Federal Nonreserved Water Rights

In 1978, the Supreme Court decided two cases of fundamental importance to water law in the western United States. *California v. United States*¹ held that state law governs the distribution of water from federal reclamation projects. *United States v. New Mexico*² held that federal reserved water rights³ are not available for secondary uses such as stock watering or maintaining instream flows⁴ for recreation or fish habitats. These decisions limited the freedom of federal agencies to control water resources without regard for state law.⁵ In doing so, they lent support to the position that primary management authority over western waters should be returned to the states.⁶

Undaunted, the Solicitor for the Department of the Interior has asserted the existence of a hitherto unrecognized federal non-

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¹ 438 U.S. 645 (1978).

² 438 U.S. 696 (1978).

³ When the federal government reserves land from the public domain, it also implicitly reserves from appropriation under state law the amount of unappropriated water that is necessary to accomplish the purpose for which the land was reserved. *Cappaert v. United States*, 426 U.S. 128, 138 (1976); see Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 B.Y.U. L. REV. 639.

⁴ An instream flow is water that is "used" by being left in the river. See Kiechel & Green, *Riparian Rights Revisited: Legal Basis for Federal Instream Flow Rights*, 16 NAT. RESOURCES J. 969, 970 n.4 (1976); Tarlock, *Appropriation for Instream Flow Maintenance: A Progress Report on "New" Public Western Water Rights*, 1978 UTAH L. REV. 211.

Until recently, it was impossible to appropriate an instream flow. 5 R. CLARK, *WATERS AND WATER RIGHTS* § 409.2, at 107-08 (1972). Some states now provide for such appropriation to protect the natural state of rivers. See, e.g., COLO. REV. STAT. § 37-92-103(4) (1973).

⁵ For discussion of typical federal agency practice prior to the 1978 cases, see Note, *Water in the Woods: The Reserved-Rights Doctrine and National Forest Lands*, 20 STAN. L. REV. 1187, 1195-98 (1968).

⁶ Since *Arizona v. California*, 373 U.S. 546 (1963), which held that the Secretary of the Interior had the power to allocate waters of the Colorado River among users in Arizona, California, and Nevada, *id.* at 580-86, the Court has returned to the states some of the authority they lost in that case. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (approving stay of federal proceedings for determination of reserved rights in state court); *United States v. District Court for Eagle County*, 401 U.S. 520 (1971) (no federal sovereign immunity against adjudication of reserved rights in state court). However, the Court also has expanded the scope of the reserved rights doctrine. See *Cappaert v. United States*, 426 U.S. 128 (1976) (reserved rights doctrine not limited to surface waters but extended to ground waters).

reserved water right.⁷ This comment reviews the claim to the non-reserved water right and analyzes its theoretical foundation.⁸ It concludes that what is involved is not a *right* but a *power* that Congress has not exercised. The putative right presupposes both a federal general common law and a nineteenth-century conception of sovereign federal ownership, neither of which is tenable today. The United States has no water rights other than reserved rights and those acquired in conformity with state law. The Solicitor's position threatens private rights and ignores strong state interests that have been recognized by Congress and the Court.

I. DEVELOPMENT OF THE CURRENT CONTROVERSY

In *United States v. New Mexico*,⁹ the Supreme Court denied for the first time federal claims of reserved water rights. Prior to

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⁷ Department of the Interior Solicitor's Opinion No. M-36914, Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, 86 Interior Dec. 553 (1979) [hereinafter cited as Solicitor's Opinion]. The Solicitor recently modified the opinion to limit its scope, but reaffirmed its basic doctrines. See note 29 *infra*.

⁸ This comment does not consider possible distinctions between rights concerning ground and surface waters. In its early development, western water law was concerned primarily with the use of surface waters, and it was in this context that the appropriation doctrine predominated. Development of groundwater law, on the other hand, was at first "sporadic and uneven." 5 R. CLARK, *supra* note 4, § 440, at 407. Courts employed, in addition to prior appropriation, theories of absolute ownership, reasonable use, and correlative rights in resolving groundwater disputes. Today, most western states apply the appropriation doctrine to groundwater and regulate its use through statutory permitting systems. *Id.* at 412-15.

The Solicitor does not develop the distinction between ground and surface waters in his argument for a nonreserved right. To the extent that the appropriation doctrine governs groundwater use, such a distinction is unimportant. The Supreme Court has brushed aside the difference in a reserved rights case, noting the physical interrelation of the two. *Capaert v. United States*, 426 U.S. 128, 142-43 (1976).

This comment also does not address the special problems of Indian water rights. For general discussion of these issues, see Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The Colorado River Decision*, 30 STAN. L. REV. 1111 (1978); Bloom, *Indian "Paramount" Rights to Water Use*, 16 ROCKY MTN. MIN. L. INST. 669 (1971); Pelcyger, *Indian Water Rights: Some Emerging Frontiers*, 21 ROCKY MTN. MIN. L. INST. 743 (1975); Veeder, *Indian Prior and Paramount Rights to the Use of Water*, 16 ROCKY MTN. MIN. L. INST. 631 (1971); Comment, *Paleface, Redskin, and the Great White Chiefs in Washington: Drawing the Battle Lines Over Western Water Rights*, 17 SAN DIEGO L. REV. 449 (1980). Nor does it consider the scope of the navigation power under the commerce clause. For a discussion of that issue, see Ericson, *The Usurpation Servitude and Reserved Indian Property: Does the Rule of No Compensation Apply to Indian Interests in Navigable Waters?*, 1979 UTAH L. REV. 47; Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1 (1963).

⁹ 438 U.S. 696 (1978).

this decision, the Court had consistently interpreted the doctrine of federal reserved water rights expansively, recognizing and granting all rights claimed by the United States.¹⁰ Specifically, the Court held that the United States, in reserving the Gila National Forest from the public lands, had reserved only enough water to accomplish the purposes for which the land was originally withdrawn.¹¹ These purposes were "to preserve the timber [and] to secure favorable water flows for private and public uses *under state law*."¹² Although the Forest Service is authorized under subsequent legislation to use National Forest lands in other ways,¹³ such secondary purposes do not have a reserved water right.¹⁴ To acquire water for secondary purposes, the Forest Service must apply to the states pursuant to their laws.¹⁵

Western states viewed this decision as significantly increasing state control of "their"¹⁶ water.¹⁷ Recognition of the federal claims for reserved rights predicated on secondary purposes, it was thought, would have threatened the displacement of private rights held under state law.¹⁸ Academic commentators, on the other

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¹⁰ *E.g.*, *Cappaert v. United States*, 426 U.S. 128 (1976) (extended to groundwater); *Arizona v. California*, 373 U.S. 546 (1963) (extended to non-Indian reservations); *Winters v. United States*, 207 U.S. 564 (1908) (applied for first time to Indian reservation). The Court's only rulings against the United States were on procedural or jurisdictional grounds. *E.g.*, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *United States v. District Court for Eagle County*, 401 U.S. 520 (1971); *United States v. District Court for Water Div. No. 5*, 401 U.S. 527 (1971).

¹¹ 438 U.S. at 700, 702.

¹² *Id.* at 718 (emphasis added).

¹³ Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-531 (1976).

¹⁴ 438 U.S. at 713-15. Authorized secondary purposes include stock watering, wildlife and fish conservation, and recreation. 16 U.S.C. § 528 (1976).

¹⁵ 438 U.S. at 716. It has been argued that the Court's holding governs only the particular secondary purposes that were at issue in the case before it, and not all secondary purposes that might arise under federal legislation. *See Fairfax & Tarlock, No Water for the Woods: A Critical Analysis of United States v. New Mexico*, 15 IDAHO L. REV. 509 (1979).

¹⁶ All western states assert that water found within the state is state property or that it belongs to the public. *See, e.g.*, CAL. CONST. art. 14, § 1; CAL. WATER CODE § 102 (West 1971); COLO. CONST. art. XVI, § 5; MONT. REV. CODES ANN. § 85-2-101 (1979); WYO. CONST. art. VIII, § 1; WYO. STAT. 41-3-115 (1977). *See also* 1 R. CLARK, *supra* note 4, § 39.3 (statutes declaring that water use is public).

¹⁷ *See In New Mexico, Water is Valuable Resource—And So Is Water Boss*, Wall St. J., May 1, 1980, at 1, col. 1. "Every attorney for the twelve states we represent considers this a historic ruling and a strong finding for states' rights," says Jack Barrett, executive director of the Western States Water Council." *Id.* at 22, col. 4. The Council is a water policy group composed of representatives appointed by governors of the western states.

¹⁸ *See* Brief for Amici Curiae Twin Lakes Reservoir & Canal Co. and Southeastern Colo. Water Conservation Dist. at 4, *United States v. New Mexico*, 438 U.S. 696 (1978); Boles & Elliott, *United States v. New Mexico and the Course of Federal Reserved Water*

hand, generally were critical of the Court's construction of the acts under which National Forests are created.¹⁹ Several, like the dissent,²⁰ dismissed as mere dictum the Court's statement that the sole exception to state control of western water is the federal reserved right.²¹ More significantly, the Solicitor for the Department of the Interior reacted to the *New Mexico* decision by asserting the existence of a federal nonreserved water right.²² The Solicitor's Opinion maintains that this right "arises from actual use of unappropriated water by the United States to carry out congressionally-authorized management objectives on federal lands."²³ In the exercise of this right, compliance with state law, although desirable, is not required.²⁴

Proponents of complete state control of water rights objected strenuously to the Solicitor's Opinion. The Western States Water Council²⁵ and the General Counsel of the New Mexico Water Resources Division²⁶ criticized it as an attempt to circumvent the holding in *United States v. New Mexico* and revive the claim to a federal water right independent of state law. In response to this opposition, the Secretary of the Interior promised governors of western states that the relevant portions of the Solicitor's Opinion would be, in effect, set aside.²⁷ He also directed his subordinates to

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Rights, 51 COLO. L. REV. 209 (1980).

¹⁹ See, e.g., Fairfax & Tarlock, *supra* note 15; Comment, *United States v. New Mexico: Purposes That Hold No Water*, 22 ARIZ. L. REV. 19 (1980); Note, *United States v. New Mexico: The Beginning of a Trend Toward Favoring State Water Rights Over Federal Water Rights*, 9 NEW MEX. L. REV. 361 (1979); Note, *Federal Acquisition of Non-Reserved Water Rights After New Mexico*, 31 STAN. L. REV. 885 (1979) [hereinafter cited as Stanford Note]; Note, *Reserved Water Rights on National Forests After United States v. New Mexico*, 1979 UTAH L. REV. 609 [hereinafter cited as Utah Note]; Case Comment, 40 OHIO ST. L.J. 729 (1979); Note, 54 WASH. L. REV. 873 (1979) [hereinafter cited as Washington Note]. At least one commentator anticipated the decision. Note, *New Mexico's National Forests and the Implied Reservation Doctrine*, 16 NAT. RESOURCES J. 975 (1976).

²⁰ 438 U.S. at 718 n.1 (Powell, J., dissenting in part).

²¹ Stanford Note, *supra* note 19; Utah Note, *supra* note 19; Case Comment, *supra* note 19; Washington Note, *supra* note 19.

²² Solicitor's Opinion, *supra* note 7, at 574-78.

²³ *Id.* at 574.

²⁴ *Id.* at 571, 577.

²⁵ Western States Water Council, *Response to the Solicitor's Opinion on Federal Water Rights*, in 1979 ANNUAL REPORT 16-40 (1979) (on file with *The University of Chicago Law Review*).

²⁶ See also Simms, *National Water Policy in the Wake of United States v. New Mexico*, 20 NAT. RESOURCES J. 1 (1980); Comment, *Federal Non-Reserved Water Rights*, 15 LAND & WATER L. REV. 67 (1980).

²⁷ Letter to Scott Matheson, Governor of Utah, and Ed Herschler, Governor of Wyoming, from Cecil Andrus, Secretary of the Interior (Feb. 4, 1980) (on file with *The Univer-*

assert "no blanket, across the board claims for non-reserved rights."²⁸ For the time being, the nonreserved federal right argument is to be held in abeyance.²⁹

This comment argues that the theory of a nonreserved right to appropriate water for secondary federal land management objectives is unsound and poses a serious threat to the rights of states and private individuals.³⁰ Absent authorization from Congress, federal agencies have no such nonreserved rights.³¹

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sity of Chicago Law Review).

²⁸ Memorandum to Assistant Secretaries for Fish & Wildlife & Parks and for Land & Water Resources and to Directors of Bureau of Land Management, Fish & Wildlife Service, National Park Service, from Secretary of the Interior (Feb. 4, 1980) (on file with *The University of Chicago Law Review*). The Secretary's decision coincided with the resignation of Leo Krulitz as Solicitor and the appointment of Clyde Martz as his successor. Mr. Martz previously had questioned broad assertions of federal authority over water. See *Discussion: Water Resources*, 6 LAND & WATER L. REV. 123, 128-29 (1970); Martz, *The Role of the Federal Government in State Water Law*, 5 KAN. L. REV. 626, 627-32 (1957). Mr. Martz has since returned to private practice.

²⁹ The Department of Agriculture has adopted Interior's position on nonreserved rights. Letter to Bob Bergland, Secretary of Agriculture, from Cecil Andrus, Secretary of the Interior (Feb. 4, 1980); letter to Cecil Andrus from Bob Bergland (Apr. 7, 1980) (letters on file with *The University of Chicago Law Review*).

Just before leaving office, Solicitor Martz supplemented the opinion of June 25, 1979. Memorandum of the Solicitor of the Department of the Interior (Jan. 16, 1981) (on file with *The University of Chicago Law Review*). The memorandum, superseding and modifying the earlier opinion, states that the two situations in which the nonreserved right may exist are (1) where federal agencies historically have used water for consumptive beneficial uses without complying with state procedures, and (2) where an act of Congress clearly mandates a use not conforming to substantive state law. *Id.* at 3.

The memorandum states that such claims will be limited in number and impact but goes on to list seven principles supporting the right that track and reaffirm the theories of the earlier opinion. *Id.* at 4-5. Most significantly, the memorandum asserts that neither the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1783 (1976 & Supp. III 1979), nor the Taylor Grazing Act, 43 U.S.C. §§ 315-316 (1976), authorizes or mandates federal water use "inconsistent in any way with the substantive requirements of state law." Memorandum of the Solicitor, *supra*, at 5-6. To the extent that the memorandum remains operative, it should substantially limit the scope of federal nonreserved claims.

³⁰ For example, in current litigation over the Big Horn River in Wyoming, the United States is claiming nonreserved rights. These claims, if successful, would prevent any new appropriations for private use. See Legal Parameters for United States' Statement of Claims 31-36, *In re* General Adjudication of All Rights to Use Water (Big Horn River), Civil No. 4993 (5th Dist., Wyo., filed Jan. 24, 1977); Wyoming's Brief in Support of Its Response to the Claims for Water Rights of the United States and the Shoshone and Arapahoe Tribes at 152-59, Big Horn River, Civil No. 4993 (5th Dist., Wyo., filed Jan. 24, 1977).

³¹ The Ninth Circuit apparently has adopted this view already. *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320, 1333 (E.D. Wash. 1978) ("where water is not explicitly or impliedly reserved, it must be appropriated under state water laws even when needed by the Federal sovereign for a federal reserve"), *aff'd*, No. 79-4297 (9th Cir. Aug. 30, 1980).

II. THE ORIGINAL FEDERAL OWNERSHIP THEORY

When the Supreme Court first announced the existence of the federal reserved water right in *Winters v. United States*,³² the Court did not reason from the existence of a federal riparian right that vested under the common law. Instead, it based its decision on the power of the United States to create rights binding on the states under the treaty power.³³ Nevertheless, many commentators have thought that the reserved right is a riparian right held by the federal government under the common law.³⁴ The original source for this position is a passage from Kent's *Commentaries*³⁵ concerning riparian rights that was cited in dictum in *United States v. Rio Grande Dam & Irrigation Co.*,³⁶ a case whose holding does not support the position.³⁷ Today, proponents of the federal nonre-

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³² 207 U.S. 564 (1908).

³³ *Id.* at 574-77. The Court held that the United States had by its treaty with the Indians created water rights binding on the state. The Court explicitly disclaimed reliance on the "doctrine of riparian rights urged by the Government," and did not consider whether a federal riparian right exists. *Id.* at 578.

³⁴ Hanks, *Peace West of the 98th Meridian*, 23 RUTGERS L. REV. 33, 40 (1968); Kiechel & Green, *supra* note 4, at 973; Morreale, *Federal-State Conflict Over Western Waters—A Decade of Attempted "Clarifying Legislation"*, 20 RUTGERS L. REV. 423 (1966); Munro, *The Pelton Decision: A New Riparianism?*, 36 OR. L. REV. 221 (1957); Sondheim & Alexander, *Federal Indian Water Rights: A Retrogression to Quasi-Riparianism*, 34 S. CAL. L. REV. 1 (1960); Veeder, *Winters Doctrine Rights—Keystone of National Programs for Western Lands and Water Conservation and Utilization*, 26 MONT. L. REV. 149, 152 (1965); Warner, *Federal Reserved Rights and Appropriation States*, 15 ROCKY MTN. MIN. L. INST. 399, 400-06 (1969); Note *Federal-State Conflicts Over the Control of Western Waters*, 60 COLUM. L. REV. 967 (1960); Comment, *The Federal Reserved Water Doctrine—Application to the Problem of Water for Oil Shale Development*, 3 LAND & WATER L. REV. 75, 89 (1968). But see Trelease, *Uneasy Federalism—State Water Laws and National Water Uses*, 55 WASH. L. REV. 751, 764 & n.64 (1980).

³⁵ 3 J. KENT, COMMENTARIES ON AMERICAN LAW 353 (New York 1828):

Every proprietor of lands on the banks of a river has naturally an equal right to the use of water which flows in the stream adjacent to his lands, as it was wont to run, (*currere solebat*) without diminution or alteration. No proprietor above or below him has a right to use the water to the prejudice of other proprietors unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere*, is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate.

³⁶ 174 U.S. 690, 702 (1899) (dictum).

³⁷ In *Rio Grande*, the United States sought to enjoin the construction of a dam across the Rio Grande River in the Territory of New Mexico. The Supreme Court reversed the territorial court's dismissal of the complaint and remanded for a determination of whether the impoundment of waters by the proposed dam would "substantially diminish the navigability of that stream within the present limits of navigability." *Id.* at 710. The Court cited the Kent passage to show, as the starting point for its analysis, that the basis of water rights

served right rely on the same *Rio Grande* dictum.³⁸ That reliance is misplaced.

A. The *Rio Grande* Dictum

The dictum assumes as a settled rule of the common law that riparian ownership carries an attendant right to flowing waters.³⁹

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at common law was riparian land tenure. It then acknowledged that a state or a territory could "change [the] common law rule and permit the appropriation of the flowing waters." *Id.* at 703.

The Court posited two exceptions, however, to the states' freedom to adopt an appropriation system. States could not limit the federal government's preexisting riparian rights or the navigability of navigable streams without specific authority from Congress. *Id.* It concluded that Congress had, by the Act of July 26, 1866, ch. 262, 14 Stat. 251, the Act of July 9, 1870, ch. 235, § 17, 16 Stat. 218, and the Desert Land Act of 1877, ch. 107, § 1, 19 Stat. 377, see text and notes at notes 54, 108-112 *infra*, "assented to the appropriation of water in contravention of the common law riparian rule," 174 U.S. at 706, but had not released its control over navigable waters. *Rio Grande* is based on the navigation power, not on a federal riparian right, and not on the passage from Kent. Its position on riparianism is just the opposite of that for which proponents of federal riparianism cite the case.

In *Winters*, the Court relied on *Rio Grande* and *United States v. Winans*, 198 U.S. 371 (1905). "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be." 207 U.S. at 577. The Court upheld an order restraining private appropriation under state law for the benefit of an Indian reservation. The citation to *Rio Grande* is ambiguous, because the page cited, 174 U.S. at 702, contains the Kent passage but not the discussion of federal power on which *Winters* relies. See text and notes at notes 32-33 *supra*.

The *Winters* Court's reliance on *Winans* strengthens the argument that it, like the *Rio Grande* Court, did not rely on the Kent passage but on the analysis introduced by that quotation. In *Winans*, the United States obtained an injunction against the impairment of Indian fishing rights by riparian non-Indian fishermen acting in accordance with state law. 198 U.S. at 377, 383-84. The Court held that the United States had exercised its power to create fishing rights in the territories (which bound the states formed from those territories), not that it had a property right in the fish. *Id.* at 383.

³⁸ *E.g.*, Solicitor's Opinion, *supra* note 7, at 565, 571 & *passim*.

³⁹ See note 35 *supra*. "This is the clear and settled general doctrine." 3 J. KENT, *supra* note 35, at 353-54. See also 1 R. CLARK, *supra* note 4, § 4.3.

In fact, the riparian doctrine was a relatively recent development in the common law. 1 S. WIEL, *WATER RIGHTS IN THE WESTERN STATES* §§ 66-70 (3d ed. 1911); Lauer, *The Common Law Background of the Riparian Doctrine*, 28 Mo. L. Rev. 60 (1963); Note, *Federal Water Rights Legislation and the Reserved Lands Controversy*, 53 Geo. L.J. 750, 753-57 (1965). *Contra*, Maas & Zoebel, *Anglo-American Water Law: Who Appropriated the Riparian Doctrine?*, 10 PUB. POLICY 109 (1960). In Blackstone's time, prior appropriation was the rule, 2 W. BLACKSTONE, *COMMENTARIES* *403, although there were few English cases on the subject. Lack of development, rather than clear doctrine, characterized the law in this area. Wiel, *Waters: American Law and French Authority*, 33 HARV. L. REV. 133, 133, 141-45 (1919). It was not until 1827 that riparian rights were authoritatively established in America. *Tyler v. Wilkerson*, 24 F. Cas. 472 (C.C.D.R.I. 1827) (No. 14,312) (Story, J.). The next year, Kent wrote the passage cited in *Rio Grande*. Both Kent and Story drew heavily but tacitly on civilian sources. See *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 744-45 (1950); Wiel, *supra*, at 139. The riparian doctrine did not take firm hold in England

Therefore, so the proponents' argument goes, the federal government acquired riparian rights in territorial streams, rivers, and ground waters and has retained this proprietary interest in all waters appropriated under state law.⁴⁰ Because of the supremacy clause, the states formed from those territories cannot extinguish those rights.⁴¹

This argument postulates that the federal government acquires rights under the common law, that is, state law,⁴² but denies that state law can determine the existence and extent of those rights. This amounts to saying that when the national government acquires state-created water rights, they somehow become greater than they were originally. The argument that the federal government holds state-created rights, but that the states cannot define these rights, is plainly inconsistent. It also contradicts the general rule that a transferee obtains a right no greater than that possessed by the transferor.⁴³

Second, the proponents' argument depends on the assumption that a state can create riparian rights in real property situated beyond its physical borders.⁴⁴ This assumption is necessary because

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until five years after Kent's writing. See *Mason v. Hill*, 3 B. & Ad. 304, 110 Eng. Rep. 114 (K.B. 1833); Wiel, *supra*, at 144. When the Court of Exchequer Chamber finally embraced the doctrine in 1851, the court relied on Kent and Story. See *Embrey v. Owen*, 6 Ex. 353, 368-70, 155 Eng. Rep. 579, 585-86 (Exch. Ch. 1851) (quoting the Kent passage cited in *Rio Grande*). In sum, there was no established rule at common law. See Wiel, *Origin and Comparative Development of the Law of Water Courses in the Common Law and in the Civil Law*, 6 CALIF. L. REV. 245 (1918).

⁴⁰ Solicitor's Opinion, *supra* note 7, at 575.

⁴¹ *Id.*; F. TRELEASE, *FEDERAL-STATE RELATIONS IN WATER LAW* 147 (National Water Commission Legal Study No. 5, 1971).

⁴² See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

⁴³ Congress intended the limited waiver of sovereign immunity in the McCarran Amendment, 43 U.S.C. § 666(a) (1976), to eliminate such claims. "[T]he United States has acquired many lands and water rights in States that have the doctrine of prior appropriation. When these lands and water rights were acquired from the individuals the government obtained no better rights than had the persons from whom the rights were obtained." S. REP. NO. 755, 82d Cong., 1st Sess. 506 (1951); *accord*, *FPC v. Oregon* (Pelton Dam), 349 U.S. 435, 453 (1955) (Douglas, J., dissenting).

⁴⁴ An alternative argument is that Congress imposed the common law on the territories, which was then binding on the states, much as Congress created rights in the territories binding on the states. See *Clark v. Allaman*, 71 Kan. 206, 80 P. 571 (1905). The Supreme Court rejected this argument in *Kansas v. Colorado*, 206 U.S. 46, 95-96 (1907), holding that Congress did not have the power to apportion waters of the Arkansas River between the two states. The precedential value of this case was doubtful after *Arizona v. California*, 373 U.S. 546 (1963), which held that Congress had so apportioned water of the Colorado River. *Id.* at 546-90. However, the Court in *California v. United States*, 438 U.S. 645 (1978), cited *Kansas v. Colorado* with approval in limiting the scope of *Arizona v. California* and requiring the Secretary of the Interior to follow state law. *Id.* at 655, 663. Although *California v. United*

there was no decisional law in the West at the time of its acquisition by the United States; the only American common law was in the decisions of the eastern states. Eastern courts, therefore, must be responsible for the federal rights. This view, however, contradicts traditional formulations of state jurisdiction; a state does not have the power to create real property rights beyond its borders.⁴⁵ The federal government cannot have riparian rights in a given state simply because it holds such rights in other states that adhere to riparian doctrine.⁴⁶

States did not involve an interstate water source, see *id.* at 651, the Court distinguished *Arizona v. California* as unique. *Id.* at 674-75. Whether the Court would follow *California v. United States* or *Arizona v. California* in a case involving distribution of water from an interstate reclamation project of a smaller scope than the Boulder Canyon Project is an open question. Nonetheless, this much of *Kansas v. Colorado* remains unimpeached: Congress did not impose the common law on the western states.

⁴⁵ See, e.g., *Fall v. Eastin*, 215 U.S. 1 (1909); *Clarke v. Clarke*, 178 U.S. 186 (1900); *Pasos v. Pan Am. Airways, Inc.*, 229 F.2d 271 (2d Cir. 1955); *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8,411) (Marshall, J.).

⁴⁶ See *Kansas v. Colorado*, 206 U.S. 46, 95 (1907): "Now the question arises between two States, one recognizing generally the common law rule of riparian rights and the other prescribing the doctrine of the public ownership of flowing water. Neither State can legislate for or impose its own policy upon the other."

One qualification is appropriate here. There are two distinct theories of western water rights, the "California" and "Colorado" doctrines. The former holds sway in California, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington; the latter rules in Colorado, Arizona, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. 5 R. CLARK, *supra* note 4, § 400, at 7 & nn.21-22. Under the California doctrine, the federal government has an original property right in all the nonnavigable waters of the states formed from territories acquired by the United States. *Lux v. Haggin*, 69 Cal. 255, 336-43, 10 P. 674, 720-24 (1886); 1 S. WIEL, *supra* note 39, §§ 152-153. States that have adopted the California doctrine recognize appropriative and riparian rights, both of which derive from the original federal title. *Id.* §§ 155-156. Thus, to the extent that the courts of these states apply the doctrine, there is a common law foundation for the federal riparian rights.

In Colorado-doctrine states, on the other hand, the United States never acquired title to western waters. 2 C. KINNEY, *LAW OF IRRIGATION* § 632 (2d ed. 1912); 5 R. CLARK, *supra* note 4, § 405, at 41 n.3; 1 S. WIEL, *supra* note 39, § 167.

The Colorado doctrine apparently has gained the approval of the Supreme Court, *Boquillas Land & Cattle Co. v. Curtis*, 213 U.S. 339, 345 (1909) (Arizona law), and a federal district court in California rejected the argument that under the California doctrine the federal agencies may take unappropriated water as property of the United States. *United States v. Fallbrook Pub. Util. Dist.*, 165 F. Supp. 806 (S.D. Cal. 1958). *But see Nevada ex rel. Shamberger v. United States*, 165 F. Supp. 600 (D. Nev. 1958), *aff'd on other grounds*, 279 F.2d 699 (9th Cir. 1960). One may argue that the California doctrine is not good law. See 1 S. WIEL, *supra* note 39, § 122. *But see* 2 C. KINNEY, *supra*, §§ 636-640. Indeed, its rationale is simply incorrect. When California adopted the common law, *Lux v. Haggin*, 69 Cal. 255, 337, 10 P. 674, 720, (1886), it did not include water rights that attached to all riparian lands within the state. Riparianism was only one alternative a court could employ. Appropriation, if anything, was the common law rule. See note 39 *supra*. Adoption of the common law only means that the state or territory adopts "a general system as against

Finally, riparian rights are not as broad as the federal reserved right, and the reserved right has never been limited according to riparian definitions.⁴⁷ Unless the lesser (riparian rights) can include the greater (federal reserved rights), common law riparianism is an inadequate basis for the federal reserved right, much less the nonreserved right.

The *Rio Grande* passage would be correct if it were limited to a situation where a state, having previously recognized riparian rights, attempted to deny them upon switching to an appropriation system.⁴⁸ The federal government could then raise the supremacy clause, which prohibits state destruction of federal property rights.⁴⁹ However, this is very different from the argument of the *Rio Grande* dictum that a state may not, from the beginning, institute an appropriation system that would "destroy" federal riparian rights within the state.

These logical problems involved in a claim of a federal riparian right may not, in themselves, constitute sufficient reason to reject the claim, but they do identify inconsistencies within the theory. These inconsistencies are the result of a problem in the internal structure of the theory.

B. The Federal Right and the Common Law

Analysis of the assertion of a federal riparian right in western waters under the common law reveals a fundamental flaw. The

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another general system," not that "patentees of a ranch on the San Pedro are to have the same rights as owners of an estate on the Thames." *Boquillas Land & Cattle Co. v. Curtis*, 213 U.S. 339, 345 (1909). See also text and notes at notes 50-54 *infra*.

⁴⁷ See, e.g., Comment, *Implied Reservation Claims After Cappaert v. United States*, 1977 ARIZ. ST. L.J. 647, 660-62.

⁴⁸ South Dakota, for example, had until 1955 a mixed system of appropriative, riparian, and absolute water rights. In that year, the state adopted a purely appropriative system. South Dakota Water Act of 1955, ch. 430, 1955 S.D. Sess. Laws 506 (codified at S.D. COMP. LAWS ANN. §§ 46-1, -5 (1967)). If the state had not provided for recognition of preexisting rights, the statute would have been open to constitutional attack. Note, *Water Rights and the Constitutionality of the 1955 South Dakota Water Act*, 11 S.D.L. REV. 374 (1966). Recognizing this problem, and not wishing to disturb vested rights, the state protected them with "grandfather" provisions. S.D. COMP. LAWS ANN. §§ 46-1-9 to -10 (1967).

⁴⁹ See *Public Util. Dist. No. 1 v. Inland Power & Light Co.*, 64 Wash. 2d 122, 390 P.2d 690 (1964) (federal land immune from state eminent domain power); cf. *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917) (lands of United States not subject to disposition under state laws). Compare *United States v. 161 Acres of Land*, 427 F. Supp. 528 (D. Colo. 1977) ("Colorado can create no right to condemn publicly owned lands") with *Rausser v. Toston Irrig. Dist.*, 172 Mont. 530, 535, 565 P.2d 632, 636 (1977) (ownership by United States "does not limit the power to condemn"). See generally 1 P. ROHAN & J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 2.22 (3d ed. 1979).

problem arises because the term "common law" has undergone a transformation in meaning since *Rio Grande*.

That case was decided during the era of the general federal common law.⁵⁰ Until the early twentieth century, the federal judiciary presupposed the existence of a common law independent of the courts that applied it. Courts found their rules of decision; they did not create them.⁵¹

*Erie Railroad v. Tompkins*⁵² set this jurisprudence aside.⁵³ Consequently, the presumed body of law that supports the reserved right is no longer available to ground some new federal claim. There is no common law under which it can be said that the United States took title to all the unappropriated western waters.⁵⁴

⁵⁰ See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842):

In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. . . . [T]he true interpretation and effect [of commercial paper] . . . are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence . . . . The law respecting negotiable instruments may be truly declared . . . to be in a great measure, not the law of a single country only, but of the entire world. . . .

. . . *Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit* [There will not be one law at Rome, another at Athens, one law now, another later, but both among all people and at all times one and the same law will obtain].

Id. at 18-19 (quoting *Luke v. Lyde*, 2 Burr. 882, 887, 97 Eng. Rep. 614, 617 (K.B. 1759) (paraphrasing Cicerō, *DE REPUBLICA* 3.33)).

⁵¹ As dissatisfaction with this view of the common law grew, judges occasionally mocked the notion of an immutable common law. "The Common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . . It is always the law of some State. . . ." *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

⁵² 304 U.S. 64 (1938).

⁵³ *Id.* at 78: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law."

⁵⁴ The common law was received in western territories and states by acts of Congress and state constitutions or statutes. See, e.g., Act of May 2, 1890, ch. 182, 26 Stat. 94; *COLO. REV. STAT.* ch. 16, § 1 (1867). See also *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 62 (1890). The reception was limited, however. Where they were found to be inappropriate for local conditions of a state or territory, common law rules were rejected. See, e.g., *ARIZ. CONST.* art. 17, § 1 (1910) (common law riparian doctrine of no force or effect).

The original source of western water law was the custom and practice of the pioneers. The appropriation doctrine grew out of the mining camps and districts. See *Irwin v. Phillips*, 5 Cal. 140, 146-47 (1855); *Eddy v. Simpson*, 3 Cal. 249, 252 (1853). See also *O. HOLLISTER, THE MINES OF COLORADO* 359-74 (1867); 1 C. LINDLEY, *AMERICAN LAW RELATING TO MINES AND MINERAL LANDS* § 42 (2d ed. 1903); C. SHINN, *MINING CAMPS: A STUDY IN AMERICAN FRONTIER GOVERNMENT* 150-89 (1885). It was in recognition and adoption of these water law rules that Congress passed the three acts releasing its control of western waters, as

State common law does not support a federal riparian title; indeed, it is in cases where state law does not give the federal agencies as much as they want that they make the riparian argument.⁵⁵ The riparian claim is not based on state law but is made in spite of it.

The only remaining source of law that might support the non-reserved right is the modern federal common law.⁵⁶ Principles of this "special" federal common law, examined below,⁵⁷ dictate that no federal nonreserved right can exist until Congress acts.

C. The Reserved Right

Even if a residual⁵⁸ federal water right exists,⁵⁹ it is nothing more than the reserved right.⁶⁰ The reserved right exhausts the federal riparian right because it is the sole exception to the long-standing deference that Congress has paid to state control of western waters.⁶¹

The Supreme Court has said that this right is to be narrowly construed to give effect to the congressional policy.⁶² The reserved

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recognized in *Rio Grande*. See note 37 *supra*; text and notes at notes 108-112 *infra*. But see note 46 *supra*; cf. *United States v. Morrison*, 203 F. 364 (C.C.D. Colo. 1901) (acts inapplicable to United States).

The common law system, see *Boquillas Land & Cattle Co. v. Curtis*, 213 U.S. 339 (1909), embraced pioneer water law as the common law rule. *Union Mill & Mining Co. v. Danberg*, 81 F. 73, 93 (C.C.D. Nev. 1897). The Supreme Court joined western courts and Congress in recognizing the validity of rights predicated on the rule. *Broder v. Natoma Water & Mining Co.* 101 U.S. 274 (1879); *Jennison v. Kirk*, 98 U.S. 453 (1878); cf. *Sturr v. Beck*, 133 U.S. 541 (1890) (riparian rights attach to public lands only on conveyance to private owner and according to state law).

⁵⁵ Where water is available for federal projects under state law, federal agencies are happy to proceed under it unless a reserved right is available. Solicitor's Opinion, *supra* note 7, at 578; letter to Cecil Andrus, *supra* note 29.

⁵⁶ "The rights and duties of the United States . . . are governed by federal rather than by local law. . . . In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943). See also Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964).

⁵⁷ See text and notes at notes 82-99 *infra*.

⁵⁸ The "residual" right is that which remains of the original federal title under the California doctrine, see note 46 *supra*, and which purportedly underlies both the reserved and nonreserved federal rights, see Solicitor's Opinion, *supra* note 7, at 563.

⁵⁹ Some commentators believe that it does. See, e.g., Hanks, *supra* note 34, at 40; Kiechel & Green, *supra* note 4, at 973.

⁶⁰ *California v. United States*, 438 U.S. 645, 662 (1978). The Court's treatment of the *Rio Grande* dictum clearly identifies reserved rights with the riparian rights spoken of by Chancellor Kent.

⁶¹ *Id.*; *United States v. New Mexico*, 438 U.S. 696, 701-02, 715 (1978).

⁶² *United States v. New Mexico*, 438 U.S. 696 (1978). Furthermore, the reserved right applies only to the minimum amount of water necessary to accomplish primary purposes.

right is identical with the federal riparian right.⁶³ The nonreserved federal right theory is an attempt to reopen the question of the scope of the reserved right under a new rubric.⁶⁴ Recognition of the nonreserved right would frustrate the congressional policy to limit the federal exception to state control. By identifying the *Rio Grande* riparian right with the reserved right in *California v. United States*, the Court rejected the implication of a riparian nonreserved right.

In sum, the argument that *Rio Grande* supports a nonreserved right expands the reserved right beyond the limit set for it by the Supreme Court. It relies on an assertion of federal title premised on a discredited nineteenth-century notion of common law. If a federal right does exist in nonreserved and unappropriated waters, it is not the result of the United States's having "title" to the waters. One must look elsewhere, namely, to the power of Congress to create property rights for the United States.

III. CONGRESSIONAL POWER AND FEDERAL APPROPRIATION OF WATER

A. The Concept of Ownership

Although the federal government has no proprietary right in nonreserved and unappropriated western waters, Congress can create such a right.⁶⁵ The power to do so is ancient, simple, and basic.

For over two thousand years the Western legal world has included water in the "negative community" of property common to all but owned by none until reduced to possession.⁶⁶ When the thing is not possessed, it is not owned.⁶⁷ The classic example of a member of the negative community is the wild animal.⁶⁸ The fun-

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Cappaert v. United States, 426 U.S. 128, 141 (1976).

⁶³ See note 60 *supra*.

⁶⁴ Simms, *supra* note 26, at 9.

⁶⁵ F. TRELEASE, *supra* note 41, at 147.

⁶⁶ The concept of the negative community is rooted in the *Institutes* of Justinian and in the civil law. See, e.g., *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 744-45 (1950). See generally Wiel, *Running Water*, 22 HARV. L. REV. 190, 204 (1909); Wiel, *Theories of Water Law*, 27 HARV. L. REV. 530, 530-31 (1914); see also Pound, *The End of Law as Developed in Legal Rules and Doctrine*, 27 HARV. L. REV. 195, 233-34 (1914).

⁶⁷ "[W]ater is a moveable wandering thing, and must of necessity continue common by the law of nature; so that I can have only a temporary, transient, usufructuary, property therein . . . ." 2 W. BLACKSTONE, COMMENTARIES *18.

⁶⁸ See *Geer v. Connecticut*, 161 U.S. 519, 522-26 (1896), *overruled on other grounds*, *Hughes v. Oklahoma*, 441 U.S. 322 (1979). See generally *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805); 2 W. BLACKSTONE, COMMENTARIES *403; O. HOLMES, *THE COMMON LAW* 217-

damental characteristic of ownership of wild animals is that it is established by capture.⁶⁹ All persons have the power to establish ownership in this way; Congress can exercise this power and create a federal property right in such animals by authorizing its agents to capture them. Similarly, Congress can create a federal property right in water by authorizing federal agencies to appropriate and use it.⁷⁰ It is also ancient doctrine, however, that the sovereign may establish rules to regulate, and even prohibit, the exploitation of natural resources. This regulatory jurisdiction is different from the sovereign's proprietary rights.⁷¹ This doctrine of *res publicae* considers natural resources to be government-owned only in the sense that the sovereign may regulate their use to protect the public interest.⁷²

A recent Supreme Court decision concerning state-federal conflicts over wild animals supports this view of government ownership. In *Hughes v. Oklahoma*,⁷³ an Oklahoma statute⁷⁴ prohibiting the exportation of minnows was challenged under the commerce clause. The Oklahoma court asserted that "the wild animals and fish within a state's border are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all its people," and held the statute to be a constitutional regulation of state property.⁷⁵ The Supreme Court rejected the

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18 (1881); 2 J. KENT, *supra* note 35, at 281-83.

⁶⁹ See *Geer v. Connecticut*, 161 U.S. 519, 539-40 (1896); *Pierson v. Post*, 3 Cai. R. 175, 177 (N.Y. Sup. Ct. 1805).

⁷⁰ F. TRELEASE, *supra* note 41, at 147.

⁷¹ Bannister, *The Question of Federal Disposition of State Waters in the Priority States*, 28 HARV. L. REV. 270, 286-291 (1915). This distinction is often overlooked. *E.g.*, TASK FORCE 5A—PRESIDENT'S WATER POLICY IMPLEMENTATION, REPORT OF THE TASK FORCE ON NON-INDIAN FEDERAL WATER RIGHTS 64 n.69 (June 1980) (equating ownership and imperium) (on file with *The University of Chicago Law Review*).

⁷² Pound, *supra* note 66, at 234. This is one of the concepts that merges into the doctrine of *res communes*. Compare Trelease, *Government Ownership and Trusteeship of Water*, 45 CALIF. L. REV. 638, 643 & n.26 (1957) (arguing that this category is not consistently defined) with Lasky, *From Prior Appropriation to Economic Distribution of Water by the State—Via Irrigation Administration*, 1 ROCKY MTN. L. REV. 161, 186-87 (1929) (arguing that the inconsistencies result more from occasional scholastic "corruption" than from significant doctrinal inconsistencies) and Weil, *Running Water*, *supra* note 66, at 192 (same). Thus, assertions of sovereign ownership are complex declarations of the legitimate governmental interest (*res publicae*) in regulating the exploitation of natural resources (*res communes*). *Hughes v. Oklahoma*, 441 U.S. 322, 335-36 (1979). Because neither the federal nor state government owns the water in a proprietary sense, governmental assertions of "ownership" actually amount to claims of regulatory jurisdiction.

⁷³ 441 U.S. 322 (1979) (overruling *Geer v. Connecticut*, 161 U.S. 519 (1896)).

⁷⁴ OKLA. STAT. ANN. tit. 29, § 4-115(B) (West 1976).

⁷⁵ *Hughes v. State*, 572 P.2d 573, 575 (Okla. Crim. App. 1977).

Oklahoma court's view of state ownership. It recognized the need to "preserv[e] the legitimate state concerns for conservation and protection of wild animals underlying the 19th century [res publicae] legal fiction of state ownership,"⁷⁶ but nonetheless held the statute invalid because the state's asserted ownership of the minnows was only a regulatory interest being exercised to obstruct interstate commerce.⁷⁷ Oklahoma's claim to ownership of minnows parallels the conflicting claims made by western states and the United States to ownership of western waters. The state and federal governments share an interest in proper regulation of water. Neither "owns" unappropriated water,⁷⁸ but each has the power to use it and to regulate its use.

In light of this view of government ownership, it is not important whether the federal government "owns" water in western states. The federal government can obtain traditional ownership of water by appropriating it. The important question is whether state or federal rules of capture apply to the United States. In other words, the issue is whether Congress has established a federal regulatory jurisdiction over federal appropriations, or has recognized the inherent regulatory jurisdiction of the states and adapted federal programs to it.

B. Federal Common Law and State Regulation of Federal Appropriation

Congress has not enacted a general statute regulating federal acquisition of appropriative water rights,⁷⁹ although the idea has been suggested several times.⁸⁰ Instead, Congress has recognized and deferred to state control of western waters.⁸¹

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⁷⁶ 441 U.S. at 335-36.

⁷⁷ *Id.* at 335.

⁷⁸ "A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture." *Id.* at 334 (quoting *Douglas v. Seacoast Prods. Inc.*, 431 U.S. 265, 284 (1977)); accord, *Release*, *supra* note 34, at 763 & n. 61.

⁷⁹ Solicitor's Opinion, *supra* note 7, at 570.

⁸⁰ F. TRELEASE, *supra* note 41, at 252-65; UNITED STATES PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 141-55 (1970); Morreale, *supra* note 34, at 510-12.

⁸¹ In *United States v. New Mexico*, the court noted that "[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law." 438 U.S. at 702 (footnote omitted). The

Nevertheless, the question remains whether the water systems of the western states are to be displaced by a federal appropriative rule whenever a federal agency believes that the state system limits its ability to accomplish secondary management objectives mandated by Congress. Because Congress has not explicitly decided whether federal agencies must obey the laws of the states in appropriating water for secondary management purposes, but federal rights are involved, the issue is one of the modern federal common law.⁸² The power to formulate a federal rule of decision may flow

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Court supported this proposition with a citation to a Senate document listing 37 statutes "in which Congress has expressly recognized the importance of deferring to state water law." *Id.* at 702 n.5 (citing *Federal Water Rights: Hearings on S. 1275 Before the Subcomm. on Irrigation & Reclamation of the Senate Comm. on Interior & Insular Affairs*, 85th Cong. 2d Sess. 302-10 (1964) (supplementary material submitted by Senator Kuchel) [hereinafter cited as *1964 Hearings*]).

One law review note argues that these 37 statutes do not demonstrate a long-standing congressional deference to state water law. "[A]ll such a list shows is that Congress deferred to state law on 37 occasions. . . . [O]ne can draw a comparable list of occasions on which Congress chose not to defer to state law . . . ." Stanford Note, *supra* note 19, at 909 (footnote omitted). The note presents such a list, but the statutes cited do not support this view. They focus upon state-created water rights and their acquisition by the federal government.

Most of the statutes the note cites provide authorization or funding for the acquisition of state rights for federal purposes. *See, e.g.*, 16 U.S.C. §§ 460l-9(a)(1), -10a, -10b (1976) (for recreational inholdings); *id.* §§ 460bb-2(a), 541(e) (for Suislaw National Forest by donation, purchase, exchange, or otherwise); *id.* §§ 541(d), 690 (for Bear River Migrating Bird Refuge by purchase, lease, or gift). The repeated enumerations of specific methods of acquisition make no sense unless predicated on state rights: if the rights were federal, the federal government would already own them.

Of the entire list cited in the note, only one statute plausibly mandates federal administration of western water, *id.* § 1a-2(e). None explicitly authorizes a federal agency to preempt state water administration; none faces the issue. Most contemplate federal acquisition of state law rights. *See also* Solicitor's Opinion, *supra* note 7, at 578. In sum, the statutes do not support the claim that Congress has, on at least 25 occasions, chosen not to defer to state law.

The note also scrutinized the 37 statutes to which the Court adverted in *United States v. New Mexico*. 31 STAN. L. REV. at 909-10 & nn.121-124. It first bases an attack on the Court's use of the 37 statutes on a quibble between recognition and deference, arguing that Senator Kuchel submitted the list only to show congressional recognition of, but not deference to, state water law. *Id.* at 909 & n.121. Apparently this argument relies on the heading of the supplement, which is "Past Recognition of State Law." *1964 Hearings, supra*, at 302. An examination of the statutes listed reveals that the recognition always was for the purpose of deference, as noted by the Court, 438 U.S. at 702.

⁸² Federal courts have the power to determine federal water rights not established by Congress. *See United States v. District Court for Eagle County*, 401 U.S. 520, 526 (1971). On the same day that it announced the end of the "federal general common law," *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), the Supreme Court sustained its jurisdiction over an interstate stream apportionment dispute arising from a state's highest court on the basis of the "federal common law." *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). *See Friendly, supra* note 56, at 408. *See also Grow & Stewart, The Winters Doctrine as Federal Common Law*, 10 NAT. RESOURCES L. 457 (1977) (reserved rights doc-

from the Court's constitutional jurisdiction over disputes between the states,⁸³ from congressional grants of exclusive jurisdiction,⁸⁴ or from the fact that the rights and duties of the United States are in question.⁸⁵

The federal common law may incorporate state law.⁸⁶ Federal common law rules are invoked only when a substantial federal interest is at stake.⁸⁷ It is not enough that Congress could regulate federal water appropriations; there must be a significant conflict between state law and federal policy.⁸⁸ Furthermore, it is not enough that a federal interest would be defeated by state law in isolated cases; the federal interest must require uniformity.⁸⁹ On the other hand, where state law would frustrate congressional policy, a special federal rule is necessary.⁹⁰

In *United States v. Kimbell Foods, Inc.*,⁹¹ the Court incorporated state law to decide whether contractual liens arising from federal loan programs take precedence over private security interests. It held that courts should consider several factors concerning the effects of applying state law to specific federal interests. If the federal program must be uniform, so must the rule; if uniformity is not required, the federal rule of decision may incorporate state law. Where a general federal rule would disrupt private relations predicated on state law, incorporation of the state rules is desirable.

trine is federal common law).

⁸³ *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110-11 (1938).

⁸⁴ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

⁸⁵ *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

⁸⁶ *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *United States v. Yazell*, 382 U.S. 341, 356 (1966).

⁸⁷ *Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29 (1956); *Reconstruction Fin. Auth. v. Beaver County*, 328 U.S. 204 (1946).

⁸⁸ See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-28 (1979).

⁸⁹ *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701-03 (1966); cf. *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (state law controls private dispute over federal oil and gas lease).

⁹⁰ *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 & n.23 (1979). This is distinct from the rule forbidding the states from discriminating against the federal government. For example, the Solicitor attempts to rely on *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973), in arguing for the inapplicability of state law to federal appropriation. Solicitor's Opinion, *supra* note 7, at 574-77. In that case, however, the state law was specifically hostile to federal interests, 412 U.S. at 595, and the federal program did not require uniformity, see *id.* at 607 (Rehnquist, J., concurring).

⁹¹ 440 U.S. 715 (1979).

The Solicitor argues that uniform management of federal lands is an important federal policy that justifies a general federal rule establishing the nonreserved right.⁹² The recent case of *Wilson v. Omaha Indian Tribe*,⁹³ a boundary dispute between Indians and non-Indians, undercuts his argument. The Court approved, as the federal rule of decision, the application of state law rules of accretion and avulsion⁹⁴ to determine the location of the Indian reservation's border.⁹⁵ Because this decision had the effect of shrinking the reservation, the Indians objected to the application of state law, arguing that federal boundary cases should provide the rule of decision.

The Court found no need for a uniform federal rule because " 'generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect [federal interests]' " are insufficient reasons for rejecting state law.⁹⁶ The Court noted that no unfairness to the United States would result: the jurisdiction of federal courts is sufficient to ensure equity and evenhandedness in application of state law to federal rights.⁹⁷ The Court also recognized the strong state interest in having its law apply to protect "the reasonable expectations of . . . private land owners upset by the vagaries of being located adjacent to . . . property in which the United States has a substantial interest."⁹⁸ Finding that a federal rule threatened to harm existing private relationships based on state law, and that no frustration of federal policy or functions required a nationally uniform rule, the Court decided that state law should be incorporated.⁹⁹

In light of this decision, the Solicitor's assertion of a federal appropriative right for congressionally authorized purposes¹⁰⁰ lacks merit. He merely makes a general plea for uniformity of federal land management programs;¹⁰¹ he does not attempt to present evi-

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⁹² Solicitor's Opinion, *supra* note 7, at 576-77.

⁹³ 442 U.S. 653 (1979).

⁹⁴ Avulsion is the abrupt change in a river course in which property boundaries marked by the river do not change. Accretion is the gradual change in a river course, in which case the property line moves with the river. See *id.* at 660 n.7.

⁹⁵ *Id.* at 661.

⁹⁶ *Id.* at 673 (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 730 (1979)).

⁹⁷ 442 U.S. at 673-74.

⁹⁸ *Id.* at 674.

⁹⁹ *Id.* at 673.

¹⁰⁰ Solicitor's Opinion, *supra* note 7, at 574-78.

¹⁰¹ If the Court intended [in *United States v. New Mexico*] that the United States could only assert water rights for purposes recognized as beneficial under state law,

dence that federal policy or interests would be frustrated by full compliance with state law. Such an attempt would be difficult. The federal common law takes as its starting point federal statutes,¹⁰² and seeks to glean from them the policies of the Congress. When federal programs are adapted to state law, there is no need for uniformity.¹⁰³ A close reading of three major federal statutes demonstrates that congressional policy consistently has been to adapt federal land management programs to state law, rather than to create uniform federal rules.

In 1976, Congress enacted the Federal Land Policy and Management Act ("FLPMA"),¹⁰⁴ which reformed the law governing the Bureau of Land Management.¹⁰⁵ The FLPMA repealed a series of prior statutes regarding homesteading, disposal, withdrawal, administration, and rights-of-way with respect to public lands.¹⁰⁶ However, Congress expressly disavowed an intent to create any new, or modify any old, water rights or water law.¹⁰⁷ The Senate Committee on Energy and Natural Resources explicitly identified the Desert Land Act of 1877¹⁰⁸ as a law not repealed by the FLPMA.¹⁰⁹ By the Desert Land Act, in conjunction with the Act of July 26, 1866¹¹⁰ and the Act of July 9, 1870,¹¹¹ "all non-navigable

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then the federal land manager would have to manage the same kind of federal lands significantly differently in different states, depending on local law. The BLM, for example, may not be able to manage lands for recreation and fishery protection in one state to the same extent that it could in a neighboring state because of differences in what are regarded as "beneficial uses" under each state's law.

Solicitor's Opinion, *supra* note 7, at 576.

¹⁰² *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 69 (1966).

¹⁰³ *United States v. Yazell*, 382 U.S. 341, 357 (1966).

¹⁰⁴ Pub. L. No. 94-579, 90 Stat. 243 (codified at 43 U.S.C. §§ 1701-1783 (1976)) [hereinafter cited without cross-reference as FLPMA].

¹⁰⁵ See Landstrom, *An Operational View of the BLM Organic Act*, 54 DEN. L.J. 445 (1977); Lasner, *Federal Land Policy and Management Act of 1976: Fruition or Frustration*, 54 DEN. L.J. 387 (1977).

¹⁰⁶ FLPMA §§ 702-706, 90 Stat. 2787-93.

¹⁰⁷ *Id.* § 701(g), 90 Stat. 2786; see Memorandum of the Solicitor, *supra* note 29.

¹⁰⁸ 43 U.S.C. § 321 (1976) (desert land patentees must acquire water rights under law of prior appropriation and subject to existing rights).

¹⁰⁹ S. REP. NO. 583, 94th Cong., 1st Sess. 77 (1975), reprinted in SENATE COMM. ON ENERGY AND NATURAL RESOURCES, LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976, at 142 (1978).

¹¹⁰ 43 U.S.C. § 661 para. 1 (1976) (United States recognizes appropriative rights established on public land under local law).

¹¹¹ *Id.* § 661 para. 2 (all federal land patents, preemptions, and homesteads subject to vested appropriative rights).

waters then a part of the public domain became . . . subject to the plenary control of the designated states."¹¹²

In 1960, Congress passed the Multiple-Use Sustained-Yield Act ("MUSYA"),¹¹³ the centerpiece of modern National Forest management.¹¹⁴ It was under the secondary purposes¹¹⁵ of MUSYA that the United States made the reserved rights claims rejected in

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¹¹² *California Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935). This case might be limited to its facts—private disputes to which the United States is not a party, *see id.* at 150-51—but a broader policy is expressed in the Desert Land Act.

The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, *insofar as the United States and its future grantees are concerned*, to the state and local doctrine of prior appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation.

Id. at 164 (emphasis added).

Although this is dictum insofar as it refers to the United States, which was not a party, *Beaver Portland* is in principle applicable to the United States. The fact that the *Beaver Portland* Court relied in part on *Kansas v. Colorado*, 206 U.S. 46, 94 (1907), *see* 295 U.S. at 164, does not lessen its precedential value despite *Arizona v. California*, 373 U.S. 546 (1963). *See* note 44 *supra*.

The scope of *Beaver Portland* was limited to public, *i.e.*, nonreserved, lands in *FPC v. Oregon (Pelton Dam)*, 349 U.S. 435 (1955) (Acts of 1866 and 1870 and Desert Land Act inapplicable to reserved lands; therefore, United States need not acquire license under state law to construct hydroelectric dam on federal reservation).

However, *California v. United States*, 438 U.S. 645 (1978), may have overruled *Pelton Dam* on this point. *Pelton Dam* was decided under the Federal Water Power Act, ch. 285, 41 Stat. 1063 (1920), as amended by Federal Power Act, ch. 687, § 201, 49 Stat. 838 (1935) (current version at 16 U.S.C. §§ 791a-828c (1976)). *California v. United States* held that the United States must comply with state water law in a federal reclamation project situated on a nonnavigable intrastate river (such as the one in *Pelton Dam*). 438 U.S. at 651. The United States had attempted to invoke the Federal Water Power Act and *Pelton Dam*. Brief for the United States at 23, 24, 25, 52, 54, 90, 128, 129, *California v. United States*, 438 U.S. 645 (1978). To the extent that the Court rejected this argument and adverted to the Desert Land Act as indicative of the long-standing congressional adoption of state law for federal reclamation projects, *id.* at 657, it revived the broad scope of *Beaver Portland*. Indeed, *California v. United States* quotes the same passage with approval, *id.* at 657-58, and apparently adopts the view of Justice Douglas's *Pelton Dam* dissent. *See FPC v. Oregon (Pelton Dam)*, 349 U.S. 435, 453, 457 (1955) (Douglas, J., dissenting). Thus, *Pelton Dam* now stands only for the proposition that the federal government need not comply with state water law where no federal appropriation occurs. However, even if federal appropriation is not subject to state law on federal reserved lands, the congressional policy of deference to state law still prevails on all federal public lands.

¹¹³ Pub. L. No. 86-517, 74 Stat. 215 (1960) (codified at 16 U.S.C. §§ 528-31 (1976)).

¹¹⁴ MUSYA supplements the Forest Service Organic Act, ch. 2, 30 Stat. 34 (1897) (current version at 16 U.S.C. §§ 473-478, 479-482, 551 (1976)). *See id.* § 528. MUSYA "gave the Forest Service the widest and most comprehensive charter . . . that any Federal agency possesses." S. REP. No. 686, 93d Cong., 2d Sess. 9, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4060, 4068.

¹¹⁵ These are outdoor recreation, range, timber, watershed, and wildlife and fish purposes. 16 U.S.C. § 528 (1976).

United States v. New Mexico.¹¹⁶ Just as MUSYA did not support the reserved right, it does not support a nonreserved right, because there are no federal interests sufficient to justify a uniform federal rule.

For example, uniformity is not essential to the National Forest management program. It could, in fact, be damaging to the program. "One of the basic concepts of multiple use is that all of these resources are entitled to equal consideration, but in particularized or localized areas, relative values of the various resources are to be recognized."¹¹⁷ The Secretary of Agriculture must give "due consideration to the relative values of various resources in particular areas."¹¹⁸ He also must "provide for public participation in the development, review, and revision of land management plans."¹¹⁹ His approach to land management must be "systematic" and "interdisciplinary,"¹²⁰ but nowhere is he charged with the duty of achieving uniformity of forest management. This is not surprising; the policy behind the multiple uses that the Secretary must achieve¹²¹ demands that periodic adjustments in use be made "to conform to changing needs and conditions"¹²² and that "some land will be used for less than all of the resources."¹²³ Uniformity simply is not important to the program.¹²⁴

Thus, neither public lands administered by the Bureau of Land Management nor National Forest System lands require uniform management. Because Congress either has adapted its programs to state law or has designed them to allow for variations in management according to local conditions, lack of uniformity will not frustrate any specific federal objectives.

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¹¹⁶ 438 U.S. at 713-15.

¹¹⁷ H.R. REP. No. 1551, 86th Cong., 2d Sess. 4, reprinted in [1960] U.S. CODE CONG. & AD. NEWS 2377, 2379; see 16 U.S.C. §§ 1604(e), 1604(g), 1607 (1976).

¹¹⁸ 16 U.S.C. § 529 (1976).

¹¹⁹ *Id.* § 1604(d).

¹²⁰ *Id.* § 1604(b).

¹²¹ *Id.* § 529.

¹²² *Id.* § 531.

¹²³ *Id.*

¹²⁴ Cf. *Kleppe v. New Mexico*, 426 U.S. 529 (1976), on which the Solicitor attempts to rely. Solicitor's Opinion, *supra* note 7, at 563, 575-76. There the state defied a specific congressional land management mandate and challenged Congress's power to regulate the public domain. 426 U.S. at 533, 536-37. See also *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980). In both *Kleppe*, see 426 U.S. at 543, and *Ventura*, see 601 F.2d at 1083, 1086, Congress had enacted statutes that—unlike those regarding water regulation on the public domain—were not adapted to state law. The cases are inapposite and do not support the Solicitor's view because Congress has adapted federal land management programs to state water laws.

Furthermore, the nonreserved right threatens to disrupt private relationships based on state law. The Solicitor suggests that the right need not be "perfected under state procedures."¹²⁵ To the extent that federal agencies appropriate water without complying with state procedures, they remove themselves from state jurisdiction. This defeats the purpose of the McCarran Amendment,¹²⁶ which subjects the United States to general state water adjudications. "The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a water system."¹²⁷ The reasons for this policy are the interdependence of water rights and the congressional selection of state water systems for the unification of relationships among users.¹²⁸ The fact that state procedures may burden the United States is not an indication of frustration of a federal purpose.¹²⁹ The United States is subject to them under the McCarran Amendment no matter what water right it asserts.¹³⁰ Finally, the states have a strong interest in regulating the development of water resources, as has long been recognized by the United States.¹³¹

CONCLUSION

This comment has argued that the recent assertions of a federal nonreserved water right are untenable. They are based on two nineteenth-century conceptions that the Supreme Court has rejected or reformulated.

The first is the general federal common law. The nonreserved right argument relies on it in finding a riparian federal right in unappropriated western waters under the common law. No appropriation state's common law provides such support and no other state's courts can create such rights beyond its borders.

The second is that the sovereign interest in natural resources is a property right akin to title. This interest is, in fact, the government's interest in regulating the exploitation of those resources.

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¹²⁵ Solicitor's Opinion, *supra* note 7, at 577. The Solicitor reasons that compliance with state procedure has certain advantages and is the "better policy" but that he is "unable to say that such compliance is required as a matter of law." *Id.*

¹²⁶ 43 U.S.C. § 666 (1976).

¹²⁷ Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976).

¹²⁸ *Id.*

¹²⁹ See *United States v. District Court for Water Div. No. 5*, 401 U.S. 527, 529 (1971).

¹³⁰ *United States v. District Court for Eagle County*, 401 U.S. 520 (1971).

¹³¹ *California v. United States*, 438 U.S. 645, 678 (1978).

There is no federal nonreserved or riparian right in western waters.

Congress does have the power to authorize federal appropriation of western waters, state law notwithstanding. Congress has not done so expressly. Whether it has done so implicitly calls for application of principles of the modern federal common law. Such an application refutes the Interior Department Solicitor's assertion that nonreserved rights exist. Uniform rules are not required merely because a federal right is at issue. There must be a demonstrated need for uniformity. The Solicitor has as yet made no such demonstration, and analysis of several statutes shows that Congress has chosen a flexible approach to federal water use, allowing adaptation to nonuniform local laws and conditions.

Given the consistent congressional policy of deference to state regulation of water rights, the nonreserved right could be justified only by a showing that a uniform rule of federal appropriation was necessary to effectuate important federal interests, and that private rights and state interests would not be disrupted. Absent such a showing, and unless Congress acts, no court should recognize a federal nonreserved right.

Barry C. Vaughan