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ABSTRACT

New Mexico's continuing prosperity depends on safeguarding its scant water resources from too rapid depletion. A United States supreme court decision of 1978 virtually stripped federal agencies of control over waters on reserved public lands within the state, giving the state engineer enlarged and practically dictatorial powers in the management of all state waters. This raises the question of the extent to which Congress can lose constitutional rights without expressly abdicating them. Equally important, powerful political pressures threaten the balancing of present use against future need by overwhelmingly supporting unlimited consumption by water users.

The death of Steve Reynolds on 25 April 1990 terminated the career of the one individual who had emerged as the leading spokesman in the nation on matters pertaining to the administration of water resources in the semiarid to desert West. The justifiably high respect which he enjoyed as New Mexico's state engineer grew out of his self-assurance, personal, integrity, adequate qualifications, and tenure in office for 35 consecutive years. The universality of this esteem tends to obscure his unswerving conviction as to the appropriate authority and responsibilities vesting in his office, an attitude shared with western state engineers in general. He was wholly committed to the principle that a state have unrestricted control over all waters within its boundaries and that this power be exercised through the state engineer. He should immediately assert rights to all waters to which his state might have any claims, basing estimates on the largest quantity possibly available, and apply those waters to beneficial use as quickly as possible to establish an unquestioned priority date. This fitted into Reynolds' frequently cited adage that water flows uphill to the uses which promise the highest economic return, and that these should be encouraged and protected. There is no doubt that this philosophy could and did encourage rapid economic growth and therefore had wide popular appeal. The major flaw in his position was its failure to impose any restraints against the overuse of the water resources, the long-term effects of which might well prove disastrous.

This essay is a somewhat modified segment of a much longer article completed several months prior to Reynolds' death. In its original form, it attempted to treat a diversity of related problems including the uniqueness of water as the only resource besides air as essential to survival; invocation of state police power to protect water as a vital resource as opposed to creating it as merely an article of commerce; equitable apportionment of stream compacts as means for distributing waters of interstate streams; and conflicting state laws governing the ownership, protection, and use of groundwaters. All these topics share the common theme of dividing authority to resolve the most important issue facing every water-poor state, i.e., distribution of power and responsibility so as to secure a balance between present use and future need. Control exercised by the state engineer is merely one of the several elements which must be considered together in order to determine if a state is adequately safeguarding its continuing prosperity, but certainly it must be recognized as the most crucial.

Reynolds viewed the federal government as the major threat to the hegemony which he believed was essential to the effective operation of his office. His attitude introduced the delicate issue of determining the demarcation line between state and federal jurisdiction over waters within the boundaries of a state but located on federal lands, the subject of heated debate for generations. Unfortunately, from its inception the problem has been treated in a purely adversarial atmosphere in which the contending parties have been more intent on justifying long-standing opinions than in attempting to evaluate the intent of Congress as it made changes in the land law and, more importantly, what would be best for both the states and the nation. The situation has been further exacerbated by approaching it as though the ends to be accomplished by federal as opposed to state control are mutually inimical. Doubtless there are times when priorities between national and local objectives will be in conflict, but in general it would seem reasonable to assume that their overall objectives would tend to complement each other. Additional heat is generated when the debate becomes one of what might happen rather than in showing substantial verifiable abuses. All of these issues have arisen as the result of adoption by the western public land states of the doctrine of prior appropriation, the circumstances under which this doctrine came into being, and its subsequent application by Congress to the western public domain.

The doctrine of prior appropriation arose while public land law was still dominated by the concept of placing federal lands in private ownership in "family-sized farms" (which in time became identified with quarter-sections of land) as rapidly as possible. This was a logical development in an agricultural frontier moving west through a mesic area in which precipitation took care of normal water needs of farmers. Title to

the land itself was the core of the system since a sufficient supply of water was accepted as a matter of course. The federal government therefore followed the riparian rights doctrine (identified with common law) which all states east of the Mississippi River as well as those abutting on its western bank adopted as their own. Because of the location of their lands riparian proprietors were given any special rights which might accrue in the use of surface waters. These were relatively inconsequential since they were required to pass on to downstream owners waters of approximately the same quantity and quality as came to them from above.

It was only as the agricultural frontier approached the ninety-eighth meridian, a line roughly splitting the tier of states reaching north from Texas through the Dakotas, that water became increasingly so scant that land values derived primarily from the availability of surface water for diversion to make them productive. The farmers' frontier was nearing this line in 1862, the year of the Homestead Act. That statute was written in terms of quarter-section (160 acre) farms, a unit incapable of supporting a family in a subhumid climate.

Actually the appropriation doctrine, which in one form or another is the basic water law of all states lying wholly or partially west of the ninety-eighth meridian, came into being before the impracticability of the riparian rights doctrine in a dry climate became apparent. It was a byproduct of the California gold rush of 1849, when much gold was recovered by washing away sand and debris then recovering the gold which remained. This wealth was located in large part on the public domain. Because of congressional preoccupation with the farming frontier, federal land law made no provision for such purposes as mining claims. Mining camp occupants therefore declared themselves bodies politic and created their own laws and customs for taking care of their peculiar problems. Since gold deposits were not necessarily located on live streams, the miners also adopted the practice of permitting the first person diverting water from a stream and conducting it to a place where it could be put to beneficial use the right to so much as he diverted and continued to use beneficially. This became known as the doctrine of prior appropriation and beneficial use. When California entered the union as a state it incorporated into its constitution the laws and customs of the mining camps as the state's mining law together with the accompanying water doctrine. California did confine the operation of the appropriation doctrine to public lands while reverting to a modified version of the common law riparian rights doctrine for lands in private ownership.

By inaction Congress tacitly accepted the situation until 26 July 1866, the date of the Mining Act which recognized local mining law and custom, including the water doctrine, as prevailing on the public lands of the United States.

> Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by local customs, laws and decisions of courts, the possessors and owners of such rights shall be maintained and protected in the same and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; *provided, however,* after the passage of the act, whenever any person or persons shall in the construction of any ditch or canal, injure or damage the possession of any settlers on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.[1]

Four years later the statute was amended to read "And all patents granted or preemption or homestead allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired or recognized by the ninth section of the act of which this act is amendatory."[2]

The Desert Land Act of 3 March 1877 extended the doctrine to water used in the reclamation of arid public lands by irrigation.

Be it enacted . . .

> Sec. 1. That it shall be lawful for any citizen of the United States, or any person or persons of requisite age, who may be entitled to become a citizen and who has filed his declaration to become such, and upon the payment of twenty-five cents per acre—to file a declaration under such oath with the register and the receiver of the land district in which any such desert land is situated that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter, *provided however,* that the right to the use of water by the person so conducting the same, on or to any tract of desert land of 640 acres shall depend on bona fide prior appropriation and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and 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 sand not navigable, shall remain

1. Mining Act of 1866, 14 State., Ch. 262, § 9, at 253 (1866).
2. Amendment to Mining Act of 1866, 16 Stat., Ch. 225, at 218 (1870).

> and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights.[3]

Section 2 defined the term "desert land" and section 3 limited operation of the statute to the three states and eight territories which comprised the semiarid to arid public domain. The law, of course, applied only to that domain because water on private land unquestionably fell within the province of the states. There were a few unresolved issues—whether the law applied to all public lands or only to those of desert nature, and absence of a precise definition of federal-state relations—but these were of minimal importance so long as the policy of the General Land Office was to transfer title to public land into private ownership as rapidly as possible, at which time land and water were reunited under state law. It was only after Congress began closing certain lands to private entry and reserving them for specific national purposes that the critical nature of these three laws became apparent. At that time two sharply conflicting points of view were expressed as to the intent of Congress in enacting them. The controversy became more heated as additional lands were withdrawn from entry. The question was jurisdictional in nature: whether the state or the federal government should control the disposition and use of unappropriated waters within the state but located on federal lands. The answer would determine whether such waters would be available at the will of Congress in developing the lands for the purposes for which they had been reserved for the national good or whether such appropriations must be consummated under state law and by state administrators. This did open up the possibility of controversy if national purpose and local interest came into conflict.

There were other contributing factors. One was a traditional western hostility to the idea of any lands being permanently reserved from private entry together with a widely held belief that such a policy should be abandoned. But the overriding attitude was that Congress, by its own actions in recognizing and confirming water rights acquired under local law and custom, and in applying the appropriation doctrine to all arid lands in the West, in effect had surrendered control over the appropriation and use of all such nonnavigable waters to those states and territories in which they were located. This conclusion was bolstered by congressional approval of state constitutions which expressly declared state or public ownership of *all* unappropriated water to be held in trust for appropriation for beneficial use under state law,[4] and by numerous federal statutes beginning with the General Revision Act of 3 March 1891 providing for

3. Desert Land Act of 1877, § 1, 43 U.S.C., § 321 (1982).

4. See, for example, Colo. Const., art. XVI, §§ 2–3 (1876); Wyo. Const., art. 1, § 31, art. VIII, §§ 2–3 (1889); N.M. Const., art. XVI, §§ 2–3 (1912).

recognition of existing state law by insisting on conformity with it or by noninterference in its operation.[5]

The one Supreme Court decision which apparently lends support to this position states: "What we hold is that following the act of 1877, if not before, all nonnavigable water then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the role of appropriation or the common-law rule in respect to riparian rights should obtain."[6] This has been widely quoted by proponents of state control of unappropriated waters on the public domain. An equally defensible interpretation is that the decision was a statement that the Desert Land Act, while applying the appropriation doctrine to all public lands in the West, left the states free to adopt either riparian rights or appropriation as they might choose. Further weight is given to such a reading by the sentences which immediately follow. "For since "Congress cannot enforce either rule upon any state," *Kansas v. Colorado*, 206 U.S. 46; 94, the full power of choice must remain with the state. The Desert Land Act does not bind or purport to bind the states to any policy."[7] Rather than declaring the act a conveyance by the federal government to the states of its proprietary claims to these unappropriated waters, this interpretation would indicate that the Supreme Court was saying that the Desert Land Act committed the United States to the doctrine of prior appropriation for its own lands regardless of the water law adopted by each of the several states.

Defenders of exclusive state control over public domain waters normally state their position as though it were an undisputed fact rather than a highly controversial interpretation of case law. Having done so, they tend to ignore insofar as possible all evidence to the contrary. Western state engineers uniformly adhere to this group as do many state attorney-generals and representatives of economic interests which envision much greater stability and benefits within the state from exclusive state control. As custodians for their respective waters, state engineers naturally assume the greatest possible control over all waters within their boundaries. Assertion of federal jurisdiction over waters on reserved public lands poses the greatest single obstacle to state control.

The contrary position depends on three basics: constitutional powers granted to Congress; proprietary interests of the United States in the lands; and a counter-interpretation of the purpose of the Mining Act of

5. *Federal-State Water Rights: Hearings on S. 1275*, March 10,11,12,13, 1964, Before the Subcomm. on Irr. and Reclam. of the S. Comm. on Int. and Ins. Aff., 88th Cong., 2d sess. (1964) (hereinafter cited as 1964 *Hearings*) at 302–10 lists 37 such statutes enacted prior to 1938.

6. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163–64 (1936).

7. *Id.*, at 164.

1866, as amended in 1870, and the Desert Land Act of 1877. Constitutionally, control over the navigability of navigable streams resides in Congress under the commerce clause; furthermore, the constitution specifically grants to Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[8] In addition to these constitutional powers, the United States can exercise its proprietary rights as owner of lands on which some nonnavigable streams originate and over which they flow. The additional argument is that the acts recognizing the applicability of the appropriation doctrine to these waters were in no sense an abdication of congressional authority to the states. That would have required a much more explicit renunciation of Congress' constitutional and proprietary rights. The acts simply legalized appropriations already made, furnished a method for future acquisition of water rights, and provided a means for settling disputes among private water rights holders. All represented the exercise of congressional authority to make use of state laws and local customs as a convenient method for handling local problems rather than as a surrender of that authority to the states.

Collectively these positions were the basis for a leading Supreme Court decision of 1899 in which, after reviewing in detail the circumstances surrounding congressional recognition of the appropriation doctrine, the Court concluded:

> Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial use of the government property. Second, it is limited by the power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.[9]

This unanimous opinion has served as the precedent for a number of important rulings and has never been seriously questioned; nevertheless, it has been ignored or played down by those who reject any claims of federal jurisdiction over waters on the public domain.

Congressional control over these waters solidified about midcentury. One major factor was a broad extension of the meaning of the

8. U.S. Const., art. IV, § 3, par. 2.
9. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899).

navigation power to streams previously considered as nonnavigable.[10] Another was the overriding of state law when it threatened the carrying out of a federal program despite express congressional authorization of such state action.[11] Indirect promotion of this movement also came from the phenomenal growth in the use of congressional spending power in furthering the general welfare by building multipurpose water installations throughout the West, with Congressional insistence that the federal government have some control over the distribution and use of waters impounded at its expense.

Local western opposition to the steady advance of federal control peaked in 1954 with the handing down of the so-called Pelton Dam decision. Oregon protested a license granted by the Federal Power Commission for a dam to be built by a private company on the nonnavigable Des Chutes River in that state on lands which earlier had been withdrawn from entry. Oregon contended that the state must first approve the project because the Mining Act, as amended, and the Desert Land Act delegated to the several states authority to regulate the use of nonnavigable waters on public lands within their respective borders. In rejecting this argument the court (with William O. Douglas dissenting) distinguished between "public lands" and "reservations."

> It is not necessary for us, in the present case, to pass upon the question of whether this legislation constitutes the express delegation or conveyance of power that is claimed by the State, because these acts are not applicable to the reserved lands and waters here involved. The Desert Land Act covers 'sources of water supply upon the pubic lands' . . . The lands before us in this case are not 'public lands' but 'reservations.'[12]

Unreserved lands being practically a thing of the past, appeal to these laws was no longer a viable alternative. Furthermore, this holding laid the foundation for a new doctrine implying a reservation of water rights for reserved lands which was not too dissimilar from riparian rights.

A storm of protest greeted the decision. Dozens of articles discussing federal encroachment in general, with special emphasis on the Pelton Dam case, appeared in law journals and elsewhere. The thrust of settlement bills introduced into Congress purporting to "clarify" the

10. To nonnavigable headwaters and tributaries which would affect existing limits of navigability of navigable streams *(id.)*; to streams which by reasonable improvement could be made navigable (United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940); to construction in which improvement of navigation is only incidental to other purposes (Okla. *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1944) and United States v. Twin City Power Co., 350 U.S. 222 (1955).

11. Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1957).

12. F.P.C. v. Ore., 349 U.S. 435, at 448 (1954).

dividing line between federal and state jurisdiction basically was designed to place all waters within a state under state control, with federal agencies required to conform to state law in the appropriation and use of water. These measures were never able to muster sufficient support to receive serious consideration.[13]

The hostility generated in the West to federal jurisdiction doubtless represented the majority view but the area was far from presenting a united front. For example, New Mexico's powerful Senator Clinton P. Anderson was one of a number of prominent westerners who considered it a short-sighted interpretation which in the long run would be detrimental to local as well as national interests. Recognition of some federal constitutional and proprietary rights was a small price to pay for what the states were receiving in return. In commenting on S. 1275, Senator Thomas H. Kuchel's relatively moderate settlement bill of a later date, he saw "potentially troublesome and dangerous provisions."

> First, it should be observed that although the title of S. 1275 states its purpose to "clarify" the relationships of the States and the Federal Government, the so-called clarification seems to consist primarily of a gift of property rights, power, and authority by the Federal Government to the States. Nowhere are the States called upon to do anything nor recognize in any way rights of the Federal Government. . . .
>
> * * * * *
>
> The Supreme Court of the United States has held that a withdrawal or reservation of lands of the United States does establish proprietary rights in the Federal Government to the waters in that reservation or withdrawal. Thus, clearly the Federal Government is giving away valuable property rights belonging to all the people of all the States.
>
> * * * * *
>
> Nowhere in S. 1275 does the Federal Government get anything in return for all it is giving up, and for the new burdens placed upon it. As I say, the States are not even called upon to recognize any Federal rights or prerogatives—except the right to pay a major portion of the costs of the projects affected by the bill.
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> * * * * *

13. R. Clark, Waters & Water Rights, vol. 2, at 98–108 (1967); 1964 *Hearings* (statement of Clinton P. Anderson).

> Now to touch upon some of the practical aspects of S. 1275. First of all, it would increase the costs of water projects by requiring the Federal Government to buy back water rights the Supreme Court says it now possesses. . . .
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> * * * * *
>
> Second, is there not danger that the divestment of proprietorship in water rights on withdrawn or reserved lands might result in defeating the purpose for which the withdrawal or reservation was made?
>
> * * * * *
>
> I would like to point out that in the ten years this controversy has been before the committee, we have initiated a large number of far-reaching water development projects. In that decade, I have yet to have called to my attention a single specific case of harm to a single individual resulting from Federal proprietorship of water rights in Federal lands withdrawn or reserved for public use.[14]
>
> * * * * *

In attempting to protect the states from federal abuse of power of which there was no evidence, the settlement bills threatened achievements being realized through federal financing of major water resource development projects throughout the West.[15]

The spate of literature relating to the Pelton Dam decision did in time result in suggestions directed towards reaching a true compromise. These recommendations generally revolved around the idea of quantifying the needs of the reserved lands with all unappropriated waters in excess of that amount available for appropriation under state law. Writers also reasserted rights of private appropriators whose priorities preceded the withdrawal of the lands, and urged the development of devices for making waters on reserved public lands available for present use until they were needed for the purposes of the reserved lands.[16]

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14. 1964 *Hearings*, 38–39 (Statement of Clinton P. Anderson).

15. *Id.*, at 39.

16. See, for example, E. Englebert, *Federalism and Water Resource Development*, 22 Law & Contemporary Prob., 604 (1957); S. Sato, *Water Resources—Comments upon the Federal State Relationships*, 48 Calif. L. Rev. 43 (1960); E. Hanks, *Peace West of the 98th Meridian—A Solution of Federal-State Conflicts over Western Waters*, 23 Rutgers L Rev. 33 (1968); F. Trelease, *Federal-State Relations in Water Law* (Nat'l. Water Comm'n.) (1971); C. Wheatley, *Study of the Development, Management and Use of Water Resources on the Public Land* (Pub. Land L. Rev. Comm'n) (1969).

Invocation of the doctrine of sovereign immunity was closely related to and intimately intertwined with the federal-state conflict over control of public domain waters within a state. The doctrine is of ancient origin and declares that the sovereign is immune from being sued unless it expressly agrees to permit such action. Water issues actually have been peripheral to rather than in the mainstream in the evolution of the doctrine; however, on occasion in general adjudications in which all water-rights claimants on a stream system are joined as defendants in order to determine their respective rights, the United States refused to be so joined even though it might claim such rights either as a proprietor or as a trustee. Such a response meant either bringing about a dismissal or, at best, only a partial resolution of those claims. Western states were able to secure much popular support for placing limitations on sovereign immunity under those circumstances.

Such legislation was enacted by passage of the McCarran Amendment to the Department of Justice appropriation for 1953. Its author, Senator Patrick McCarran of Nevada, made very clear its purpose when he stated in reporting it from committee that "it is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream."[17] Although the admendment was ambiguously worded in several places,[18] for a number of years the courts gave to it the narrow definition which McCarran indicated.[19]

New Mexico's attitudes toward the demarcation line between state and federal authority in general have been a reflection of the views of the other interior public land states. It adapted readily to the appropriation doctrine. In 1883 the territorial supreme court recognized it as prevailing in New Mexico,[20] and a few years later expressly rejected riparian rights.[21] The territorial water code of 1907 has remained substantially unchanged as the core of the state's surface water law. This legislation created the office of territorial (later state) engineer, an official who has general supervision over the waters and their measurement, appropriation, and use. The code borrowed from Wyoming a permit system under which the potential water user made written application to the engineer requesting permission to appropriate water. The priority related back to the date

17. Sen. Comm. on the Judiciary, Authorizing Suits Against the United States to Adjudicate and Administer Water Rights, S. Rep. No. 755, 82d Cong., 1st sess. (1951) at 9.

18. McCarran Amendment to Dept. of Justice Appropriation, Title 2, § 208, 43 U.S.C. § 666 (1982).

19. Miller v. Jennings, 243 F. (2d) 157 (1957); Nev. *ex rel.* Shamberger v. United States, 165 F. Supp. 600 (1958); *id.*, 279 F. (2d) 699 (1960); Dugan v. Rank, 32 U.S. 609 (1962).

20. Keeney v. Carillo, 211 N.M. 480 (1883).

21. Trambley v. Luterman, 6 N.M. 15 (1891).

of the filing if, after investigation, the engineer approved the application.[22]

With statehood the constitution had a brief simple statement of the appropriation doctrine:

> Section 1. All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed.
>
> Section 2. The unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.
>
> Section 3. Beneficial use shall be the basis, the measure, and the limit of the right to the use of water.[23]

Despite consistent rebuffs on the jurisdictional issue prior to 1978, western state engineers and their cohorts persisted in their claim of exclusive state control over all waters within their respective boundaries; however, by that time a combination of circumstances had created a more receptive climate of public opinion. In 1963, with three justices dissenting a Supreme Court decision allocating waters among the Lower Basin states of the Colorado River system served as a catalyst for uniting western sentiment. It not only decreed that the Boulder Canyon Project Act had provided a comprehensive plan in which there was no room for state law to operate but also extended the principle of the Winters Doctrine, previously confined exclusively to waters for use on lands held in trust for Indian tribes, to federal enclaves in which the government's interest was proprietary.[24]

Another source of western apprehension was the movement toward multiple-purpose administration of Forest Service and Bureau of Land Management (BLM) lands. Gifford Pinchot's utilitarian approach to his responsibilities as long-time administrator of the national forests actually had resulted in informal recognition of the multiple-use concept but without statutory authorization. The problem of the BLM, on the other hand, was one of struggling for an identity and the establishment of objectives in its handling of public lands which on the whole were of marginal value only if considered from the standpoint of a single use. Such lands might be susceptible of use for a variety of purposes, and their true value measured in terms of the total, including conservation and environmental

22. Water Act of 1907, 1907 N.M. Laws, 71–93.
23. N.M. Const., art. 4, §§ 1–3.
24. Ariz. v. Cal., 373 U.S. 546, 587–88, 598 (1963).

considerations as well as immediate economic profit. Inherent in the multiple use concept, therefore, was the probability of pitting the interests of private users against each other, and of public good against private gain. The multiple use concept also raised the specter or permanency to the reserved land policy which was anathema to many states' rights westerners with a tradition of unrestrained use of public lands for their own purposes.

The Multiple Use-Sustained Yield Act of 1960[25] simply listed the various functions in which the Forest Service was already engaged, placing them in alphabetical order to avoid the appearance of showing preference for one use over another. The Forest and Rangeland Renewable Resources Planning Act of 1970, as amended by the National Forest Management Act of 1976,[26] really called for a general reevaluation of Forest Service policies and programs with periodic reassessments. Although the water needs of the agency were always modest and it had cooperated with the states, the legislation bred two fears: further extension of Forest Service activities, and concern that it would claim its organic act of 4 June 1897 as a priority date for all of these activities.

The Land Classification and Multiple Use Act of 1964[27]provided for the classification of BLM lands, with those not marked for disposal to be administered under multiple-use, sustained-yield principles. Policies at that time were being set largely by district grazing advisory boards. In 1975, following passage of the Federal Advisory Committee Act of 1972,[28]which mandated a review of all types of advisory boards in order to define more clearly their duties and to assure broader representation of interests and points of view, the district grazing advisory boards were replaced by multiple-use boards representing a variety of often conflicting interests. The change was viewed with dismay by stock growers since they had furnished the membership of the previous boards excepting one wildlife representative on each. The Federal Land Policy and Management Act (BLM Organic Act) of 1976[29] aroused even greater western alarm, not so much because of any claims that the BLM might make for reserved water rights but rather the possible course the agency might pursue in balancing grazing privileges against such public purposes as control of soil erosion or the prevention of stream and reservoir siltation. Public land users generally adhered to the idea of giving preferential treatment to the dominant economic use at the expense of environmental considerations with no precise identifiable economic value. The legislation further bolstered the idea that the BLM and its lands were here to stay.

25. 16 U.S.C. §§ 528–31 (1982).
26. 16 U.S.C. §§ 1601–14 (1982).
27. 78 Stat., P.L. 85–607, 986–88 (1964), highly scattered codification in U.S.C.
28. 5 U.S.C. App. (1982).
29. 90 Stat., P.L. 94–579, 2743–94 (1976).

Coming on the eve of Jimmy Carter's inauguration, it was his administration which bore the brunt of the criticism for these substantial enlargements of federal bureaucratic authority. Carter unwittingly contributed further to the sectional strife when, without realizing the depth of feeling in the West on such matters, he recommended to Congress that nineteen authorized Bureau of Reclamation and corps of engineers western projects be completely reevaluated before being funded. Subsequently he suggested the need for a comprehensive joint study, the end result of which would be concrete recommendations for a national water resources management policy. This definitely did not fit into the plans of many powerful western lobbies which had no sympathy for federal planning on water issues. Despite conciliatory gestures in an attempt to recover some sectional support, relations continued to deteriorate, culminating in the Sagebrush Rebellion which began in June of 1979.[30]

Still another movement contributing substantially to the reemergence of states' rights advocates has been the extension of state court jurisdiction into many areas formerly considered as exclusively within the province of federal courts. Despite protestations to the contrary, there is considerable evidence that state courts have a definite bias towards supporting state claims to control over all waters within their boundaries. It is somewhat observable at the federal district court level since those judges normally are appointed from the area, but it is more obvious in state court systems whose judges are chosen for a term of years by an electorate strongly influenced by local groups who have a very real interest in protecting land-use procedures which they regard as furnishing to them the greatest economic benefit.

In 1971 a sharp shift in judicial interpretation converted the McCarran Amendment from a limitation on sovereign immunity into a mechanism for circumventing consideration of the concept of federally reserved waters on its own merits. Two companion cases initiated in state district court in Colorado joined the United States as a defendant because of the federal government's assertion of reserved water rights for a national forest on the relatively insignificant Eagle River tributary of the Colorado River. The United States sought dismissal as a party on the grounds that this suit was not in the nature of a general adjudication nor did the McCarran Amendment consent to adjudication of federally reserved water rights in state courts. The court denied the motion, an action affirmed by the state Supreme Court and by the Supreme Court of

30. Pub. Papers, Jimmy Carter, 1977, vol. 1 at 207–08, 453–55, 490–93, 651–54, 919, vol. 2 at 976; S. Comm. on Agri., Nutrition, and Forestry, Land and Water Resources, Conservation Act of 1977, S. Rep. No. 95-59, 95th Cong., 1st Sess. (1977); Soil and Water Conservation Act of 1977 (1977), 16 U.S.C. secs. 2001–08 (1982); Mess. of the Pres., Federal Water Policy Initiatives, H. Doc. No. 95-347, 95th Cong., 2d Sess. (1978); Congress Makes Waves over Carter Water Policy, 10 Nat'l. J. 1052–56 (1978).

the United States. The effect of these decisions was to extend the waiver of immunity to all types of water rights claimed by the United States, giving a much more flexible definition to the meaning of the term "general adjudication" and unequivocally upholding the jurisdiction of state courts. Five years later, with three justices dissenting, these principles were broadened to include waters held in trust by the United States for use on Indian reservations. The one thing salvaged by the United States was recognition by the court that the McCarran Amendment did provide for concurrent federal-state jurisdiction, but the chance for successful pursuit at the federal level was remote when the adjudication systems were of state origin.[31]

The pro-state bias of the courts was exploited by State Engineer Reynolds in many ways during his lengthy tenure. While disclaiming any political motivation and insisting that he administered rather than interpreted state water law, he operated within a frame of reference which accepted as undisputed fact that total control over all waters in the state vested in the state engineer. Characterized by a former justice of the state supreme court as "the most litigious S.O.B. in the history of New Mexico,"[32] he encouraged his legal staff to engage in litigation to build a body of case law to support his views, including emphatic denial of any federal jurisdiction over New Mexico's waters. Probably the most important principle developed in this manner was a holding that an actual man-made diversion of water was necessary to establish an appropriative right for agriculture and presumably all other water uses.[33] The significance of this ruling is that the appropriation doctrine rests on "beneficial use" which varies considerably from state to state. This decision can therefore be interpreted as a refusal by New Mexico's courts to recognize instream flow values as beneficial. Since many of the uses for reserved water contemplated by federal agencies are for preserving a minimum instream flow on reserved lands, this principle serves as an additional method whereby the state can further limit the federal government in carrying out the purposes for which the lands were reserved. Reynolds was also active in joining Indian tribes in adjudicating their water rights in state courts.[34]

A general adjudication suit of all water rights on the Mimbres River, in which the state intervened as plaintiff, afforded Reynolds the opportunity to again assert limitations on the federal government's con-

31. United States v. Dist. Court in and for the County of Eagle, 401 U.S. 520 (1971); United States v. Dist. Court in and for Water Div. No. 5, 401 U.S. 528 (1971); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

32. J. Blundell, *Hot Spot in New Mexico*, Wall St. J., May 1, 1980 (hereinafter referred to by name and date of journal only), 22 col. 3.

33. State *ex rel.* Reynolds v. Miranda, 83 N.M. 443 (1972).

34. State *ex rel.* Reynolds v. Lewis, 88 N.M. 636 (1976); State *ex rel.* Reynolds v. United States, 408 F. Supp. 1029 (1975); Wall St. J., May 1, 1980, 1 col. 1, 22 col. 3; C. Poling, *El Jefe Steve Reynolds*, N.M. Bus. J., 38–41(Oct. 1981).

trol over waters on public lands. A special master supported Forest Service claims of reserved water rights to six cubic feet of water per second in the Gila National Forest for minimum instream flow and recreational purposes. The state Supreme Court affirmed the district court's reversal of this finding. In the higher court view the intent of Congress in enacting the Organic Act of 4 June 1897 was to limit the purposes for which the national forests were created. This act reads: "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 the citizens of the United States."[35] In a very narrow interpretation in which the court was obviously unable to see the forest for the tress, it held that this did not include instream flow or recreational purposes. The Multiple Use-Sustained Yield Act was an expansion rather than an explanation of these purposes and was not retroactive.[36]

On certiorari, in a five-to-four decision the United States Supreme Court affirmed the holding of the New Mexico courts. After properly quoting the relevant portions of the Organic Act of 1897, Justice Rehnquist completely ignored the clause "except to improve and protect the forest within the boundaries" in the following statement upon which he based his majority opinion. "The legislative debates surrounding the Organic Administration Act of 1897 and its predecessor bills demonstrate that Congress intended national forests to be reserved for only two purposes—'to conserve the water flows, and to furnish a continuous supply of timber for the people'."[37] He reached this conclusion in spite of the fact that the clause which he omitted is separated by the word "or" from the portion he cited. Reading the passage in its entirety, Justice Powell, for the minority, was able to see three purposes quite clearly. While agreeing that improving and protecting the forest could not be stretched to cover recreational or stock-watering uses, he envisioned a forest as consisting "of the birds, animals, and fish—the wildlife –that inhabit them as well as the trees, flowers, shrubs, and grasses. I therefore would hold that the United States is entitled to as much water as is necessary to sustain the wildlife of the forests, as well as the plants."[38] The reservation of an instream flow for this purpose was wholly consistent with the Organic Act of 1897; furthermore, "reservation of an instream flow is not a consumptive use; it does not subtract from the amount of water that is available to downstream appropriators."[39] It is not without significance that four of the five judges voting with the majority were appointed during the preceding eight years (The

35. 16 U.S.C. § 475.
36. Mimbres Valley Irrigation Co. v. Salopek, 90 N.M.410 (1977).
37. United States v. N.M. 438 U.S. 698, 707 (1978).
38. *Id.*, at 719.
39. *Id.*, at 725.

Nixon-Ford administrations). Despite the vigorous dissent, with no substantial change in its basic arguments the state was able to take a giant step towards achieving what it had been unable to do in the past.

Although this narrow interpretation of reserved water rights was specifically directed toward the organic act of the Department of Agriculture's Forest Service, the same reasoning was equally applicable in limiting water use by other federal entities. Concerned with the future of water-based programs already initiated by agencies within the Department of the Interior, Leo Krulitz, the solicitor for that department, developed a theory in support of non-reserved federal water rights which would justify governmental use of unappropriated waters on federal public lands in accomplishing the purposes for which these lands had been reserved. His reasoning was that a combination of the supremacy and property clauses in the constitution[40] gave Congress control over unappropriated waters on, under, flowing through, or appurtenant to federally owned lands for any congressionally-approved projects. This power resided in Congress until such time as that body clearly and expressly granted it to the states. In his opinion, the acts of 1866, 1870, and 1877 were no such express declaration even though there were claims to the contrary. Other statutory evidence cited by the opposition as limiting federal power had made such specific declarations. The operation of non-reserved federal water rights was not unlike appropriation under state law once it was established that the purpose was congressionally sanctioned, except that the appropriation was not made under state law and the uses were not limited to those which the state defined as "beneficial."[41]

Western states which had so recently achieved a major breakthrough by placing strict limitations on reserved water rights immediately embarked on a campaign to prevent activation of the Krulitz theory.[42] Existing circumstances generally favored their success. Newly-inaugurated President Ronald Reagan's "new federalism" consisted primarily in shifting as much decisionmaking and authority as possible to the state level in domestic affairs. It involved severe curtailment of federal expenditures on environmental improvement as a part of a drastic reduction in domestic spending. James Watt, Reagan's Secretary of the Interior, had been chairman and chief counsel for the Mountain States Legal Foundation, an organization which was in constant conflict with conservationists and environmentalists. Its primary objective was rapid development of the natural resources of the public domain by private investors. The Reagan-

40. U.S. Const., art. 4, § 3, par. 2, and art. 6,§ 2.

41. 86 Interior Dec., M-36914 at 563–78.

42. R. Sims, *National Water Policy in the Wake of United States v. New Mexico*, 20 Nat. Resources J. 1–16 (1980) is the most important of the several articles critical of the Krulitz theory. Sims, as legal counsel for the New Mexico State engineer, successfully argued before the United States Supreme Court the cause he discusses.

Watt's policies certainly offered no assurance of significant state input into the decisionmaking process but it did serve to defuse the Sagebrush Rebellion. Aside from selling or leasing exploitable resources to private corporations, however, the general tenor of the administration was to subordinate federal claims to state law.[43] It therefore came as no great surprise when William H. Coldiron, Krulitz's successor in the Interior Department, repudiated the theory of non-reserved water rights. While agreeing that Congress originally had such power as Krulitz mentioned, through permissiveness it had allowed state law to replace federal law on public lands except for the amount necessary for the original purposes for which the lands were reserved.[44] This is the prevailing policy of the department even though a subsequent theory advanced by Theodore B. Olson for the Land and Natural Resources Division of the Department of Justice states a modified version of the Krulitz theory.[45] Quite predictably, Olsen's opinion was subjected to a barrage of criticism. Apparently the present status is that non-reserved water rights have been rejected and reserved water rights (express or implied) are limited to the original purposes for which the lands were withdrawn from entry, applying the narrowest possible definition to those purposes.

Despite the apparent finality of this conclusion, there are unanswered questions. Since the theory of non-reserved water rights was advanced as an alternative to the reserved rights doctrine, an explanation of the reserved right doctrine must precede any discussion of federal water rights. Reserved water rights represent a judicial recognition of a means for furnishing water to accomplish the public purposes for which certain lands were withdrawn from entry. But, as Dean Frank J. Trelease has pointed out, a reserved water right cannot be created either by express statement or by implication unless constitutional power already resides in Congress to control waters on federally owned lands. The controversy has come about by confusing the reserved rights doctrine with the exercise of federal power under the supremacy clause.

> First and foremost it is of utmost importance that the Congress, the Department of Justice and the federal land holding agencies should realize that the *reservation policy is not a source of federal power.* [Emphasis in the original.] The federal functions exercised in the name of the reservation doctrine rest instead on the

43. R. Cawley, *Changes in Federal-State Relations*, 2 Sw. Rev. of Management & Econ. 1–12 (summer 1982); Excerpts of Remarks by Secretary Watt to Nat'l Water Resources Ass'n., Salt Lake City, Oct. 26, 1982 (handout at convention); Weekly Comp. of Pres. Docs, Ronald Reagan, vol. 17 at 197–98, 364, 412–13, 910, vol. 19 at 244–45, 454.

44. 88 Interior Dec., M-36904 at 1055–65.

45. Federal "Non-Reserved" Water Rights, Theodore B. Olson memo for Carol E. Dinkins, Asst. Atty-Gen., Land and Nat. Resources Div.

> supremacy clause coupled with some other power exercised in making the reservation of land or with some other power incidentally exercised on the reserved land.[46]

This power can be asserted with or without a "reservation doctrine." In Trelease's opinion the federal government should rely on that broader grounds rather than the limited doctrine because it would be more equitable and capable of being exercised elsewhere as well as in public land states.[47] This more substantial foundation for federal power rests on two statements in the constitution: 1. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding:"[48] and, 2. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ."[49] In addition, as the owner of these lands the United States is entitled under state law to the same rights as any other proprietor in the management and use of its lands.

There is general agreement that at some time in the past control over public domain waters resided in Congress. Mere failure to exercise a power given to Congress by the constitution certainly does not extinguish that power, so the question becomes one of whether Congress consciously either delegated or surrendered such power to the respective states. Present controversies, therefore, are simply an extension of the long-standing debate over the intent of Congress in enacting the Mining Act of 1866, with the 1870 amendment, and the Desert Land Act of 1877. Certainly there is no express declaration of such a delegation or abdication of congressional control. There is no doubt but that the acts were a commitment to the operation of the appropriation doctrine in the management of waters on the public domain. But congressional commitment to the adoption of a workable water doctrine for arid public lands, and reliance on it for settling local disputes, is a far cry from a relinquishment to the states of complete control over the waters on those lands. It takes a considerable stretching of credulity to contend that Congress intended to give away such a fundamental constitutional power in so casual a manner. It seems much more logical to assume that this constitutional power continue to

46. *Federal-State Relations in Water Law* (Nat'l Water Comm'n) (1971) at 139.
47. *Id.*, at 117–60.
48. U.S. Const., art. VI, par. 2.
49. *Id.*, art. IV § 3, par. 2.

reside in Congress until that body makes a clear and unmistakable declaration to the contrary.

The present trend in the opposite direction, however, suggests that federal agencies will be strictly limited in developing lands reserved for specified national purposes as almost total control over the waters of these lands passes to the states in which they are located. They, in turn, delegate this authority to state engineers already enjoying dictatorial powers over all other waters within their boundaries. With popular sentiment overwhelmingly supporting unrestricted use of the waters, it would require an extremely courageous state engineer to advocate limitations regardless of the speed with which this vital and irreplaceable natural resource is being exhausted.