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Note

Expansion of the Reservation Of Water Rights Doctrine

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

I. INTRODUCTION

*Cappaert v. United States*¹ is the latest in a long line of cases² dealing with the implied reservation of water rights doctrine. This doctrine, also known as the *Winters* doctrine because it originated in *Winters v. United States*,³ says that when the United States government reserves land, it also reserves enough water to accomplish its purposes.⁴ In substance, the doctrine means that when water is needed to accomplish the purpose of a reservation, the federal government can take without compensation whatever amount of unappropriated water existed on the date the reservation was established. *Cappaert* involved an attempt by the Supreme Court to clarify the issues and questions that have arisen from the implied reservation of water rights doctrine.

II. SCOPE OF THE DOCTRINE

In *Winters v. United States*,⁵ the federal government brought suit on behalf of certain Indians to enjoin farmers from diverting water from a river for irrigation. The defendant farmers began diverting water in 1900, and under the prior appropriation law⁶ of

1. 426 U.S. 128 (1976).

2. See *Powers v. United States*, 305 U.S. 527 (1939); *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321 (9th Cir. 1956), *modified*, 330 F.2d 897 (9th Cir. 1964); *United States v. Walker River Irrigation Dist.*, 104 F.2d 334 (9th Cir. 1939); *United States v. McIntire*, 101 F.2d 650 (9th Cir. 1939); *Skeem v. United States*, 273 F. 93 (9th Cir. 1921); *Conrad Inv. Co. v. United States*, 161 F. 829 (9th Cir. 1908); *United States v. Hibner*, 27 F.2d 909 (D. Idaho 1928).

3. 207 U.S. 564 (1908).

4. The doctrine is wholly of judicial origin. It has been neither abrogated nor expanded by Congress, although several attempts have been made. See *Cappaert v. United States*, 426 U.S. 128, 145 (1976).

5. 207 U.S. 564 (1908).

6. Essentially the doctrine of prior appropriation is one of first in time, first in right. The first person to divert water from a stream has a prior right to a certain amount of water over all subsequent users if

the west they should have prevailed over the Indians who had used the waters of the river before 1900, but who had not complied with the prior appropriation laws of the state.

The river was adjacent to the Indian reservation, established by treaty in 1888 "for the purpose of opening for settlement a large portion of such area"⁷ that the Indians had previously occupied in Montana. The Court found that the purpose of the reservation was to civilize the Indians and turn them into farmers.⁸ For this they needed water because the land was worthless for farming without irrigation. The Court, therefore, held that there was an implied reservation of water, which was exempt from the appropriation law of the state, and which was reserved as of the date of the treaty.⁹ Furthermore, the Court held that the government reserved the water "for a use which would be necessarily continued through years."¹⁰

Because the *Winters* doctrine was a judicial doctrine, its attributes developed as new controversies arose. *Winters* held that the priority date of the water right was the date the reservation was established by *treaty*. This later was extended to include establishment by executive order or by statute.¹¹ Therefore, the reserved right was superior to all subsequently created state rights, and was exempt from the appropriation laws of the states.¹² This concept later was extended to mean that the federal government's rights "cannot be lost by nonuse under state laws, nor by legal action of the various states through condemnation, inverse condemnation, or statutory enactment, nor by private appropriation."¹³ The doctrine has been applied to waters arising upon, traversing or adjacent to the reservation.¹⁴

Winters and its progeny¹⁵ applied solely to Indian reservations. It was not until 1963, in *Arizona v. California*,¹⁶ that the United

he complies with state law. Under this doctrine, a prior appropriator can stop subsequent appropriators, whether upstream or downstream, from diverting water until he receives that certain amount.

7. 207 U.S. at 567.

8. *Id.* at 576.

9. *Id.* at 577.

10. *Id.*

11. *Arizona v. California*, 373 U.S. 546 (1963).

12. 207 U.S. at 577.

13. Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 B.Y.U.L. REV. 639, 655 (footnotes omitted).

14. *Arizona v. California*, 373 U.S. 546 (1963); *United States v. Walker River Irrigation Dist.*, 104 F.2d 334 (9th Cir. 1939).

15. See note 2 *supra*.

16. 373 U.S. 546 (1963).

States Supreme Court applied the *Winters* doctrine to non-Indian lands. In *Arizona*, the Court said:

The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusion of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.¹⁷

Arizona surprised everyone. Except in *Federal Power Commission v. Oregon*,¹⁸ there was no indication that the implied reservation of water rights doctrine applied to reservations other than Indian reservations. The doctrine was broadened again in *United States v. District Court for Eagle County*,¹⁹ where the Court held that federally reserved lands included any federal enclave.²⁰ *Eagle County* thus brought national parks, monuments, forests, fish and wildlife areas, and military reservations under the reserved rights doctrine.

Many problems were raised by these decisions. First, there is a significant difference between the doctrine of prior appropriation and the *Winters* doctrine of reserved rights. The doctrine of prior appropriation promotes the best use of a scarce and important resource. If the resource remains unused, the right is lost. The *Winters* doctrine, which covers future as well as present needs and exists side by side with the doctrine of prior appropriation, promotes uncertainty because water rights are not lost through nonuse and because the rights are not quantified. This means that the highest and best use of a scarce resource will not be achieved. For example, why should someone upstream from a federal reservation or someone who shares the same underground aquifer with a federal reservation develop this resource when it might be possible for him to be divested of his water right after spending large sums of money?

Second, for a long time there was no way to adjudicate these

17. *Id.* at 601.

18. 349 U.S. 435 (1955). This case was not a water rights case *per se*; however, it distinguished "public lands," and "reservations." The Court held that, "Public lands' are lands subject to private appropriation and disposal under public land laws. 'Reservations' are not so subject." *Id.* at 443-44. This meant that non-Indian federal reservations did not have to fulfill the requirements of state law before they could appropriate water for their own use.

19. 401 U.S. 520 (1971).

20. *Id.* at 523.

reserved rights. Because of sovereign immunity, it was impossible to bring the United States into court. This problem has been alleviated by the McCarran amendment²¹ which allows the United States to be joined as a defendant for the adjudication of water rights, and by the *Eagle County* case, holding that the McCarran amendment applied to federal reserved rights. Furthermore, in *Colorado River Water Conservation District v. United States*,²² the Court held that Indian reserved rights also could be adjudicated in state court under the McCarran amendment.²³

Third, in a stream-wide adjudication of reserved rights there is the problem of quantification. That is, what is the basis for establishing the quantity of reserved federal rights and should these rights be quantified at all? If they remain unquantified, there is a problem of not promoting the best use of a scarce and important resource because economic development will be limited if there is no certainty of a future water right. However, if the rights are quantified, the future needs of the federal government may not be met.

Fourth, how does one identify the purposes for which the reservation was established in order to determine if there is an implied reservation of water rights?

Before examining *Cappaert*, it is appropriate to note that at least two commentators have concluded that "[t]he reservation doctrine is a financial doctrine and nothing more."²⁴ This is so because it "is not open to question that if the United States needs water for the exercise of a constitutional power and the implementation of a federal statute, it may physically take it. It may or may not be constitutionally required to pay compensation, but it may

21. 43 U.S.C. § 666 (1970):

(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

22. 424 U.S. 800 (1976).

23. *Id.* at 809.

24. F. TRELEASE, NATIONAL WATER COMMISSION, *FEDERAL-STATE RELATIONS IN WATER LAW* 147m (1971). See also Corker, *Federal-State Relations in Water Rights Adjudication and Administration*, 17 *ROCKY MTN. MIN. L. INST.* 579 (1972). "The only significant function of a reserved water right is to avoid payment of compensation, because the United States can without a reservation acquire any water right for any authorized purpose." *Id.* at 593.

take the water."²⁵ This becomes clear if *Winters* is examined in more detail. Congress could have appropriated money to pay for the water the Indians were using, but it showed no inclination to do so. Therefore, the United States Supreme Court found a way out for the Indians. Because the Court could not force Congress to pay, it forced the settlers to pay by finding a prior right vested in the Indians. It is clear that the Indians, as wards of the nation, did need protection. It is less clear why the federal government needed protection.

*Arizona v. California*²⁶ applied the reservation doctrine to all federal reservations of lands. The Court did not do this to get the water, because the federal government already had that power under the supremacy clause.²⁷ *Arizona* posed two major questions: What happens to water rights acquired at great expense before 1963, which suddenly became subject to the reservation doctrine? What happens to the concept of notice when the Supreme Court guards the federal treasury?

Prior to *Cappaert*, it was noted that

[I]n light of *Eagle County*, however, it is apparent that a court can find a federal reserved water right if (1) the land in question constitutes a federal enclave or reservation, (2) the land is withdrawn from the public domain, and (3) the circumstances surrounding creation of the enclave or withdrawal of the reservation reveal an intent to reserve water.²⁸

In *Cappaert*, the United States Supreme Court confirmed and expanded this reservation doctrine.

III. THE FACTS OF CAPPAERT

In 1952, President Truman by proclamation²⁹ added Devil's Hole to the Death Valley National Monument. The hole is a deep

25. F. TRELEASE, *supra* note 24, at 147j.

26. 373 U.S. 546 (1963).

27. See notes 24 and 25 and accompanying text *supra*.

28. Ranquist, *supra* note 13, at 651.

29. WHEREAS the said pool is a unique subsurface remnant of the prehistoric chain of lakes which in Pleistocene times formed the Death Valley Lake System, and is unusual among caverns in that it is a solution area in distinctly striated limestone, while also owing its formation in part to fault action; and

WHEREAS the geologic evidence that this subterranean pool is an integral part of the hydrographic history of the Death Valley region is further confirmed by the presence in this pool of a peculiar race of desert fish, and zoologists have demonstrated that this race of fish, which is found nowhere else in the world, evolved only after the gradual drying up of the Death Valley Lake System isolated this fish population

limestone cavern and contains a pool which "is a remnant of the prehistoric Death Valley Lake System."³⁰ The forty acre tract of land on which the hole lies was withdrawn from the public domain under the Act for the Preservation of American Antiquities,³¹ and is managed by the National Park Service.

The Cappaerts owned a 12,000 acre ranch near Devil's Hole. The ranch represented an investment of more than seven million dollars, and employed more than 80 people with an annual payroll of over \$340,000.³² In 1968, the Cappaerts began irrigating their land by pumping groundwater from an underground aquifer which was also the source of water in Devil's Hole.³³ After they started pumping the summer water level of the pool in Devil's Hole began to decrease. Beginning in 1962, the level of water in Devil's Hole was measured with reference to a copper marker installed on one of the walls of the hole by the U.S. Geological Survey. Until 1968, the water level, with seasonable variations, had been stable at 1.2 feet below the copper marker. In 1969 the water level in Devil's Hole began to decrease until it was nearly four feet below the marker in 1972.³⁴

When the water in the pool decreased more than 3.0 feet below the copper marker, a large rock shelf became exposed and reduced the spawning area of Devil's Hole pupfish—a species found only in the Devil's Hole pool. As this spawning area was reduced, the breeding ability of the pupfish was impaired.

The Cappaerts applied to the State Engineer of Nevada in April of 1970 for permits to change the use of water from several of their wells.³⁵ The National Park Service learned of their application and filed a protest. The National Park Service was repre-

from the original ancestral stock that in Pleistocene times was common to the entire region; and

WHEREAS the said pool is of such outstanding scientific importance that it should be given special protection, and such protection can be best afforded by making the said forty-acre tract containing the pool a part of the said monument. . . .

17 Fed. Reg. 691 (1952).

30. 426 U.S. at 131.

31. The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments

16 U.S.C. § 431 (1970).

32. 426 U.S. at 133.

33. *Id.*

34. *Id.*

35. *Id.* at 134.

sented at a hearing conducted by the State Engineer on December 16, 1970, and requested either that the Cappaerts' application be denied or that decision on the application be postponed until studies were completed³⁶ on which of Cappaerts' wells could be pumped safely to prevent lowering of the water level in Devil's Hole.³⁷

The State Engineer would not postpone the hearing and at its completion overruled the National Park Service's protest.

[H]e stated that there was no recorded federal water right with respect to Devil's Hole, that the testimony indicated that the Cappaerts' pumping would not unreasonably lower the water table or adversely affect existing water rights, and that the permit would be granted since further economic development of the Cappaerts' land would be in the public interest.³⁸

In August, 1971, the United States filed suit in the Federal District Court for Nevada to prevent the Cappaerts from pumping from six specific wells near Devil's Hole except for domestic purposes. The complaint alleged that the United States, in establishing Devil's Hole as part of Death Valley National Monument, reserved the unappropriated waters appurtenant to the land to the extent necessary for the requirements and purposes of the reservation and that the Cappaerts had no perfected water rights as of the date of the reservation.³⁹ The complaint also alleged that irreparable harm to the United States would ensue because, by lowering the water level, the Cappaerts were threatening the survival of the pupfish. The district court entered a preliminary injunction limiting pumping from designated wells so as to return the level of Devil's Hole to not more than 3.0 feet below the marker.⁴⁰ The Court of Appeals for the Ninth Circuit affirmed⁴¹ and the Supreme Court granted certiorari "to consider the scope of the implied reservation of water rights doctrine."⁴²

IV. THE SUPREME COURT'S OPINION

The Supreme Court, in a unanimous opinion by Chief Justice Burger, affirmed. The Court held that when the United States withdrew the forty acres of land known as Devil's Hole it reserved enough appurtenant unappropriated water "to maintain the level of

36. *Id.*

37. *Id.*

38. *Id.* at 134-35.

39. *Id.* at 135.

40. *Id.* at 136.

41. *United States v. Cappaert*, 508 F.2d 313 (9th Cir. 1974).

42. 426 U.S. at 138.

the pool to preserve its scientific value and thereby implement Proclamation No. 2961."⁴³

The Court reviewed the reserved water rights doctrine and in general reaffirmed it. However, for the first time the Court specifically set forth all the attributes of the reservation doctrine as it applies to non-Indian reservations of federal land.

The Court stated it as follows:

[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of reserved lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.⁴⁴

The Court clarified the above definition, stating that:

In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.⁴⁵

It then stated where one must look to find these "purposes." The Court first looked to the Proclamation which recited that the pool should be given special protection.⁴⁶ It then looked to the National Park Service Act⁴⁷ to which reference was made in the Presidential Proclamation and which

provides that the "fundamental purpose of the said parks, monuments, and reservations" is "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."⁴⁸

The Cappaerts had argued that the Act for the Preservation of American Antiquities did not bestow on the President the authority

43. *Id.* at 147.

44. *Id.* at 138 (citations omitted).

45. *Id.* at 139.

46. *Id.* at 140.

47. 16 U.S.C. §§ 1-3 (1970).

48. 426 U.S. at 140-41 (citation omitted).

to reserve a pool of water. However the Court found that “[t]he pool in Devil’s Hole and its rare inhabitants are ‘objects of historic or scientific interest’ ”⁴⁹ as required by the Act.

Nevada, also a petitioner, argued that the *Winters* doctrine was “an equitable doctrine calling for a balancing of competing interests.”⁵⁰ The Court found that this was not the test, and noted that in *Winters* the upstream farmers had invested much money in their irrigation projects which no longer could be used.

The Court also found that the implied reservation of water doctrine reserved only water necessary to fulfill the purpose of the reservation and no more.⁵¹ Here, because the purpose of the reservation was the preservation of the pool and its fish, the Court found that the district court tailored its injunction to minimal need, curtailing pumping only to the extent necessary to preserve an adequate water level at Devil’s Hole, and implement the stated objectives of the proclamation.⁵²

The Court recognized that groundwater and surface water are related hydrologically and therefore held that the implied reservation of water rights doctrine also applied to groundwater.⁵³

Petitioners argued that the United States should conform to state law in perfecting its rights. They contended that the Desert Land Act of 1877⁵⁴ severed nonnavigable water from public land, subjecting it to state law.⁵⁵ However, the Court correctly cited its previous decision in *Federal Power Commission v. Oregon*,⁵⁶ which held that the Desert Land Act was inapplicable to reserved lands.⁵⁷

The final argument by Nevada was that because the National Park Service filed a protest to the Cappaerts’ pumping permit application in the state administrative proceeding,⁵⁸ the United States was barred by res judicata or collateral estoppel. However, the Court merely noted that the United States was never a party to that proceeding and thus was not estopped from raising its right in federal court.⁵⁹

49. *Id.* at 142.

50. *Id.* at 138.

51. *Id.* at 141.

52. *Id.*

53. *Id.* at 142.

54. 43 U.S.C. § 321 (1970).

55. 426 U.S. at 143.

56. 349 U.S. 435 (1955).

57. *Id.* at 443-44.

58. 426 U.S. at 143.

59. *Id.*

Looking to the implied reservation of water rights doctrine test set forth by Ranquist⁶⁰ prior to *Cappaert* it is found that much of what was known before was repeated by the Court in *Cappaert*.⁶¹ However the Court did add some new embellishments.

For example, Ranquist's test looked to the circumstances surrounding the creation of a reservation, while *Cappaert* provided guidance in this area by directing one to look at all possible documents and statutes to determine the purpose. However, this does not answer all the questions that may arise regarding how to interpret those documents and statutes.⁶²

Further, *Cappaert* said that only such water is needed which minimally fulfills the purpose of the reservation.⁶³ When this part of the opinion is read in conjunction with the *Eagle County*⁶⁴ case one interpretation is that the Supreme Court supports quantification of federal reserved water rights. In *Eagle County* the United States argued that Colorado water rights were based on the appropriation system which required the permanent fixing of rights to the use of water at the time of the adjudication, with no provision for the future needs, as is often required in cases of reserved water rights.⁶⁵ This argument was made to prevent reserved rights from being adjudicated in state court, and was rejected by the Supreme Court. It quoted Senator McCarran, chairman of the committee reporting on the bill, who said;

"S. 18 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. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can

60. See note 28 and accompanying text *supra*.

61. See note 45 and accompanying text *supra*.

62. See Corker, *supra* note 24.

How broad are the federal purposes which quantitatively measure the federal right? Are the purposes limited to those which might have been reasonably foreseeable to President McKinley when he created a national forest, or to his successor who may read in federal statutes still on the books that a purpose of the national forests is to produce water? Since the important word labelling "the doctrine" is "implied," there is vast room for argument. Furthermore, no one with a water right with a priority after 1900, supplied from a national forest created in that year, will be greatly cheered to learn that the United States has a superior right to that water, the size and nature of the federal right depending on implications yet to be discerned from documents reposing in federal archives.

Id. at 585-86 (footnotes omitted).

63. See note 51 and accompanying text *supra*.

64. 401 U.S. 520 (1971).

65. *Id.* at 523.

be joined as parties defendant, any subsequent decree would be of little value."⁶⁶

Thus, the general tenor of both *Cappaert* and *Eagle County* is that these rights be settled, so that future economic development will not be stymied by unquantified federal reserved water rights.

This was the conclusion reached by the Idaho Supreme Court in *Avondale Irrigation District v. North Idaho Properties, Inc.*⁶⁷ *Avondale* presented the issue of "whether in a general adjudication of water rights in a state court, the United States must quantify its reserved water rights."⁶⁸ The Idaho Supreme Court held that under the McCarran amendment⁶⁹ and its legislative history the United States was "bound by Idaho state law, and therefore must quantify the amount of water claimed under the reservation doctrine at the time of the general adjudication of water rights."⁷⁰ The court found that congressional intent was "to instill certainty into the water rights of the citizens of the various states,"⁷¹ and that if reserved water rights remained unquantified there would be no certainty.

The fact that the Supreme Court applied the reservation doctrine to groundwater was no surprise.⁷² A tougher question answered in *Cappaert* was what happens to those water rights that were acquired at great expense before 1963, before the notice given by *Arizona*, which suddenly became subject to the reservation doctrine? The answer was that the government wins. The Court affirmed the original *Winters* doctrine and said that the reserved right vests in unappropriated waters on the date the reservation is established,⁷³ be it 1863 or 1963. Therefore it refused to attack the basic problem posed by the *Winters* doctrine, i.e., it does not promote the highest and best use of a scarce resource. The Court failed to take into account the uncertainty that is caused by the significant differences between the doctrine of prior appropriation and the doctrine of reserved water rights. The Court may prefer that Congress act in this area. The Court has recognized that "several bills have been introduced . . . to subject at least some federal water uses to state appropriation doctrines."⁷⁴

66. *Id.* at 525.

67. 96 Idaho 1, 523 P.2d 818 (1974).

68. *Id.* at 2, 523 P.2d at 819.

69. 43 U.S.C. § 666 (1970).

70. 96 Idaho at 4-5, 523 P.2d at 821-22.

71. *Id.* at 3, 523 P.2d at 821.

72. See *Tweedy v. Texas Co.*, 286 F. Supp. 383, 386 (D. Mont. 1968).

73. See note 44 and accompanying text *supra*.

74. 426 U.S. at 145.

The Court has tried to implement the policy of the McCarran amendment by permitting the United States to be brought in as a party defendant in a stream-wide adjudication of water rights, including federal reserved rights.⁷⁵ Perhaps the Court heeded Corker who said, "My own judgment is that the possibility is slight that 'the implied reservation doctrine' will ever produce any spectacular happening with respect to the flow of water, as distinguished from the flow of words."⁷⁶

V. CONCLUSION

In *Cappaert*, the Supreme Court added a little more structure to the implied reservation of water rights doctrine. Yet it failed to explain why state water rights created prior to 1963—the date the reservation doctrine was applied to reservations other than Indian reservations—must be divested without compensation in favor of federal reserved rights. The Court failed to explain the purpose of this "financial doctrine."⁷⁷ It seemed to say that all western water rights ought to be quantified to create more certainty,⁷⁸ yet, it expanded the doctrine of reserved water rights to the detriment of individuals who have put a scarce economic resource to beneficial use.⁷⁹ Until Congress acts, uncertainty will remain.

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75. See *United States v. District Court for Eagle County*, 401 U.S. 520 (1971); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

76. Corker, *supra* note 24, at 587.

77. See notes 24-27 and accompanying text *supra*.

78. See notes 63-71 and accompanying text *supra*.

79. See *Cappaert v. United States*, 426 U.S. 128 (1976).