values.[145] In addition, the new management acts and the National Environmental Policy Act of 1969[146] protect these values far beyond previous levels and give the courts explicit statutory authority to prohibit the Executive from failing to adhere to congressional protection directives. Recent litigation over the failure of the federal government to claim reserved rights said to be threatened by energy development in Southern Utah illustrates the weakness of the common law public trust approaches.

Relying on a combination of statutory and trust theories, one district court has imposed an affirmative duty on the federal government to protect the Redwood National Park.[147] In *Sierra Club v. Andrus*,[148] the Sierra Club attempted to expand that theory by seeking

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[144] *See supra* note 139.

[145] For a minute account of the evolution of the final land allocation decisions, *see* Public Lands News, *passim*, 1976-81.

[146] *See supra* note 140.

[147] Sierra Club v. Department of the Interior, 376 F. Supp. 90 (N.D. Cal. 1974); 398 F. Supp. 284 (N.D. Cal. 1975). The court's use of the public trust is partially validated in the 1978 park expansion legislation. 16 U.S.C. § 1a-1 (Supp. III 1980). After a trial on the merits, the court held that the Park Service abused its duty to protect the park through the acquisition of buffer zones or boundary modifications. Although the court attempted to supervise a protection plan, the suit was ultimately dismissed, 424 F. Supp. 172 (N.D. Cal. 1976), because of the court's inability to finance the acquisition of the necessary buffer zones. Congress ultimately came to the rescue and expanded the Park. 16 U.S.C. § 79b(a) (Supp. III 1980). For a well-researched account of the controversy, see Hudson, *Sierra Club v. Department of Interior, The Fight to Preserve the Redwood National Park*, 7 ECOL. L.Q. 781 (1979).

[148] 487 F. Supp. 443 (D.D.C. 1980), *aff'd sub. nom.* Sierra Club v. Watt, 659 F.2d 203 (D.C.

to compel the federal government to claim its reserved rights for water arising in the Southern Utah and Northern Arizona portions of the Grand Canyon National Park, the Glen Canyon recreation area, and certain BLM lands. Citing eight specific energy projects pending in the area, as well as unspecified projects in the preliminary planning stages, plaintiffs brought the suit on the theory that potential federal reserved rights were subject to imminent threat because of "energy-related development." Despite President Carter's memorandum of July 12, 1978,[149] urging federal agencies to quantify their claims and to work with state agencies, the United States refused to intervene in the Utah state court adjudication. The Department of Justice took the position that the United States would not participate in state court proceedings unless joined by Utah pursuant to the McCarran Act.

The Sierra Club argued that intervention in the state court proceeding was mandated by duties imposed statutorily, as well as by federal common law. They noted that the problems surrounding the buffers necessary to protect the Redwood National Park had caused Congress to add the following amendment to the 1916 National Park Organic Act:

> [T]he first section of the Act of August 18, 1970 (84 Stat. 825), is amended by adding the following: Congress further reaffirms, declares and directs that the promotion and regulation of the various areas of the National Park System, as defined in Section 2 of this Act, shall be consistent with and found in the purpose of the Act of August 25, 1916, to the common benefit of all people of the United States. The authorization of activities shall be construed and the protection, management and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these areas have been established, except as may have been or shall be directly and specifically provided by Congress.[150]

Cir. 1981). The Sierra Club appealed only the issue of whether reserved rights may be claimed under the Federal Land Policy and Management Act, discussed *infra* notes 163-68. Although the court had substantial doubts about directing the federal government to take a particular position in litigation, it nonetheless decided to reach the merits because after the Sierra Club had filed its appeal, the government joined the state water rights adjudication. The court found the Sierra Club's argument "totally without merit." Reserved rights do not attach to lands administered by the BLM because these lands are "public domain," not withdrawn lands. *See infra* note 177.

[149] *See supra* note 37.

[150] 16 U.S.C. § 1a-1 (Supp. III 1980).

Relying on the legislative history of section 101(b), the *Andrus* Court found that Congress had expressly rejected the trust theory as a separate delegation of Park Service responsibility. Thus, "the entire duty" to manage public lands was contained in the Federal Lands Policy Management Act. This conclusion does not, however, exclude future suits arguing an abuse of executive discretion based on trust-like arguments. The Court agreed, and the federal government conceded that section 101 incorporates the central concept of the trust theory by concluding that "the discretion accorded the Secretary in discharging his duty of managing and protecting Park and Bureau of Land Management Resources is not unlimited."[151]

Turning to the merits of the section 101(b) action, the district court first considered the appropriate standard of review. The arbitrary, capricious and abuse of discretion standard was adopted and *Ethyl Corp. v. EPA*,[152] was cited for the proposition that this is a "highly deferential standard." This standard allows the court to pick and choose among different levels of judicial review, ranging from deferential to critical, under the theory that no matter what action was being reviewed, courts are obligated to take a hard look at agency action.[153] Applying this standard, the District Court held that the case was not ripe for review and that the plaintiff had an adequate administrative remedy in the form of the quantification work of the Task Force on Non-Indian Water Rights. On the ripeness issue, the court concluded that it

> fails to perceive how the proposed energy developments can pose an "immediate" threat to the alleged federal reserved water rights. If the energy interests subsequently perfect water rights in the subject water courses, such rights would clearly be junior to any federal reserved rights therein. Furthermore, plaintiff has not persuasively shown that the proposed energy developments will acquire rights senior to the alleged federal rights, by assignment or otherwise, and the Court will not speculate regarding whether such rights could be so acquired. In sum, the proposed energy developments with which plaintiff is concerned do not pose an immediate threat to any federal reserved water rights or the subject water courses because they hold no legally cognizable water rights therein.[154]

Having developed our theory, it is important to make clear that our theory of reserved water rights is not presently the law. The law

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[151] 487 F. Supp. at 448.

[152] 541 F.2d 1 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976).

[153] *See, e.g.*, International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).

[154] 487 F. Supp. at 451.

as it now stands is articulated in Justice Rehnquist's majority opinion in the *New Mexico* case:

> [T]he Court has repeatedly emphasized that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert,* [426 U.S., at 141]. See *Arizona v. California,* [373 U.S., at 600-01]. *District Court for Eagle County,* [401 U.S., at 523]. Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.
>
> This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal/state jurisdiction with respect to allocation of water. Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law. See *California v. United States,* [438 U.S., at 653-70, 678-79]. Where water is necessary to fulfill the very purpose for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.[155]

B. *Primary and Secondary Problems*

Justice Rehnquist's statement of law creates problems both for federal land managers and energy developers acting pursuant to a federal lease or other federal permission. In particular, the latter must first establish that energy development is a purpose of the reservation, and second, that the water was reserved for a primary and not secondary purpose. Before turning to a general analysis of the application of *New Mexico* to energy claims, we discuss the distinction between primary and secondary purposes, which is Justice Rehnquist's contribution to the common law of federal reserved rights.

The primary-secondary distinction has important implications for energy development and for all manner of other non-Indian, as well as Indian claims. Justice Rehnquist was led to the distinction in the

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[155] 438 U.S. at 700-02.

course of rejecting the government's argument that any doubts that the claimed rights fell within the scope of the 1891 and 1897 Acts could be resolved by construing the Multiple-Use Sustained-Yield Act of 1960 as a confirmation of the broad purposes of the original legislation. Since he strained to narrowly interpret the 1891 and 1897 statutes, Justice Rehnquist read the 1960 Act as expanding, rather than confirming, the purposes for which forests could be managed. It should follow from this conclusion that the federal government has a 1960 priority date for rights within the "expanded" purposes of the Multiple-Use Act. However, in dictum the Court concluded that no reserved rights for the uses sought could be claimed under the Multiple-Use Sustained-Yield Act for two related reasons. First, they were all secondary. Second, the Court said:

> "[R]eserved rights doctrine" is a doctrine built on implication and is an exception to Congress' explicit deference to state water law in other areas. Without legislative history to the contrary, we are led to conclude that Congress did not intend in enacting the Multiple-Use Sustained-Yield Act of 1960 to reserve water for the secondary purposes there established. A reservation of additional water could mean a substantial loss in the amount of water available for irrigation and domestic use, thereby defeating Congress' principal purpose of securing favorable conditions of water flow.[156]

Even a casual reading of the legislative history of the Multiple-Use Sustained-Yield Act of 1960 suggests that Justice Rehnquist misread the Act. The primary-secondary distinction, as applied to the Multiple Use Act, is neither compelled by the words of the statute nor is it even suggested in the legislative history of the Act. The legislative history is quite clear that any distinction or priority among users is contrary to congressional intent.[157]

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[156] *Id.* at 713-17.

[157] Justice Rehnquist in his short tenure on the Court has established a reputation for selectively reading legislative intent to support his policy preferences. *See* Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976). His reading of the purpose of the Multiple Use-Sustained Yield Act is creative even by his own high standards. The question of ranking forest values was extensively discussed during consideration of the Act because the timber products industry was concerned that early drafts of the legislation would bump timber management from what they believed to be first place in the multiple use hierarchy. However, the timber products industry lost this fight; the legislative history makes it clear that all uses were to be given equal weight in multiple-use decision making. The very concept of ranking uses was explicitly considered and specifically rejected, and thus there is no foundation for the primary-secondary distinction. *See* S. DANA & S. FAIRFAX, *supra* note 39, at 203. *See also* Note and Comment, *The Multiple-Use Sustained-Yield Act of 1960*, 41 OR. L. REV. 49, 53-54 (1961); *Multiple Use Gets Confidence Vote*, 66 AMERICAN FOREST 31 (1960); Bergoffen, The Multiple-Use Sustained-Yield Law 121-71 (June 1961) (unpublished thesis in the Syracuse University

The reason for this misreading of the legislation is easy to discern. *United States v. New Mexico* clearly evinces an intent by a majority of the Court to limit the substantive scope of federal non-Indian reserved rights. Perhaps the majority's analysis was designed to chill a number of forces within and without the federal government that are pushing for an expanded theory of reserved rights, and as stated above, *New Mexico* will no doubt have that affect.

C. *The Solicitor's Opinion Creates Openings for Energy Developers*

The fears of the *New Mexico* majority were justified. In brief, under President Carter's Water Policy Initiatives, the Department of the Interior and the Department of Justice attempted to expand the federal reserved water rights doctrine.[158] To effect that end former Solicitor Krulitz, of the Department of the Interior, issued an opinion that attempted to ignore and circumvent *New Mexico.* The Carter administration sought to expand the doctrine to increase the amount of water required for the environmental management objectives of the Park Service, the Fish and Wildlife Service and the Bureau of Land Management. The Department of the Interior was not interested in using the doctrine to allow federal lessees and licensees to obtain water rights through the federal government and to circumvent state law requirements. However, the use of reserved rights to support energy development has been advocated both in the Departments of Interior and Energy, and in Congress, and these arguments were bolstered by the Carter administration's reserved rights policy. The lack of success in both of these forums to date will not preclude the issues from being raised again on the ground that energy independence requires the federal government to insure that state water law does not constrain rapid development of the public lands.

Energy developers desirous of federal water rights were especially interested in the Opinion's theory that would blunt the "chilling effect" of *New Mexico* through circumvention of that case's logic and limit its impact by pretending that the majority opinion was never written and by asserting a new theory of federal proprietary rights that does not depend on a congressional intent to reserve. It is reported that only the fourth draft of the Solicitor's Opinion even mentioned *New Mexico;*[159] and when the case is mentioned, it is generally

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[158] *See supra* note 37.

[159] Simms, *National Water Policy in the Wake of United States v. New Mexico,* 20 NAT. RESOURCES J. 1 (1980).

cited for propositions that are the reverse of the logic or the spirit of *New Mexico*. The most ambitious attempt to circumvent *New Mexico* is the Opinion's assertion that the federal government can appropriate any unappropriated water (albeit with a current priority date) to fulfill congressional management mandates. As initially stated, the assertion of non-reserved federal appropriative rights does not directly benefit energy developers, but there is no reason why future expansions could not.

Federal non-reserved appropriative rights are permissible because, as the Opinion explains, "[t]he United States also has the right to appropriate water on its own property for congressionally authorized uses, whether or not such uses are part of any 'reservation' of the land."[160] Federal appropriative rights may be claimed under a much lower standard than a reserved right. The right to appropriate does not arise by implication from the reservation of land for particular purposes, but instead arises from actual use of unappropriated water by the United States to carry out congressionally authorized management objectives on federal lands. Such rights are not dependent upon the substantive doctrines and policies of state water law. Agencies of the Department of the Interior are advised to follow state procedural law "to the greatest practicable extent," but the Opinion reserves the right to rule in the future that the government need not comply with state procedural law. The claimed immunity from state substantive and procedural law was substantially modified by the last Solicitor to serve in the Carter Administration, the distinguished natural resources lawyer Clyde Martz.[161]

The constitutional power of the federal government to impose a federal water law incident to the disposition of the public domain is beyond doubt, but whether Congress has done so is another question. In 1978, a unanimous Supreme Court opinion reaffirmed the general understanding that Congress has not created a federal body of water law in the course of holding that water is not a locatable mineral under the Mining Law of 1872.[162] *Charlestone Products* notwithstanding, in a most casual reading of the Federal Land Policy and

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[160] Solicitor's Opinion, *supra* note 1, at 574.

[161] Solicitor Clyde Martz opined that "This right is limited to quantities of water required for beneficial uses recognized by state law. Its priority date is fixed by applicable state law in all cases except for historic consumptive beneficial uses of water not heretofore perfected by permitting or other procedural requirements of state law . . . " C. Martz, Supplement to Solicitor's Opinion M-36914, 88 INTERIOR DEC. 253, 255 (1981).

[162] Andrus v. Charlestone Products Co., 436 U.S. 604 (1978).

Management Act of 1976 (FLPMA),[163] the Solicitor purports to have found a congressional intent to allow federal appropriations. FLPMA charts a new course for public lands policy by mandating that multiple use-sustained yield management of the retained public lands be accomplished through rational planning. In adopting FLPMA, Congress did not intend to upset the pre-1976 balance of federal-state control over water rights. Nonetheless, on the incredible ground that federal appropriation of unappropriated waters constitutes the status quo, the Opinion concluded that although FLPMA does not establish reserved rights on BLM lands, "[i]n FLPMA, Congress authorized the United States to appropriate unappropriated water available on the public domain as of October 21, 1976, to meet the new management objectives dictated in the Act."[164] The two examples listed are "[w]ater for such consumptive uses as recreational campgrounds, timber production, and livestock grazing" and "[i]nstream flows and other nonconsumptive uses."[165]

The legal foundation for the assertion of federal nonreserved appropriative rights is confused. The Opinion argued both the Property and Supremacy Clauses underpinnings at various times and finally rested the Department's power upon both clauses by concluding:

> [I]t is my opinion that, since Congress has vested [under the Acts of 1866, 1870 and 1877] only the public with the right to appropriate unappropriated water arising on, under, through or appurtenant to federally owned lands under state law, the United States itself retains a proprietary interest in those waters that have not been appropriated pursuant to state law. The United States therefore retains the power to utilize those unappropriated waters to carry out the management of objectives specified in congressional directives. Any legislation enacted by Congress to accomplish management objectives on federal lands preempts conflicting state regulations or laws as a result of the operation of the Property and Supremacy Clauses. . . .[166]

The Solicitor failed to note that the choice of theories upon which reliance is placed makes a difference. Under the Property Clause, only a congressionally authorized management objective is required because the agency is merely putting something that the federal government already owns to use. However, to claim that the Supremacy

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[163] Pub. L. 94-579, 90 Stat. 2744 (1976) (codified in scattered sections of 7,16,30,40,43 U.S.C.).

[164] Solicitor's Opinion, *supra* note 1, at 615.

[165] *Id.*

[166] *Id.* at 575-76.

Clause allows the agency to acquire water free from state law, the agency must point both to a congressional intent to acquire water for a constitutional objective and to a specific intent to supersede state law.[167] The former requirement is easier to satisfy than the latter.

Moreover, the Solicitor's "construction" of federal land management legislation is wrong. None of the cases and secondary sources cited by the Solicitor supports his position.[168] Additionally, evidence of some congressional intent to reserve is crucial to the accommodation the Court has tried to strike between federal and state interests. Congress has acquiesced in the limited use of the reservation doctrine but has never shown any desire to develop a comprehensive system of federal water rights approaching those possible under the Solicitor's Opinion. Instead, Congress has expressed a preference for state allocation, unless a strong federal interest necessitates a contrary result. If the Acts of 1866, 1870 and 1877 and *California Oregon Power Co.* mean anything, it is that Western waters will be allocated by state law, unless Congress finds that federal interests require an allocation not recognized by the law of the states. To treat the Federal Land Policy and Management Act of 1976 as if Congress contemplated the opposite result demonstrates a complete unwillingness to appreciate the evolution of federal-state water rights law.

At the present time, the actual threat to future state law claimants is null, although federal appropriative rights for instream flows have already been asserted in Wyoming. On February 4, 1980, Secretary Andrus offered Western governors the following interpretation of the Solicitor's Opinion:

> First, no program of blanket assertion of rights pursuant to part of the Opinion is being undertaken by this Department, and none will

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[167] *See* Comment, *Federal Non-Reserved Water Rights*, 15 LAND & WATER L. REV. 67, 74-78 (1980). For another criticism of the Opinion see Note, *Federal Nonreserved Water Rights*, 48 U. CHI. L. REV. 758 (1981).

[168] The Solicitor relies in part on United States v. Rio Grande Irrigation Co., 174 U.S. 690 (1899) and United States v. Lake Misere Land Co., 412 U.S. 580 (1973). *Rio Grande* suggested in dictum that the federal government may claim water rights by virtue of its ownership of the public domain. However, the case does not discuss the impact of the three acts of 1866, 1870 and 1877 on federal claims and thus is only limited authority for the assertion of non-reserved federal appropriative rights. *Lake Misere* is an application of the rule that the federal government can fashion federal property rules to carry out congressional programs. In *Lake Misere*, the Court found that Congress intended to supersede state oil and gas law which made it difficult for the federal government to acquire the mineral rights to land acquired for wildlife refuge. The issue with respect to federal non-reserved water rights is whether Congress in fact intended to supersede state law, so *Lake Misere* does not support the Solicitor's position and is probably contrary to it. See Comment, *supra* note 167, at 79-94 for a detailed analysis of other miscited cases.

> be without further discussion with you. A directive to this effect has been issued to the appropriate Interior agencies (a copy of which is attached). By virtue of this action, this part of the Opinion may be regarded as inactive in all but the most limited circumstances. These circumstances would occur only if court or statutory deadlines force the Department to file all federal claims in a particular watershed or area before our remaining differences are resolved. If we have no choice but to make such filings, we might include, in some instances, claims based on concepts embodied in the Solicitor's Opinion, but this would be the case with or without the existence of the Opinion itself. In such cases, which I expect to be quite limited, I will further guide any assertions by directing that they be approved prior to filing by the appropriate Assistant Secretary. Let me also emphasize that merely filing such claims in these narrow circumstances will not prevent us from withdrawing or modifying them if that becomes appropriate.[169]

On September 11, 1982 this portion of the Krulitz Opinion was reversed by the current Solicitor, William H. Coldiron.[169.1] This reversal is hardly surprising, but the issue of federal non-reserved rights is not closed because Congress remains free to reopen the issue as are future solicitors.

D. *Federal Water Rights For Energy Development*

Claims asserted by federal lessees and by federal agencies for reserved rights (as well as for other federal water rights) should be rejected, at least at the present time, on the theory that private beneficiaries of federal mineral resources, or their agency surrogates, are not entitled to federal water rights. This simple proposition is at the heart of the dual system of federal-state water rights which have evolved in this century. Assuming that we will follow nineteenth century disposal policies with respect to mineral development of the public lands, the federal government's interest should be limited to that of obtaining a fair return to the Treasury and to regulating the side effects of the extraction process. Other necessary components, such as capital and labor, and supplementary resources, such as water, must be acquired through the private market. Since private water rights are subject to state supervision, submitting federal lessees to state law will allow the state to integrate water allocation planning into its land and natural resources planning generally, and

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[169] Letter from Cecil Andrus, Secretary of the Interior, to the Honorable Scott M. Matheson, Governor of the State of Utah and the Honorable Ed Herschler, Governor of Wyoming, (Feb. 4, 1980).

[169.1] 88 INTERIOR DEC. 1055 (1981).

to decide how much extraction versus other water-dependent uses it wishes to foster. Few states have availed themselves of this opportunity, but there are good reasons for holding this opportunity open.

The assumptions upon which this analysis rests have long prevailed in the Far West, but in recent years it has been argued that the imperatives of energy development require that federal water rights displace state water rights. The argument is a variant of the case for federal promulgation of uniform, minimum environmental standards. State self-interest results in the frustration of overriding national goals because of the adverse consequences of one state's parochial choice upon other states.[170] Here, the fear is that states will withdraw substantial amounts of water from energy development to the detriment of energy consumers outside of the Rocky Mountain energy basket. Federal reserved rights, appropriations, condemnation of state water rights, and the aggressive use of the federal government's power to market water stores behind federal reservoirs would be used to force the Far Western states to share their water on fair terms with the rest of the country. What we cannot achieve with OPEC, it seems we will force on the energy-rich Far West. There is no constitutional barrier to federal preemption of state water law for an obviously compelling national interest.[171] Any doubts of the states' power to take water out of interstate commerce under the nineteenth century doctrine of state ownership seem to have been dispelled by the Supreme Court's recent decision in *Hughes v. Oklahoma*.[172] However, the mere existence of federal power does not require its utilization and there is no compelling need for the exercise of federal preemption at this time.

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[170] *See* Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211-19 (1977), which distinguishes among four arguments for centralization: (1) the tragedy of the commons, (2) the disparities in effective political representation, (3) the prevention of spillovers and (4) the promotion of higher moral ideals. The case for decentralized control is basically (1) the diseconomies of scale, (2) the protection of opportunities for local self-determination and, (3) the regressive impacts of the promotion of high moral ideals suggest that the cost of many decisions made at the highest level of government exceeds the benefits.

[171] See Note, *Federal Acquisition of Non-Reserved Water Rights After New Mexico*, 31 STAN. L. REV. 885 (1979). The only objection to federal preemption is an argument that state control over its water resources is an essential attribute of sovereignty protected by the tenth amendment, but the author rejects an *Usery* argument. National League of Cities v. Usery, 426 U.S. 833 (1976). This seems correct in light of the Supreme Court's recent refusal to invalidate portions of the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-38 (Supp. III 1979), as unconstitutional infringements on state powers to allocate land use. Hodel v. Indiana, 101 S.Ct. 2376 (1981) and Hodel v. Virginia Mining & Reclamation Ass'n, 101 S. Ct. 2352 (1981).

[172] 441 U.S. 322 (1979).

Recent studies of the oil shale synthetic fuels industry[173] and the direct use of coal[174] indicate state water law is currently not a barrier to energy development. The major reserved rights problem impeding energy planning is not the lack of reserved rights for federal lessees and permittees, but the vast and diffuse reserved rights claims being asserted by the Indian tribes. The possibilities for resolving many of these claims short of litigation do not seem promising.[175] One aspect of the problem may be just the opposite. The federal government and the states have not been sufficiently diligent in assuring whether the environmental and social costs of the existing pattern of market allocation are acceptable, given the variables affecting the use of our scarce water resources for rapid energy development.[176] In the future, the fears of a lock-up by the Western states may impinge on national interest and the problem may be reopened. However, at the present time the case for decentralized control is a compelling one.

Although the issue was not before the Court, *United States v. New Mexico* appears to have adopted the preceding analysis with respect to energy claims by federal lessees and their surrogates. In an analogous situation, the Court rejected a Forest Service claim for stockwatering purposes.[177] It could be argued that the Forest Service

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[173] OFFICE OF TECHNOLOGY ASSESSMENT, AN ASSESSMENT OF OIL SHALE TECHNOLOGIES 388-90 (1980).

[174] OFFICE OF TECHNOLOGY ASSESSMENT, THE DIRECT USE OF COAL 156-57 (1979).

[175] An interesting note by Scott M. Matheson, the son of the current governor of Utah, compares proposals for legislative and adjudicative quantifications of Indian reserved rights by Congress, the courts and agencies. The author concludes that "if [Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) which sets forth conditions for federal court deferral to state general water adjudication involving Indian and non-Indian reserved rights] is construed narrowly, the courts offer a more promising alternnative for defining the content of Indian reserved rights." Note, *Indian Reserved Water Rights: The Winters of Our Discontent*, 88 YALE L.J. 1689, 1711 (1979).

> The scope of potential Indian reserved rights claims has been expanded by the Ninth Circuit's recent opinion in Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981). The Tribe's original fishing grounds on the Columbia River had been destroyed by dams so the court awarded the tribe a reserved right necessary to maintain a replacement fishery on the reservation. The court did not read *New Mexico* as reversing the traditional role that the purposes of Indian reservations should be liberally construed.

Id. at 1219-22.

[176] The case for decentralized control is basically (1) the diseconomies of scale, (2) the protection of opportunities for local self-determination and (3) the regressive impacts of the promotion of higher moral ideals suggest that the cost of many decisions made at the highest level of government exceeds the benefits. *See generally*, H. INGRAM, N. LANEY, J. MCCAIN, A POLICY APPROACH TO POLITICAL REPRESENTATION: LESSONS FROM THE FOUR CORNERS STATES 101-82 (1980).

[177] 438 U.S. at 715-17. This analysis is confirmed in Sierra Club v. Watt, 659 F.2d 203 (D.C. Cir. 1981) which holds that the Bureau of Land Management cannot claim reserved rights in

should be entitled to ration water as a means of livestock management programs, but both the majority and dissenting opinions agreed that stock-watering rights fell outside the scope of the purposes for which the forests are managed. With some exceptions, the Department of the Interior seems to have generally adopted the "no water rights for private beneficiaries of public domain" principle in the Solicitor's Opinion.

The Opinion deals with the questions of reserved rights for Taylor Grazing Act permittees and federal oil shale lessees. Except for the federal naval oil shale reserves, the Solicitor concludes that permittees and lessees cannot claim reserved rights.[178] Taylor Grazing Act permits do not carry reserved rights because, with limited exceptions such as the 1926 withdrawal of waterholes,[179] the United States has not claimed reserved rights for the beneficiaries of disposed public domain lands. Taylor Grazing Act withdrawals and the revested Oregon and California lands[180] fall within this policy. These lands are not reservations; they are public lands for which Congress clearly did not intend to claim reserved rights. (The Opinion does not explore the interesting issue of whether Oregon and California lands, which are neither withdrawals nor reservations, carry with them reserved rights for timber production and forest protection as a result of the 1937 Revestiture Act.) Otherwise, all public lands would carry with them the potential for reserved rights.

However, reserved rights may still be possible on lands withdrawn for energy purposes. The federal government has a potential interest in promoting mineral development on the public lands beyond current leasing statutes, especially in light of our drive for energy independence. Reserved rights could be claimed to be consistent with the purpose of mineral withdrawals.

Possible reserved rights for oil shale development are discussed in the Opinion. Reserved right claims appurtenant to oil shale lands,

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retained "public domain" lands that it manages because such rights can only be claimed on withdrawn lands.

[178] Solicitor's Opinion, *supra* note 1, at 591-92.

[179] Public Water Reserve No. 107, Executive Order of April 17, 1926. The Solicitor's claims to reserved rights for the purpose of granting federal private water rights is justly criticized in Trelease, *Uneasy Federalism — State Water Laws and National Water Uses*, 55 WASH. L. REV. 751, 761-63 (1980).

[180] Title to these lands was conveyed to the Oregon and California Railroad Company in 1866, [Act of July 25, 1866, 14 Stat. 239 (1866)], to another railroad in 1869, and then reverted to the United States in 1915 [Oregon and California R.R. Co. v. United States, 238 U.S. 393 (1915)]. The lands have been managed as permanent forest lands since 1916. 43 U.S.C. §§ 1181-1181F (1976).

withdrawn under Executive Order No. 5237,[181] are rejected in summary fashion. Executive Order No. 5237 provides that the oil shale deposits are "temporarily withdrawn from lease and other disposal and reserved for the purposes of investigation, examination, and classification."[182] The Opinion concludes that this statement of purpose excludes any reserved rights for development.[183] No broader principle is developed from this conclusion. The failure to do so is unfortunate in that other federal agencies and federal lessees have asserted reserved rights claims for oil shale development, and in addition, a more general statement of the status of water rights claims of mineral lessees and other federal energy development permittees would help facilitate energy development planning.

In a case construing the standards for joining the United States in a state adjudication under the McCarran Act,[184] the Court said in dictum that the Department of the Navy could claim reserved rights to carry out the purpose of the oil shale reservations, even though the lands are not appurtenant to the major source of water, the Colorado River.[185] Relying on this single sentence, the Department of Energy, which administers the reserves, is asserting water rights for uses on its oil shale reserves for mining, retorting, upgrading spent shale disposal, environmental restoration, and supporting population and oil-shale-related industries.[186] However, the claim is limited to development of the reserves "only in a national emergency and then under very strict control."[187]

The Naval reserves stand on a different footing from the oil shale reserves administered by the Department of the Interior. The Department of the Interior only administers reserves that will be developed for non-defense consumption. Therefore, only with respect to the Naval reserves would the purpose (national defense) be frustrated if appurtenant rights were not implied. Reserved rights for mineral development should be limited to direct federal development for clearly defined national purposes. Otherwise, mineral lessees carry out the federal policy of allowing disposition or use of the public domain, and therefore, the use of water for mineral development is not

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[181] Exec. Order No. 5327(a) (April 15, 1930).

[182] *Id.*

[183] The conclusion is based on Holland, *Mixing Oil and Water: The Effect of Prevailing Water Law Doctrine on Oil Shale Development*, 52 DENVER L.J. 657 (1975).

[184] United States v. District Court in and for Water Dist. No. 5, 401 U.S. 527 (1971).

[185] *Id.*

[186] OFFICE OF TECHNOLOGY ASSESSMENT, AN ASSESSMENT OF OIL SHALE TECHNOLOGIES 397 (1980).

[187] 401 U.S. 527 (1971).

superior to uses traditionally allocated by state law. There is no need to give federal energy lessees reserved rights because Congress has never indicated that there is a federal policy of energy development requiring that federal lessees and licensees be able to displace water rights vested under state law. Besides, even if it were allowed, the "reservation" would be junior to most rights. Should Congress ever decide that national energy policy required this reservation, it would be better to effect this same result under the Supremacy Clause.[188] Federal preference rights should be based on the federal power to acquire property to carry out federal policies, not on prior federal ownership of the water. The difference between a supremacy and reserved rights approach is crucial. Under the former approach, holders of state water rights are entitled to compensation when vested rights are destroyed, while in the latter case they may not be entitled to any compensation, depending upon their priority.

Congress has recently considered whether federal reserved and appropriative rights are necessary for energy development. In spite of strong arguments to the contrary, to date Congress still expressly opts for the operation of state water law in the development of synthetic fuels technologies and coal slurry pipelines. The Coal Pipeline Act of 1979[189] was designed to remove the major legal barrier to construction of slurry pipelines between the energy-rich, demand-poor West and the high demand areas in the Atlantic Coast and Southwest regions. Western railroads which want to carry the coal have blocked construction of pipelines by refusing to grant pipeline developers the fee or easement interests necessary to build a pipeline, while at the same time dramatically increasing the rates for transporting the coal from the East and Southwest. Recent decisions construing original railway grants may allow some pipeline crossings,[190] but the scope of judicial relief is uncertain, thus creating a case for federal right-of-way legislation. Under the recently proposed Coal Pipeline Act of 1979, a pipeline company could obtain a certificate of public convenience and necessity, giving the company eminent domain power over private lands. Section 302 of the proposed act prohibits the United States from acquiring any rights for the pipeline except pursuant to state law. The grant of eminent domain expressly precludes "granting a right to the use of water to any coal pipeline"

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[188] *See* Olpin, Tarlock & Austin, *Geothermal Development and Western Water Law,* 1979 UTAH L. REV. 773, 808-09.

[189] *See* H.R. REP. No. 692, 96th Cong., 1st Sess. 24 (1979).

[190] *E.g.,* Energy Transportation Systems, Inc. v. Union Pac. R.R. Co., 606 F.2d 934 (10th Cir. 1979).

except pursuant to state law (substantive and procedural).[191] The House Committee on Interior and Insular Affairs specifically rejected an assertion of both the reserved rights doctrine and the Opinion's argument that the "federal government may appropriate unappropriated water without complying with state substantive and procedural law."[192] A similar issue arose when Congress considered the creation of the Energy Mobilization Board (EMB) to put priority energy projects on the "fast tract." In all versions of the legislation, which almost passed the Congress in 1980, it was expressly stated that EMB approval would not be a source of federal water rights.[193] Water rights were one of the few pre-existing legal orders not disturbed by the proposed EMB.

Reserved rights claims have also been mentioned for the development of geothermal resources. Geothermal resources are exploitable heat stored in rock and transported in steam or liquids. Initially, the Department of the Interior took the position that geothermal resources were water.[194] A 1930 withdrawal of all unappropriated lands containing hot springs,[195] a 1967 withdrawal of all lands valuable for geothermal development,[196] and the 1970 Geothermal Steam Act[197] were urged as support for the proposition that geothermal lessees could claim reserved rights. Reserved rights could be used to defend against claims that a geothermal field interferes with vested state groundwater or surface rights. Much of the force of this argument has been taken away by a Ninth Circuit decision holding that geothermal resources are minerals, not water, for the purposes of interpreting mineral conveyances.[198] However, this issue could arise should a geothermal developer be enjoined from developing a field in order to protect groundwater levels. One of the authors has analyzed the reserved rights claims at length, concluding that they should not be recognized in the case of geothermal resources for three primary reasons, in addition to the general arguments above. First, "it is not

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[191] Proposed Coal Pipeline Act of 1979, § 302(c).

[192] *Coal Pipeline Act of 1979*, H.R. REP. No. 692, pt. I, 96th Cong., 1st Sess. 24 (1979). *See* Tarlock, *Western Water Law and Coal Development* 51 COLO. L. REV. 511, 538-41 (1980).

[193] *Priority Energy Project Act of 1979*, S. REP. No. 331, 96th Cong., 1st Sess. 17 (1979). For a brief analysis of the legislation, see Development, *The Energy Mobilization Board*, 8 ECOL. L.Q. 727-47 (1980).

[194] Olpin, Tarlock & Austin, *supra* note 188.

[195] Exec. Order No. 5389 (July 7, 1930).

[196] 32 Fed. Reg. 2588 (1967), as amended 32 Fed. Reg. 4506-08 (1967).

[197] 30 U.S.C. §§ 1001-25 (1970 & Supp. III 1980).

[198] United States v. Union Oil Co., 549 F.2d 1271 (9th Cir., *cert. den. sub nom.*, Ottoboni v. United States, 435 U.S. 911 (1977).

possible to ascertain from the withdrawals the lands to which federal reserved rights might attach."[199] Second, reserved rights are generally recognized for use only on reserved lands, but in the case of geothermal resources development, the purpose would, "presumably be to serve values away from the lands on which the extraction occurs . . . ."[200] Third, federal preemption with compensation is a fairer way of promoting geothermal development should water law unreasonably block such development.[201]

V. CONCLUSION

Those who urge the recognition of federal proprietary water rights for Western energy development take comfort in the sweeping theories of reserved and nonreserved rights (more than in the specific claims to which the Department of the Interior committed itself) announced in the 1979 Solicitor's Opinion. We join the distinguished Western water law authority, Professor Frank J. Trelease, in arguing that the legal and historical premises underlying the Solicitor's Opinion are seriously flawed and that there is no need for a federal water rights law for energy development.[202] However, it is important to note that political opposition to an increased federal role, rather than the numerous errors on which the Opinion rests, has thus far prevented its implementation. The long-playing energy "crisis" provides ample opportunity and motivation for altering the political climate, despite the Reagan administration's strong commitment to Western self-determination. Energy interests could yet use Congress or the executive in an effort to gain free and convenient water entitlements to further development plans. We have tried to close this Pandora's box of sloppy misconceptions concerning federal reserved and non-reserved rights because we believe that the theories are both bad law and bad policy. Federal reserved rights are not necessary for the achievement of national energy goals. Using an arcane vocabulary of historical trivia and irrelevant judicial doctrine, they would simply confuse planning, conceal energy costs[203] and substantially increase the costs of the decision making regarding these difficult and perva-

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[199] Olpin, Tarlock & Austin, *supra* note 188, at 809.

[200] *Id.*

[201] *Id.*

[202] Trelease, *supra* note 13. *See also* Comment, PALEFACE, REDSKIN, AND THE *Great White Chiefs in Washington: Drawing the Battle Lines Over Western Water Rights*, 17 SAN DIEGO L. REV. 449, 473-76 (1980).

[203] *See* Joskow & Pundyck, *Should the Government Subsidize Nonconventional Energy Supplies*, REGULATION (Sept.-Oct. 1979), at 18.

sive allocation problems.

If and when water entitlements become a barrier to energy planning and development, Congress can intervene, using its ample powers to displace state law in the national interest. Prior to such a showing, however, sidestepping the process by pressing a previously little used but important legal fiction into service avoids essential public dialogue and threatens the minor utility which that fiction ought to play in federal land management.

Understandably, energy developers are seeking to exploit the possibilities of the federal reserved rights doctrine held open after a decade of pressure to expand the concept to cover environmental goals. This situation speaks forcefully about the long-term risks of the use of legal doctrines to sidestep the political process. Once a doctrine is extended beyond its widely understood context, it may not be possible to repair the underlying logic. Fortunately, in the case of federal proprietary rights, the opposition to its expansion to energy development is strong and is likely to remain so. The opportunity remains to elucidate a coherent basis for defining the doctrine, which will preserve its place in the achievement of congressionally mandated land management goals, while foreclosing its emergence as a license, albeit judicially reviewable, to grab water.