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WATER RESOURCES ON THE PUBLIC LANDS PLLRC'S SOLUTION TO THE RESERVATION DOCTRINE

*Frank J. Trelease**

INTRODUCTION—THE REPORT AND THE RECOMMENDATIONS

THE water resources chapter of the Report of The Public Land Law Review Commission concentrates on the controversial field of federal-state water rights.¹ The Commission focused attention on what they describe as “the implied reservation doctrine of federal water rights,” based on withdrawals of public domain lands from the operation of some or all public land laws. This fairly new court-made doctrine gave the federal agencies power they did not know they had, but created consternation in the state governments and apprehension in the western water users. The Commission made no attempt to make a coherent system of the doctrine, or even to state it, but addressed itself to the pragmatic problems of how to retain to the federal government the major benefits claimed by federal agencies under the doctrine and how to eliminate its worst effects on the states and the water users.

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1. PUBLIC LAND LAW REVIEW COMM., ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS 141-155 (1970). [Hereinafter cited as REPORT]. The chapter also contained recommendations regarding watershed protection activities: that the public land management agencies report on the objectives, practices and effect of the program and that Congress establish goals and provide funds for them, and that watershed protection should in limited situations be a reason for retention of public lands and a justification for acquiring lands.

The reservation doctrine was foreshadowed by an off-hand statement of the United States Supreme Court in 1899.² It had its real beginnings in 1908 with the holding that the setting aside of an Indian reservation necessarily reserved the water without which the lands would be valueless.³ The effect of the reservation of the water was to make the Indian water rights superior, contrary to the state law of priority, to non-Indian rights off the reservation which antedated actual use by the Indians on the reservation. The major impetus to the doctrine, extending it to other types of reservations of federal lands, came in the 1955 *Pelton Dam*⁴ case, in which the Supreme Court held that state water law presented no barrier to a Federal Power Commission license for a dam located on United States land reserved for a power site, for the reasons that the Act of 1866 and the Desert Land Act of 1877, which severed water rights from land rights on the "public lands" and made them appropriable under state law, were not applicable to "reserved lands." Actual water rights were not involved in that case. The 1963 case of *Arizona v. California*⁵ was the first authoritative case to make an actual allocation of water for reserved purposes other than on Indian reservations. The after-effects are well summarized in the *Report*:

The result has been apprehension in the western public land states that the doctrine will have the effect of disrupting established water right priority systems and destroying, without compensation, water rights considered to have vested under state law. Moreover, the uncertainty generated by the doctrine is an impediment to sound coordinated planning for future water resources development.

Legislative proposals that Congress either affirm, abolish, or clarify the reservation doctrine have been the subject of numerous hearings and discussions during the last decade, but Congress has taken no action on the matter. The issue has been one of the most controversial before the Commission.⁶

2. *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899).

3. *Winters v. United States*, 207 U.S. 564 (1908).

4. *F.P.C. v. Oregon*, 349 U.S. 435 (1955).

5. 373 U.S. 546 (1963).

6. *REPORT*, at 144.

The Commission was aided by a monumental "Study of the Development, Management, and Use of Water Resources on the Public Lands," consisting of a thorough and thoughtful legal study by Charles F. Wheatley, Jr., an attorney in Washington, D.C. and Professor Charles E. Corker, of the University of Washington School of Law, and an analysis of the resources, their economics and technology, by Thomas M. Stetson and Daniel J. Reed.⁷ Federal agencies concerned with public lands and with water resource development, the Department of Justice, governors, state agencies and advisors supplied information to the Commission and the Study contractors and made comments on the Study to the Commission. From all this the Commission distilled the following findings:

The two most important questions which Congress should resolve, however, center on (1) the uncertainty which the doctrine has engendered, and (2) the equity of holders of water rights vested under state law, whose rights may be curtailed without compensation through its strict application. Solutions of these two critical problems would permit reliance on the reservation doctrine where necessary to assure adequate federal water rights for the reserved public lands, and at the same time minimize disruption to existing state administrative machinery, promote more effective water resources planning, and provide equitable treatment to holders of water rights vested under state laws.⁸

The counsel of the Commission is that these questions and these objectives are to be answered and met by:

Recommendation 56: The implied reservation doctrine of water rights for federally reserved lands should be clarified and limited by Congress in at least four ways: (a) amounts of water claimed, both surface and underground, should be formally established; (b) procedure for contesting each claim should be provided; (c) water requirements for future reservations should be expressly reserved; and

7. WHEATLEY, CORKER, STETSON, REED, DEVELOPMENT, MANAGEMENT AND USE OF WATER RESOURCES ON THE PUBLIC LANDS, Clearinghouse for Federal Scientific and Technical Information of the Dept. of Com., PB188 065 & 188 066. (Hereinafter cited as STUDY).

8. *Id.*, 147.

(d) compensation should be awarded where interference results with claims valid under state law before the decision in *Arizona v. California*.⁹

If Congress follows these recommendations and the legislation successfully accomplishes the Commission's objectives, it will retain the major benefit of the doctrine to the federal agencies, still freeing them from state control of waters on reserved public lands, whether the reservation be made in the past or in the future. It will remove the open-ended feature of past reservation, for the agencies will have to fill in the blank checks they hold on water resources on or near the reserved lands. In the future, the "implied" feature of the doctrine will disappear and both the reservation of water and its amount will be spelled out. The possibility that appropriators may lose their water without compensation by an exercise of the reserved right will be removed as to pre-1963 rights but retained for appropriations since that date. Apparently the operative fact is notice: the federal government will lose a windfall, but one it did not know it owned, while the appropriator's past rights will not be subject to a superior right he did not know existed but in the future his new rights will be subject to reservations for particular uses and quantities, which he does know about.

QUANTIFICATION.

Many of the early proposals put forth by states and their Congressmen and Senators were for substantial elimination of the doctrine. All failed. More recently demands have been made for "quantification": if the identity and amounts of the superior federal claims are at least known, many of the uncertainties felt by the western states and their water users will be resolved.

The *Report* does not spell out the nature of these uncertainties. The Study, however, lists no less than six different possible forms of the reservation doctrine and enumerates eleven unresolved issues that present uncertainties for federal

9. *Id.*, 146.

administrators.¹⁰ Most of these are one side of a coin which presents to the state and to the water user opposite but corresponding uncertainties as to the nature of the right to which they may have to yield. If state water administrators and water users holding state-created water rights do not know what they are up against, when it can be called into play and how much it can hurt them, then life for them is indeed uncertain. The Study next views the impact of the doctrine on non-federal public and private beneficial uses, and starts with the spine-chilling reminder that 61% of the 363 million acre feet of water arising in the eleven western states originates on National Forest and National Park reservations. In a turn-about, it then estimates current uses on reservations as an almost *de minimis* 2.25 million acre feet of the 113 million of total withdrawals in those states. Whether this is looked at as 2.25/113th or 2.25/363rds the prediction is that by 2000 A.D. the numerator will increase only to 2.6. The chiller seems based on the utmost extension of the doctrine to reservation of all water "arising on" reserved lands, the *de minimis* refresher on the reservation of water only for "intended reservation purposes." In between these is a fair area of uncertainty.

As for the possible impact on private rights, only one small example of actual deprivation of water by exercise of the reservation doctrine was found, and it has apparently come to naught.¹¹ The big potential for future displacement is, of course, found in the Indian claims, a matter outside the purview of the *Report* and of this review. Nevertheless, the future impact of the non-Indian doctrine will not come off the top of a 363 million acre foot tank, but in specific locales where the possible quantity that could be involved might have serious effects on meager local supplies and on a number of valuable

10. STUDY, *supra*, n. 7 558-564.

11. Glenn v. United States, Civil No. C-153-61 (D. Utah March 16, 1963), discussed in STUDY, 90-91, 116-121, 144-145. Mrs. Glenn sued under the Tort Claims Act for loss of a 1930 irrigation appropriation to a recreation area in a National Forest established in 1897. Her suit was dismissed on stipulated "facts" which assumed a state of law more favorable to the government than might actually be the case. However, Mrs. Glenn's use has now been changed to domestic use for a small resort on Flaming Gorge Reservoir, and apparently there is water enough for her uses as well as for the campground—bourbon may be diluted, teeth brushed and toilets flushed at both locations.

rights. This uncertainty may render the rights less valuable, and be reflected in land values.

Where the impact may fall on unappropriated water, the uncertainties may still be troublesome. Possible private uses of water that may be claimed under the doctrine may be deterred, investments in the water and in the potential enterprises that could use it may be foregone. A very loud complaint of state water officials and political leaders is that as full development approaches, state planning for use of the remaining available and unappropriated waters—which are meager indeed in some areas—cannot proceed without knowing the quantity of water to be dealt with. The physical measurements of the stream may be known, but if the federal government has a superior, unused, undimensioned claim to it, planning for the future takes the form of a guessing game.

The solution proposed is to identify and quantify the reserved waters and water rights. Once their identity, location, purpose, priority, place of use and above all quantity are determined, many possibilities of impact on private rights are eliminated, and the effect on particular rights and victims can be pretty well determined. If they will result only in use of unappropriated water, the planners can subtract them from the physical supply and make their plans with the remainder. The cloud may be removed from many sources and developers and investors may proceed with their enterprises.

The original suggestion for delineation of federal claims to reserved water emanated from the Department of Justice in 1963.¹² Any suggestion from this department should be treated with respect, for its opposition has been a key factor in the failure of the Barrett bill, the Aspinall bills, the Kuchel bills and a myriad¹³ of other bills for a "Western Water Rights Settlement Act" to get anywhere, even out of committee. Yet there could be trouble ahead even for a quantification bill. The Department of Justice does not carve its pronouncements and positions on stone. The 1963 proposal, put

12. Morreale [Hanks], *Federal-State Conflicts over Western Waters—A Decade of "Clarifying Legislation,"* 20 *RUTGERS L. REV.* 423, 498 (1966).

13. *Id.* In 1966 Professor Eva Morreale Hanks counted fifty.

forth my Ramsey Clark, then Assistant Attorney General, Land and Natural Resources Division, was coupled with suggestions for temporary private use of the inventoried reserved waters and the appropriation of water in excess of that inventoried, clearly imparting a binding effect to the inventory. His successor, Clyde O. Martz, in a report to the Public Land Law Review Commission, coupled a proposal for an inventory with a procedure for adjudicating the federal claims in state courts.¹⁴ But the Department may be backtracking. The situation in New Mexico has been cited as a model of federal-state cooperation, and in that state the Department of Justice has been persuaded to join in several adjudications, eliminating questions as to the scope of the McCarran Amendment by having the United States intervene as a plaintiff seeking determination of federal water rights.¹⁵ Now, however, it is reported that the attorney from the Department of Justice who represents the U. S. in those cases seeks to list possible forest uses without putting a top limit on their quantity and to add a general catch-all of "other forest purposes." If this procedure is allowed, the adjudications will result in no inventory at all.

The procedure the Commission recommends to Congress in subsidiary and slightly more detailed recommendations is to "[p]rovide a reasonable period of time within which Federal land agencies must ascertain and give public notice of their projected water requirements for the next 40 years for reserved areas, and forbid the assertion of a reservation claim for any quantity or use not included within such public notice."¹⁶ But unless this is done in a cooperative spirit of good faith, if inflated and open-ended claims are put forth, the result may not be much better than what we now have. And it is obvious that in the New Mexico case the problem of the government lawyer and of the Forest Service official supplying him with information is that neither wants to be identified as "the man who gave away the government's water" when some currently unforeseeable (or overlooked) need for

14. STUDY, *supra*, n. 7.

15. Memorandum, F. Hurlan Flint, General Counsel, to S. E. Reynolds, New Mexico State Engineer, May 2, 1969.

16. REPORT, 147.

water arises. It is therefore not to be assumed that there will be no federal opposition to proposed legislation calling for firm inventories.

PROCEDURES.

The *Report's* next subsidiary recommendation is for Congress to "establish a procedure for administrative or judicial determination of the reasonableness of the quantity claimed, or the validity of the proposed use under present law."¹⁷

The "McCarran Amendment" might appear to the casual reader as providing state adjudicating procedures as a mechanism for judicial review of the agency inventories, but it has inherent defects and has been so circumscribed by interpretation that it will not do.¹⁸ Although the defects of the Amendment which make it an unsatisfactory vehicle are noted, the *Report* does not recommend its modification to eliminate them. Neither does it recommend that such a course be not pursued. It ducks the issue by recommending *any* form of "administrative or judicial determination."

If what is meant by administrative determination is a process within the federal agencies themselves, it is submitted that it will hardly fail to be subject to the same weaknesses noted above. For instance, the Secretary of Agriculture no more than the Regional Forester wishes to have the finger of shame pointed at him, especially since he must rely on information supplied by that forester. Perhaps a broadening of the McCarran Amendment would lead to administrative review by state water officials, as well as by state courts. The Study indicated the range of choice as lying between this course and the creation of a federal administrative tribunal for the adjudication of water rights.¹⁹ If administrative procedures are used, both the study and the *Report* recommend judicial review,²⁰ which is to extend to "at least the limited questions of the reasonableness of the quantity claimed . . . its

17. *Id.*

18. 66 STAT. 560 (1952), 43 U.S.C. § 666 (1964).

19. STUDY, 580.

20. REPORT, at 148.

priority date and . . . purposes." This would make the courts the protectors against inflated claims and the decision makers as to the reasonable probabilities that water will be put to use within forty years. Just how often the courts will be persuaded to substitute their judgment for that of the experts is open to question. If this is to be their job, if the judge is to be freed from the substantial evidence rule and the clearly erroneous doctrine, I rather prefer the suggestion of Glen Taylor, when Acting Assistant Attorney General, that he handle the whole matter:

A simplified procedure for adjudication in the federal courts of the validity of such administrative determination could constitute an additional safeguard. We tend to think that provision for judicial review of the administrative determinations at the suit of state administrators or holders of conflicting water rights would be a much simpler way to accomplish this objective than to amend [the McCarran Amendment] in the manner suggested. . . Such a procedure would adequately provide for judicial determination of the validity of the United States' claims of federal rights, it would avoid submitting the United States to numerous uncertainties which presently exist as to whether state laws permit the recognition of such rights in state court adjudication proceedings and it would avoid the necessity for disrupting normal state court adjudication procedures by injecting into them federal questions with respect to federal reserved rights which are clearly more appropriate for determination by the courts of the United States than by courts of the several states.²¹

One issue before the adjudicating body is sure to be the scope of the reservation doctrine. Again the agencies and the Department of Justice can be counted on to make the broadest possible claims, to push for that statement of the doctrine which will give the United States the freest hand, to argue that each uncertainty in the law of the doctrine be resolved in the government's favor. Congressional codification or limitation of the doctrine was given as an alternative in the Study

21. Letter, Glen E. Taylor, Acting Assistant Attorney General, to Chairman Wayne M. Aspinall, April 15, 1969.

but rejected in the *Report*, and while enactment of a federal water code might be a long drawn out process, and the code might itself be subject to lengthy litigation over its interpretation, it could have advantages. To the states, Congress might be more generous than the Supreme Court. Legislators striving for fairness and equity might waive much that the Court would declare as a naked legal question of federal power. The level of abstraction at which these matters may be argued presents other problems. The *Report* speaks of "timely contests by present users or appropriate state agencies" but disapproves of a "case by case approach."²² Perhaps individual water users will be present claiming specific present or potential harm from particular claims of reservation, but more likely and more often the Attorneys General of the states and the Solicitor General of the United States will be arguing big, theoretical, legalistic questions of who has jurisdiction over bits and pieces of unappropriated water, in large complicated adjudication proceedings that will eventually reach the United States Supreme Court. Each, under the adversary process, can be counted on to stretch his arguments and the authorities as far as they will go. Anyone who has read any Supreme Court water cases since *First Iowa*²³ will start giving odds on the outcome without waiting for further details.

COMPENSATION.

The final recommendation of the Commission is that Congress "require compensation to be paid where the utilization of the implied reservation doctrine interferes with uses under water rights vested under state law prior to the 1963 decision in *Arizona v. California*." This recommendation is a very large victory for the states, and a deserved one. The reasons are admirably stated: "As a matter of policy Congress has generally provided in the Reclamation Act of 1902 and the

22. REPORT at 147 & 148.

23. Cf. Meyers, *The Colorado River*, 19 STANFORD L. REV. 1, 61 (1966): "A brief review of the leading cases [*First Iowa Hydro-Electric Co-op v. F.P.C.*, 328 U.S. 152 (1946); *F.P.C. v. Oregon*, *supra* n. 4; *Arizona v. California*, *supra* n. 5; *City of Fresno v. California*, 372 U.S. 627 (1963)] will sustain the contention that the Court steadfastly adheres to the view that the decision-making power in water resource allocation should be made an exclusive federal function, regardless of what Congress says."

Federal Power Act of 1920 that compensation be provided to holders of water rights vested under state law when they are interfered with by projects authorized or licensed under those two acts. We find no reason for a different policy where public land programs are involved. As a matter of fairness and equity, it is appropriate to compensate holders of vested state water rights whose uses are curtailed through federal reliance on the implied reservation doctrine. We believe that the potential costs of the federal government would be relatively low."²⁴

Best of all, I like the last: "In any event, the social costs of displacing existing uses for the benefit of national programs should be borne by federal taxpayers, and not by the affected individual users." I once said in this regard:

The compensation principle is needed not because it sets states' rights above the national powers, or private interests above national interests, but because it is in the national interest and is in accord with the very policy officially adopted by the agencies of the United States and approved by the President of the United States. . . . On this issue of a state desire for secure water rights versus federal reluctance to buy back what it has given away, the solution seems a simple one, yet one that is somehow just beyond our grasp. All that is needed is for federal officials on the policy-making level to understand an economic principal that is intuitively known by the Western water user and that has been officially adopted—on paper—as the policy of the Department of the Army, the Department of the Interior, the Department of Agriculture, and the Department of Health, Education and Welfare, and approved by the President. That is, that in developing water resources the goal is "to provide the maximum net benefits," and that in counting costs against those benefits the government should include "losses . . . and induced adverse effects . . . whether or not compensation is involved." This quotation is worth more than a footnote citation; it is from "Policies, Standards, and Procedures in the Formulation, Evaluation, and Review of Plans for the Use and Development of Water and Land Re-

24. REPORT, 149.

sources," prepared under the direction of the President's Water Resources Council in 1962. [S. Doc. No. 97, 87th Cong., 2nd Sess. (1962)] What does it mean? It means that if the government initiates a water use for a military purpose on reserved land, and thereby deprives a farmer of water used for irrigation, the loss of the irrigation is a cost of the new military use. It is a cost whether or not the government pays the farmer. If, in addition to reserved land, the Defense Department needs the farmer's water, it will pay him for it. But the land, too, was "given away"—it was homesteaded by the farmer's grandfather. For years the land and water have increased the gross national product and the national welfare. This productive quality has given each a value. Now, if either land or water must be used for military purposes, that gross product and that welfare will be decreased, and that value will be destroyed. The only issue is who should bear the loss and pay the cost. Should it be paid from the national treasury and borne by all those in the nation who get the benefit of the military post, or should the farmer be required to lay this costly sacrifice on the altar of the public good?²⁵

I once tried to show that a sensible system of water rights ought to include security of water rights and eschew uncompensated transfers of water from one user to another, for reasons of policy, to promote wise resource uses and practices.²⁶ Most people can see this as between individuals and do not openly favor impoverishing *A* in order to enrich *B*. However, many do not at first grasp this principle as between individuals and the government or the public. But governments do not use water. People do. Using water "reserved for recreational use by the public" may mean giving it to the proprietor of a commercial ski resort constructed under a national forest use permit and taking it away from a resort owner located just outside the forest boundary. Oil shale, we are told, is a resource of great magnitude, which "belongs to

25. Trelease, *Water Rights of Various Levels of Government—State's Rights vs. National Powers*, 19 WYO. L. J. 189, 200-202 (1965).

26. Trelease, *Policies for Water Law; Property Rights, Economic Forces and Public Regulation*, 5 NATURAL RESOURCES J. 1 (1965).

all the people of the United States.”²⁷ If the withdrawal of oil shale deposits and their temporary reservation “for the purpose of investigation, examination and classification” should be held to have reserved all water needed for extracting and processing the shale²⁸ then the water may well be taken from farmers, turning their farms and orchards to desert, and given free to large oil companies. Even where the use is directly by a government agency, as for a military post that takes water from stockmen and sheepmen, the citizens and taxpayers of America are using the graziers’ water for their defense and should pay for it.

The recommended solution is the combination of a retro-active abandonment of the reservation doctrine (for compensation purposes) but its prospective retention for all purposes. All non-Indian reserved water rights are given a new priority date, June 3, 1963, instead of the date the reservation was created. The theory is that the vice of the doctrine is that it has been sprung without notice on the state water users. “Prior to the Supreme Court’s decision in *Arizona v. California* . . . , no water user could have been on actual or constructive notice of the existence of such an ‘implied’ federal water right.”²⁹ In the future appropriators will know that they are tenants at will of the water and that the federal landlord may evict them at any time, and they may govern their acts and investments accordingly.

As a quibble, why 1963? A good deal of notice was given by the *Pelton Dam* case in 1955 and by the public and Congressional furor that followed. Although *Arizona v. California* was the first Supreme Court case to actually allocate water under the reservation doctrine, the doctrine’s existence and shape was quite well indicated by *Pelton*, some lower court cases, and the Indian cases. The only answer that occurs to me is that fewer people will be caught and deprived of water if the 1963 date is used, and that seems answer enough.

27. Galbraith, *Separate Views, Interim Report of the Oil Shale Advisory Board*, printed in 2 LAND AND WATER L. REV. 51 (1967).

28. See STUDY at 247, Hillhouse, *The Federal Reserved Water Doctrine—Application to the Problem of Water for Oil Shale Development*, 3 LAND & WATER L. REV. 75 (1968).

29. REPORT, 149.

The future retention of the reservation doctrine seems a trade-off, a *quid pro quo* to the federal agencies. Their position has been that in the past the use of state water law by the federal government may have worked very well, but that it is now inadequate for new federal programs and policies. New reservations may be needed to avoid "the proposition that the federal government should first give away what it owns and then purchase it back."³⁰ The Commission therefore recommends a new reservation doctrine for the future: that Congress provide procedures for the creation of future withdrawals and reservations, requiring specific claims of reserved water rights, buttressed by a statement of prospective water requirements and an express reservation of such quantity of unappropriated water.³¹

Another quibble: Congressmen seeking to implement the recommendation should be careful in their draftsmanship and should not use the Commission's wording. Compensation is to be awarded "where interference results with claims valid under state law before the decision in *Arizona v. California*." The Supreme Court might treat such language as it did Section 18 of the Boulder Canyon Project Act: "Nothing herein shall be construed as interfering with such rights as the states now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary. . . ." In brushing aside *all* state laws as inapplicable to project water rights, the Court said that the rights the states "now" had in 1928 were "then" subject to federal powers to regulate and develop the river, and were superseded by the very act which stated that it was not interfering with them.³² Similarly, "claims valid under state law before the decision in *Arizona v. California*" were then subject to the reservation power, though "valid."

Finally some questions are left as to the form compensation should take and the procedure for obtaining it. Of course here as elsewhere the Commission was not writing legislation for Congress, but these details may be important. Ideally,

30. Morreale, *supra* n. 12, at p. 468.

31. REPORT, 149.

32. *Arizona v. California*, 373 U.S. 546, 587 (1963).

water rights should be property rights which the owners may dispose of for such compensation as they may fix. If taken under eminent domain, an artificial price is set. In every state the cities are superior governments which may take the water rights of irrigators, and they buy or condemn water rights as needed. But the use of the reservation doctrine apparently does not contemplate transfers of water rights as such. Rather, the contemplated system seems to be to simply take water, and pay damage if it is later found that the holders of water rights have been injured. The taking of a water right may be expensive, since the new user will always insist on obtaining a good right with an early priority. Paying for damage may be cheaper since the rights of the junior appropriators most likely to be affected are marginal and less valuable. But this process brings up all sorts of problems of whether anything is taken at all, of multiplicities of suits, of serious problems of the statute of limitations and the measure of damages. One difficulty is that in a poor water year, even an appropriator well up on the priority list may suffer from a shortage of water and be injured by a federal taking of water, while the very junior appropriator is harmed not at all because even without the federal use he would get none. Perhaps one solution might be something comparable to the practice of taking easements to flood instead of land itself in the upper levels of flood control reservoirs. The value of the easement is calculated with reference to the possible frequency of floods which would inundate the land when caught behind the dam. Perhaps hydrologists could produce a formula that would predict the probability of harm to each appropriator of a source from which a certain quantity is taken, which could be used to figure the reduction in value of the water right.

CONCLUSIONS.

There is an air of unreality to the controversy over the reservation doctrine. No one is badly hurt, at least as yet. We speak of fears. Are they just of bugaboos that hide in the dark of the future? The *Report* addresses itself to this question: "The Commission gave much attention to the question of

whether this controversy might be only a doctrinal legal argument with little substantive impact. We conclude it has substance." The Study made its own inventory of present and proposed uses of reserved water and came up with totals that are within the margin of error of water measurement.³³ The effects downstream, on large projects on large rivers, well may be *de minimis*, even difficult to detect. However, when these totals are split up and the items are identified as particular demands at particular places, conflicts with particular rights may arise. Campground uses may be minimal, but some types of federal uses on reserved lands, especially in the headwaters, could call for fair-sized projects that consume or withdraw substantial quantities measured by that locally available. To some very real degree, then, the Commission's two major concerns of uncertainty and equity do exist. The Commission meets the first by quantification and the second by compensation. Will the Commission's solutions work?

I have expressed fears that "quantification" is not a magic word that will solve all problems. It may not even quantify. It could do so, and work very well, if employed as suggested by the Forest Service, "with discretion, understanding and emphasis on minimizing uncertainties."³⁴ Many men of good will and discretion are to be found on the staffs of the federal agencies. But there may be some who are overbearing, or timid. They may prepare inventories which are grandiose claims of a pie-in-the-sky order, which may confirm the worst fears of state planners, who will see little left for them, and which may unnecessarily becloud the titles to unused waters, perhaps deterring development even more than the present uncertainties.

I have expressed fears that the "clarification" necessarily involved in determining what and how much goes into the inventory may take the worse possible direction, from the standpoint of the states and the water users. I am not sure that this issue will be best decided by the courts in special

33. STUDY, 463-486.

34. Department of Agriculture comments on STUDY, accompanying letter, Clifford M. Hardin, Secretary of Agriculture, to Director Milton A. Pearl, PLLRC, April, 6, 1969.

proceedings. The case by case method, rejected by the Commission, might be better. Codification, which might be more liberal to states, was also rejected.

But if Congress can be moved to order the inventory, perhaps it can be persuaded to lay down some ground rules for it. At the least it might require that the adjudicating body find and justify a congressional intent to reserve water for each reservation of land, and that the water claimed must be shown to relate to the purposes of the reservation when made. It might remove other uncertainties, as much for the protection of federal agencies, projects and uses as for the elimination of uncertainties to the states and water users. It should find and lay down principles for quantification, so that the inventory becomes a meaningful thing.

On the question of compensation, I wholeheartedly agree that any water users harmed by exercise of the reservations should receive compensation. They may be few. Fifteen years after *Pelton Dam* we still have no claimants for it. I suggest that the major effect of Congressional adoption of the Commission's recommendation would be the same as quantification: the removal of uncertainty. Water users who feel themselves under the gun, whose land and enterprise values are depressed by fears of uncompensated taking, would be able to rest easier.

My initial reactions, then, are that the Public Land Law Review Commission's recommendations might work. They should be tried, they should be supported. I have some nagging doubts. There may be a better solution, a more encompassing solution. The reservation doctrine applicable to non-Indian lands is but a small part of the very large and very complicated field of relations between the states and the federal government in water conservation, use and development. These legal problems are but a small part of a proper policy for federal, state and private water conservation, use and development. The total area is currently under consideration by another federal study agency—the National Water Commission. I do not suggest a jurisdictional problem but a practical one.

The National Water Commission will consider not only that portion of the reservation doctrine which was the concern of the Public Land Law Review Commission but also its much larger facet, quantitatively, the reservations for the Indians. This area is complicated not only by questions of federal-state conflicts of power but by even more difficult problems of justice to those people of the United States for whose benefit the reservations were made, as well as justice to off-reservation water users. The solution of subsidiary problems of the method and measure of quantification, the purposes, transferability and leasability of Indian rights and the questions of who should bear the social costs involved may have a bearing or an effect on the non-Indian reservations. The National Water Commission will also concern itself with the navigation servitude, which in some respects of uncompensated destruction of rights closely resembles the reservation doctrine. As for planning by the states, it will study the problems resulting from the dissolution of the partnership between the state and federal governments by the construing away of Section 9(b) of the Federal Power Act and Section 8 of the Reclamation Act³⁵ and the new problems of how to get an effective state voice in the total planning process, including the coordination of state and federal efforts to preserve and use waters for recreation, fish and wildlife purposes and protection of the environment. It will study problems of alleged federal infringement on states' rights created under compact, problems arising out of federal operation of projects, or from possible future transbasin diversions. Out of these studies may come recommendations for a truly national water law with both state and federal components. The reservation doctrine and the problems arising from it might sink quietly beneath the waters of the policy guiding such a law. Such a policy should call for federal insistence on federal law when national considerations require it, but permit federal accommodation of state interests where federal objectives are not sacrificed, and federal adjustments to state needs where state interests outweigh federal advantages. A national water policy should also encourage

35. See *Arizona v. California*, 373 U.S. 546 (1963); *City of Fresno v. California*, 372 U.S. 627 (1963); *First Iowa Hydro-Electric Co-op v. F.P.C.*, 328 U.S. 152 (1946).

the improvement of state water law to accomplish federal as well as improved state objectives, the improvement of state water administration and planning, and above all the improvement of federal-state communication, procedures and organizations for planning. If such a policy can be found and implemented, there will be no reservation doctrine problems.