

Water Rights and the National Park Service

Part II: The Federal Reserved Water Rights Doctrine

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Editor's Note: *This is the second of two articles by the Chief, Water Rights Branch, NPS Water Resources Division in Fort Collins, CO. The first appeared on p. 30 of **Park Science**, Vol. 12 No. 3.*

Origin

The tension between the Doctrine of Prior Appropriation and federal "Reservations" culminated in a court case that changed the face of western water law. The Fort Belknap Indian Reservation in Montana was created in 1888 to change the "habits" of "... a nomadic and uncivilized people" into those of "... a pastoral and civilized people." In 1898, efforts to develop irrigated agriculture on the reservation immediately ran afoul of the Doctrine of Prior Appropriation because water in the Milk River had been appropriated prior to 1898 by other irrigators. Thus, under state law, the Indian appropriation would be junior, and unfulfilled.

In 1908, the U.S. Supreme Court determined that when Congress created the Indian Reservation, by **implication** it also reserved from the unappropriated waters of the state that water necessary to achieve the intent of the reservation – namely, irrigated agriculture. This reservation of water occurred on the date of the

land reservation and was senior to appropriations that occurred after that date.

This case, *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 50 L.Ed. 340 (1908), created what came to be known as the Winters Doctrine or Winters Right. While the decision stood the Doctrine of Prior Appropriation on its head, it at least appeared to be limited to the unique concerns of Indian law.

Evolution

The fervent hope of westerners that the Winters Doctrine would apply only to Indians was soon dashed as the Court generalized its applicability to all "federal enclaves." Over time a series of decisions by the U.S. Supreme Court gave the doctrine substance and form. Eventually this creation of the court took on its present name and, through recent decisions, its growth finally was checked.

Some have argued that the doctrine was merely a ploy to legalize a federal "taking of property without due compensation." Others hold that the doctrine represents state law giving way to Federal Sovereignty. Whichever the case, federal reserved water rights added substantial uncertainty to what had been viewed as a fairly ordered and settled approach for using a scarce resource.

Elements of the Doctrine

As the Court has made rulings, it has "interpreted" its own creation. Subject to future additional evolution, the doctrine has the following characteristics:

- when land is set aside from the Public Domain for a specific purpose requiring water, water sufficient to accomplish that purpose is reserved from the unappropriated waters of the state;
- the priority date of the right is the date of the land reservation;
- the amount of water reserved is that **minimum** amount necessary to **prevent the defeat** of the purpose of the reservation;
- the reservation of water is only for the **primary** purpose of the reservation, no other;
- the right is not constrained by state law (for example, it is not lost due to non-use, and purposes need not be recognized as beneficial by the state); and
- the right is to meet present and **future** need.

How the Doctrines Relate to the NPS

NPS Reservations

As noted earlier, the NPS organic act defines its "reservations" and their purposes. It would appear that the NPS's position would be pretty secure and therefore eliminate any concerns about water rights. The reality of the situation however is a bit more complicated. First, the reserved rights doctrine may not apply to all NPS areas because some have not come from the Public Domain, but rather from state or private ownership.

Furthermore, many NPS reservations are of fairly recent vintage. Thus, while the doctrine might apply, the priority date may be so junior as to be ineffective in providing protection against impact from other water users.

The NPS Case

Additional complications are found in the definition of NPS reservation purposes. While the NPS organic act links Parks, Monuments and other units under the

same umbrella of purposes, some State Courts have made a distinction between Parks and Monuments. Specifically, the courts have looked to the enabling legislation or Proclamations for Monuments to find purposes rather than relying upon the broad language quoted above. Contrary to expectation, looking at the authorities for setting aside specific sites does not necessarily produce a better definition of purposes.

The determination of the minimum amount of the right is a further complication, especially in view of the vague purposes often cited in typical enabling legislation or Proclamations. As a general principle, the courts are reluctant to accept the proposition that a Park or a Monument has a reserved right entitlement to all water not appropriated at the time of the reservation's creation, including natural stream flow. This should not be surprising considering the potential for impacts to long standing state water rights. Senior appropriators could suddenly find themselves to be juniors because of the federal reserved right.

Limitations of the Doctrine

The only way to quantify and secure recognition of a federal reserved water right is by participating in a basin-wide general adjudication of water rights. This was made possible in 1952 by passage of the McCarran Amendment (66 Stat. 560, 43 U.S.C.A. § 666) which granted a limited waiver of Sovereign Immunity to allow suit of the United States for the purpose of adjudicating water rights. Thus it is that, to secure its rights to water in Parks and Monuments, the NPS must develop evidence designed to convince the court that (1) the U.S. is **entitled** to water (water necessary for the purpose of the reservation), and (2) the amount claimed is the **minimum amount** necessary to prevent **defeat** of the reservation purpose.

Generally, when the NPS enters State Court, often a less than sympathetic arena, it must be prepared to bear the burden of proof and demonstrate with a preponderance of evidence that its claim to water for each and all reservation purposes is valid and the minimum amount necessary for both the present and the future. When the court has ruled and, if appropriate, all appeals have been exhausted, the NPS must "live" with the determination. If quantities granted prove inadequate, the only recourse is new appropriation or acquisition of existing rights under state law.

What the NPS Faces Now and in the Future

Drought and municipal growth are two of the many water related challenges facing the NPS. Water shortage coupled with increased demand result in increased pressure to dam rivers and pump aquifers. When these things occur near NPS units, it is very likely that NPS resources sooner or later will suffer. Surprisingly, perhaps, one line of defense lies in water rights. In certain instances the NPS can assert its water rights seniority as basis for protection from injury by junior appropriators. However this very likely will result in litigation, even adjudication, requiring substantial commitments in time and money by all water users, especially the NPS.

As municipal and other kinds of development proceed, most western states feel a pressing need to eliminate the uncertainty attendant to un-adjudicated, and therefore un-quantified, federal reserved water rights. As a result, the states have by and large com-

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mitted to adjudicating all water rights by the close of this century. Preparing for the court battles that inevitably await will require herculean efforts by the NPS and other federal agencies.

Conclusion

The legal doctrine that governs most water use in the west conflicts with the "fundamental purpose" of the NPS. This doctrine arose, in the absence of federal guidance, to meet the needs of commerce in a semi-arid setting at a time of rapid and almost chaotic development. It served its intended purpose well, but it did not provide for the unanticipated needs of a growing and increasingly sophisticated nation. The requirements of legislation and Proclamation created conflicts that culminated in a retrofit of the doctrine using Court-created "implied rights."

The NPS employs both the Federal Reserved Water Rights Doctrine and the Doctrine of Prior Appropriation to accomplish its mission. The process of securing and protecting water rights is demanding, requiring in-depth scientific investigations and complex legal argument. However, even though the investment to protect water rights may be high, the cost of not protecting them likely would be higher. This becomes ever more apparent as water development and municipal growth place increasing demands upon the same water sources as are relied upon by the fragile ecosystems of Parks, Monuments, and other NPS units.

The opinions expressed are those of the author and do not necessarily reflect those of the Department of the Interior or the National Park Service.