Federal Reserved Water Rights

Development and Status of Federal Reserved Water Rights:

When the United States reserves public land for uses such as Indian reservations, military reservations, national parks, forest, or monuments, it also implicitly reserves sufficient water to satisfy the purposes for which the reservation was created. Both reservations made by presidential executive order or those made by an act of Congress have implied reserved rights. The date of priority of a federal reserved right is the date the reservation was established.

The federal reserved water rights doctrine was established by the U.S. Supreme Court in 1908 in Winters *v.* United States. In this case, the U.S. Supreme Court found that an Indian reservation (in the case, the Fort Belknap Indian Reservation) may reserve water for future use in an amount necessary to fulfill the purpose of the reservation, with a priority dating from the treaty that established the reservation. This doctrine establishes that when the federal government created Indian reservations, water rights were reserved in sufficient quantity to meet the purposes for which the reservation was established.

The Winters Doctrine was a land mark case for it was the first time the federal government deviated from the established convention that water law was purely a state matter. In 1952, however, Congress passed the McCarren Amendment which returns substantial power to the states with respect to the management of water. The McCarren Amendment requires that the federal government waive its sovereign immunity in cases involving the general adjudication of water rights. Prior to this legislation, the federal government had reserved the right not to be included in general basin adjudications conducted under state law. The McCarren Amendment, however, recognized that the exemption of the federal government from these adjudications would undermine the state's water allocation systems. Therefore, any federal agency claiming a federal reserved water right must participate in the state's adjudication process.

Federal court decisions since the McCarren Amendment have further limited federal reserved water rights. In the 1976 Cappaert *v.* United States of America, the Court ruled that a federal reserved water right quantification was limited to the primary purpose of the reservation and only to the minimum amount of water necessary to fulfill the purpose of the reservation. In 1978, in United State of America *v.* New Mexico, the Court found that the reserved water rights on national forests apply only to the preservation of timber resources and water flows. All other claimed needs were to be considered secondary purposes and the federal government would have to obtain rights like any other appropriator under state law. These rulings have narrowed the scope of the Winter's Doctrine. Federal reserved water rights may only include quantities of water necessary to meet the primary purpose for which the reservation was established ("primary purpose" requirement) and only in the minimum amounts necessary to meet those purposes ("minimal needs" requirement).

The Winters Doctrine originally applied to Indian reservations but has since been applied to other federal land reservations. A variety of court decisions have extended the reserved right doctrine to encompass not only Indian reservations, but water uses in national forests, national parks and monuments, and military reservations. In the 1963 Arizona *v.* California decision, the U.S. Supreme Court found the Winters Doctrine equally applicable to other federal establishments and affirmed an allocation of water for non-Indian federal uses.

Today, federal reserved water rights can be asserted on most lands managed by the federal government. Reserved rights are, for the most part, immune from state water laws and therefore, are not subject to diversion and beneficial use requirements and cannot be lost by non-use. The federal government, however, is required to submit all reserved water rights claims to the state's adjudication process, and are limited by the "primary purpose" and "minimal needs"

requirements. In addition, federal reserved water rights are nontransferable. By law, these rights can only exist on lands owned by the federal government. If a land transfer occurs, any existing federal reserved water right becomes invalid.

Because federal reserved water rights must meet the "primary purpose" and "minimal needs" requirements, it is important to quantify any federal reserved right. Generally, quantifying a federal reserved right requires specifying the amount of water claimed, the water sources, the primary purpose of the reservation for which the water is needed, and the priority date of the claim (the date the reservation was created). The most contentious issue is often the amount of water claimed. The quantification of a federal reserved water right often involves the sophisticated integration of ecological models with surface and ground water flow models. The data necessary for accurate modeling is often unavailable or needs to be collected, and there are often discrepancies over appropriate modeling techniques and the interpretation of results. As a result, much of the current controversy is not centered around asserting a federal reserved right, but in the quantification of that assertion.

Federal Reserved Water Rights and the Bureau of Land Management:

The following types of federal reserved water rights can occur on BLM lands: public water holes and springs; mineral hot springs; stock driveways; public oil shale withdrawals; wild and scenic rivers; national monuments and conservation areas; and wilderness areas.

Probably the most common federal reserved water right for BLM is for public water holes and springs. These rights were created by executive orders called Public Water Reserves (PWR). Until 1926, PWRs were created on an ad hoc and sight specific basis. Federal agencies would identify the springs they wanted reserved and these would be incorporated (by executive order) into a chronologically numbered Public Water Reserve. Therefore PWRs with early numbers refer to sight specific reservations. In 1926, a cart blank Public Water Reserve was created through an executive order by President Coolidge entitled "Public Water Reserves No. 107". PWR 107 ended the sight specific system of reserving springs and water holes. The purpose of PWR 107 was to reserve natural springs and water holes yielding amounts in excess of homesteading requirements. This order states that "legal subdivision(s) of public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water be reserved for public use". There was no intent to reserve the entire yield of each public spring or water hole, rather reserved water was limited to domestic human consumption and stockwatering. All waters from these sources in excess of the minimum amount necessary for these limited public watering purposes is available for appropriation through state water law. To date, many of these Public Water Reserves have not been registered with the state and/or are not adjudicated.

Wilderness designations can be considered the most restrictive of the federal land management designation. Reserved water rights are set aside pursuant to the Wilderness Act of 1964 (16 USC section 1131). Development within wilderness areas is restricted, and these restrictions extend to the development of water supplies. The Wilderness Act reserves the amount of water within the wilderness area necessary to preserve and protect the specific values responsible for designation of the area, and to provide for public enjoyment of these values. Only the minimum amount of water necessary to fulfill the primary purpose of the reservation may be asserted as a reserved right.

Wild and Scenic River designations are derived from the Wild and Scenic Rivers Act of 1968 (16 USC section 1271). This legislation states that "certain selected rivers of the nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations". Designation of a stream or river segment as "wild and scenic" prevents construction of flow modifying structures and other facilities on the selected stretch. The

area of restricted development can vary, but generally includes at least the area within one-quarter mile of the ordinary high water mark on either side of the river. The act also reserved to the United States the amount of unappropriated water flowing through the public lands necessary to preserve and protect in free-flowing condition the specific values which were responsible for designation of the watercourse. The act, however, does not automatically reserve the entire unappropriated flow of the river.

Stock driveways are reserved pursuant to Section 10 of the Stock-Raising Homestead Act of 1916. This act was repealed by Section 704(a) of the FLPMA, but reservations made prior to 1976 remain in effect until changed in accordance with the act. This act authorized the withdrawal of public lands containing water holds needed for watering stock during their movement to seasonal ranges or shipping points. The priority date for each water hole is the date on which the application for the land withdrawal was approved.

Mineral hot springs with medicinal or curative properties located on vacant, unappropriated, and unreserved public lands constitute federal reserved water rights. The BLM is authorized to lease these springs for public purposes.

Public oil shale withdrawals reserve that quantity of water which can be used for investigating, examining, and classifying oil shale, but only those waters needed for assessment of the oil shale resources. Federal reserved rights do not apply to waters necessary to develop the oil shale. Waters for development must come through state law and allocation procedures.