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GENERAL STREAM ADJUDICATIONS, THE MCCARRAN AMENDMENT, AND RESERVED WATER RIGHTS

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I. INTRODUCTION

General stream adjudications (GSAs) are special proceedings, usually judicial, in which the priority and scope of the legal rights to all water uses from the same source of supply are determined.[1] GSAs are being used in many western states to determine the existence and scope of both Indian and federal reserved water rights.[2] That state courts are determining federal rights is the product of the McCarran Amendment, made law by Congress in 1952.[3] Ordinarily, water rights are established under state law.[4] Reserved rights are a prominent exception. States have long been concerned about these inchoate claims to use water and have wanted to get them determined in order to integrate them administratively with state-law water rights.[5] The McCarran Amendment provides a mechanism for this purpose.

A decision to enter into a GSA represents a major commitment of state resources and involves the participation of many, if not all, existing water users from the same source of water supply.[6] GSAs are lengthy, contentious, and

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[1] A. Dan Tarlock, LAW OF WATER RIGHTS & RESOURCES § 7:2 [hereinafter Tarlock].

[2] John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II*, 9 U. DENV. WATER L. REV. 299 (2006) [hereinafter Thorson II].

[3] Act of July 10, 1952, Pub. L. No. 945, 66 Stat. 560 (current version at 43 U.S.C. § 666 (2015)). *See infra* note 20 and accompanying text.

[4] *See*, *e.g.*, DAVID H. GETCHES, WATER LAW IN A NUTSHELL (4th ed. 2008).

[5] Thorson II, *supra* note 2, at 305–06.

[6] *Id.* at 366–67.

complex proceedings that extend far beyond determination of tribal and federal water claims.[7] Nevertheless, most western states have decided they are worth initiating and completing, even with their challenges.

While there are undoubted benefits to states to have Indian and federal reserved rights determined, prioritized, and quantified, there appear to be serious questions about having this determination occur in state courts. With nearly forty years of experience it now appears that these courts are sometimes reaching widely differing results, based on the manner in which they apply federal law—results that are leading to a law of reserved rights that seems to vary from state to state and that, in some cases, appears to frustrate the federal purposes intended to be achieved under the reserved rights doctrine.

This article addresses the use of GSAs to determine both Indian and federal reserved water rights. It begins in Part II with a brief summary of the reserved rights doctrine.[8] This part also includes a discussion of the McCarran Amendment and the decisions of the U.S. Supreme Court holding that state courts, as part of properly structured GSAs, can determine and quantify Indian and federal reserved water rights. Part III then examines all state appellate court decisions involving the determination of reserved water rights as part of a GSA. It concludes that GSAs in state courts are not appropriate forums for the determination of federal and Indian reserved rights.[9]

II. THE RESERVED RIGHTS DOCTRINE AND THE MCCARRAN AMENDMENT

The primary motive for most general stream adjudications in the past forty years has been to determine and quantify federal and Indian reserved rights.[10] The existence of such rights is outside state law and process, and their scope and potential seniority place a cloud of uncertainty on uses established under state law.[11] The implied reserved rights doctrine is a product of federal common law, a determination by the U.S. Supreme Court of an implied intent by the United States when reserving federal lands to also reserve some portion of available water from

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[7] *Id.* at 464.

[8] *See infra* notes 10–13 and accompanying text.

[9] For a critique of general stream adjudications more generally, see Lawrence J. MacDonnell, *Rethinking the Use of General Stream Adjudications*, 15 WYO. L. REV. 347 (2015) [hereinafter Rethinking] (concluding that general stream adjudications are nineteenth century artifacts that are expensive, cumbersome, time consuming, and not either necessary or appropriate for determining state-law-based water rights).

[10] Scott B. McElroy & Jeff J**.** Davis, *Revisiting* Colorado River Water Conservation District v. United States–*There Must be a Better Way*, 27 ARIZ. ST. L.J. 597, 612 (1995) [hereinafter McElroy & Davis].

[11] Thorson II, *supra* note 2, at 306–12.

disposition under state law in order to enable fulfillment of federal objectives.[12] It first emerged in the context of reservations of lands in which Indians were to permanently reside—arid lands that require the use of large quantities of water to live and establish a viable community and economy.[13]

The U.S. Supreme Court first announced this doctrine in its 1908 decision, *Winters v. United States*.[14] The Court determined that the treaty entered into between the United States and two tribes creating the Fort Belknap Indian Reservation along the Milk River in Montana impliedly reserved water necessary to build and maintain a permanent homeland.[15] This water had been set aside in 1888, at the time the treaty was signed.[16] Appropriative rights established under Montana law to this source of water were later in time and thus subject to the prior tribal rights.[17] The Court determined that the United States and tribes could reserve this water even after a territory became a state.[18]

Congress attached the McCarran Amendment to an appropriations bill for the Justice Department in 1952.[19] The Amendment provided a waiver of federal sovereign immunity in the event a state filed a "suit" for the adjudication of rights to use the water of a "river system."[20] There is no mention of reserved water

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[12] *See, e.g.,* Cappaert v. United States, 426 U.S. 128, 138 (1976). For a thorough overview of federal and Indian reserved rights law, see Robert E. Beck, *Reserved Water Rights*, *in* 4 Waters and Water Rights, Ch. 37 (1991) [hereinafter Reserved Water Rights].

[13] Winters v. United States, 207 U.S. 564 (1908).

[14] *Id.*

[15] *Id.* at 575–76.

[16] *Id.* at 576.

[17] *Id.* at 577.

[18] *Id.*

[19] McElroy & Davis, *supra* note 10, at 601. This article discusses the concerns that motivated adoption of this provision. *Id.* at 601–05; *see also* Michael Lieder, *Adjudication of Indian Water Rights Under the McCarran Amendment: Two Courts Are Better Than One*, 71 Geo. L.J. 1023 (1982–1983).

[20] Now codified at 43 U.S.C. § 666, it provides:

> (a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, order, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances:
>
> *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

rights in the provision, and apparently there was little discussion of reserved rights during the legislative process.[21]

In the 1963 *Arizona v. California* decision, the Court applied the *Winters* doctrine to confirm the existence of reserved water rights for tribes with reservations located along the mainstream of the Colorado River in Arizona, California, and Nevada.[22] The Court adopted the "practicably irrigable acreage" standard for quantifying these rights, finding that the reservations had been established for the purpose of setting aside permanent homelands for the tribes and that the expectation was that irrigated agriculture would be a primary means for which reservation lands would be used.[23] Without analysis or discussion, the decision also extended this doctrine to other federal land reservations, concluding that the same principle of implied intent to achieve reservation purposes applied.[24] The Court found that reserved water rights had been created for a national recreation area and two national wildlife refuges located along the lower Colorado River.[25] The Court also concluded that reserved rights had been established with the creation of the Gila National Forest in New Mexico, but it did not attempt to quantify these rights.[26] The substantial quantities of water determined to be associated with the Indian reserved water rights, together with the newly determined existence of reserved rights associated with other reservation of federal lands, raised widespread concern among the western states that water rights established under state law would be displaced by senior Indian and federal reserved water rights.[27]

Sometime later in the 1960s, the United States found itself resisting joinder under the McCarran Amendment in a supplemental adjudication proceeding in Colorado for the purpose of determining its reserved water rights.[28] Colorado had long used a judicial adjudication process to verify the claims of appropriation of

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[21] McElroy & Davis, *supra* note 10, at 601 ("The history of the bill shows virtually no interest on the part of Congress in the adjudication of Indian reserved rights.").

[22] Arizona v. California, 373 U.S. 546, 599–600 (1963); *see also* NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE: FINAL REPORT TO THE PRESIDENT AND TO CONGRESS OF THE UNITED STATES 475 (1973).

[23] *Arizona*, 373 U.S. at 600.

[24] *Id.* at 595.

[25] *Id.* at 601.

[26] *Id.*

[27] WESTERN STATES WATER COUNCIL, INDIAN WATER RIGHTS IN THE WEST: A STUDY (1984).

[28] United States v. Dist. Ct. in and for the Cnty. of Eagle, 458 P.2d 760 (Colo. 1969). The U.S. Supreme Court first considered the scope of the McCarran Amendment in *Dugan v. Rank*, 372 U.S. 609 (1963). Here, the U.S. Supreme Court held that a suit filed against the government by downstream water users to prevent storage of water in Friant Dam failed because the United States had not waived its sovereign immunity. 372 U.S. at 611. The Court noted that the suit did not include all water users nor was it seeking the determination of priorities. *Id.* at 618.

water.[29] Now a Colorado court, in an adjudication instigated by the Colorado River Water Conservation District, sought to join the United States for the purpose of determining its reserved rights.[30] The United States opposed joinder, arguing the Colorado process did not meet the requirements of the McCarran Amendment.[31] Under the rule that only parties to an adjudication are bound by its results, the United States noted that Colorado's supplemental adjudication proceedings did not include those whose rights had already been adjudicated and did not allow the award of a priority earlier than all those already adjudicated.[32] Thus, the court would be unable to recognize the earlier priorities associated with reserved water rights.[33] Moreover, because the Amendment refers to adjudications of a "river system," the United States argued that a state adjudication that does not encompass an entire river and its tributaries does not meet this requirement.[34] Finally, the United States argued that the McCarran Amendment did not give state courts the authority to determine federal reserved rights.[35]

The case went first to the Colorado Supreme Court. In its review of the McCarran Amendment, the court noted:

> Our situation with respect to water rights has been that priorities are decreed under state laws, but any water rights of the United States in Colorado remain mysterious, largely unknown, uncatalogued and unrelated to decreed water rights. This creates an undesirable, impractical and chaotic situation. It was to

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[29] Robert G. Dunbar, Forging New Rights in Western Waters 92 (1983).

[30] *Cnty. of Eagle*, 458 P.2d at 761.

[31] *Id.*

[32] *Id.* at 767.

[33] *Id.* While the matter has not been litigated, the extent to which an adjudication must include *de minimis* water users to satisfy the McCarran Amendment has been noted. Thorson II, *supra* note 2, at 366–67. Problematic are the large number of de minimis water users such as those using domestic wells or stock water ponds. More potentially significant is whether users of tributary groundwater must be included. *See also* Thomas H. Pacheco, *How Big is Big? The Scope of Water Rights Suits Under the McCarran Amendment*, 15 Ecology L.Q. 627 (1988).

[34] *See, e.g.*, United States v. Dist. Ct. in and for the Cnty. of Eagle, 401 U.S. 520, 523 (1971); *In re* Snake River Basin Water System, 764 P.2d 78, 86 (Idaho 1988); Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ., 849 P.2d 372, 373 (N.M. Ct. App. 1993). The United States has also questioned the use of administrative processes as part of an adjudication because the Amendment specifies there must be a "suit." United States v. Oregon, 44 F.3d 758, 765 (9th Cir. 1994). A consequence of these efforts to avoid application of the McCarran Amendment is the belief that state adjudications have to be as comprehensive as possible, pushing states towards establishing what have proved to be complex and challenging processes. *See* Thorson II, *supra* note 2, at 368 ("Comprehensiveness is required for the waiver of sovereign immunity under the McCarran Amendment.").

[35] *See, e.g.*, United States v. Dist. Ct. for Eagle Cnty., 401 U.S. 520, 523–24 (1971).

> remedy this situation and similar ones in other states that caused Congress to adopt the McCarran Amendment.[36]

The court decided that Colorado's adjudication statute gave Colorado courts "plenary" jurisdiction of the determination of all water rights in Colorado, including those of the United States and including claims based on the reserved rights doctrine.[37] Such authority included the ability to adjudicate the actual priorities of any reserved rights, even if those rights would then be senior to state-law-based rights previously adjudicated.[38] It further determined that the adjudicatory court could ensure that any parties who might be affected by the adjudication of the federal rights would be given notice of the proceeding.[39]

The U.S. Supreme Court upheld this decision, deciding that the McCarran Amendment intended to enable state courts in general stream adjudications to consider all federal claims, including those based on the reserved rights doctrine.[40] It further determined that the Colorado adjudication qualified as a general stream adjudication under the McCarran Amendment.[41] It dismissed the argument respecting the absence of all parties from the proceeding and the inability under Colorado law to establish priorities in a supplemental adjudication senior to those already adjudicated as too technical.[42] In a companion case involving a separate adjudication proceeding in Colorado instituted under a revised statutory provision, the Supreme Court affirmed its views.[43]

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[36] *Cnty. of Eagle*, 458 P.2d at 765.

[37] *Id.* at 772.

[38] *Id.* ("The fact that our statutes do not provide for the adjudication of the rights of the United States with priorities prior to the dates of later decrees does not mean that our district courts in a water adjudication cannot determine the rights of the United States in relation to decreed water rights. On the contrary, our district courts have that jurisdiction.").

[39] *Id.* at 774 ("As we hold that the district court has jurisdiction by reason of its plenary powers, it follows that the court need not have a statutory provision for notice. After the United States has filed its statements of claim in the district court, including the priority dates it seeks, the court then can determine which claimants of adjudicated rights need be given notice and can specify the manner that notice shall be given. Obviously, notice should be directed to those who might be adversely affected if the prayers for relief of the United States were granted.").

[40] *Eagle Cnty.*, 401 U.S. at 524. The Court rejected the argument that the adjudication did not encompass an entire river system as required under the McCarran Amendment. *Id.* at 523 ("We deem almost frivolous the suggestion that the Eagle and its tributaries are not a 'river system' within the meaning of the Act. No suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many States. The 'river system' must be read as embracing one within the particular State's jurisdiction.").

[41] 401 U.S. at 525–26.

[42] "We think that argument is extremely technical; and we decline to confine 43 U.S.C. § 666 so narrowly." *Id.* at 525 (footnote omitted).

[43] United States v. Dist. Ct. in and for Water Div. No. 5, 401 U.S. 527 (1971).

In 1972, the United States filed suit in the Federal District Court for Colorado to obtain determination of water rights of two tribes located on reservations in the southwest portion of the state.[44] Because proceedings that sought to join the United States had been initiated in a Colorado court pursuant to that state's adjudication provision, the federal district court granted a motion to dismiss the federal claims, citing the abstention doctrine.[45] The U.S. Supreme Court held that the McCarran Amendment had not taken away federal court jurisdiction to determine federal water rights, but that the policy favoring avoidance of piecemeal litigation and other considerations of judicial efficiency warranted dismissal in this case in favor of the state process.[46] Thus, for example, the Court noted the location of the federal court in Denver while the Colorado court was located in the area of the state in which the water claims existed.[47] The Court expressly held that Indian reserved rights could be determined in a general stream adjudication consistent with the requirements of the McCarran Amendment.[48]

In *Cappaert v. United States*, the U.S. Supreme Court upheld an injunction against groundwater pumping on private lands adjacent to the Devil's Hole National Monument on the basis that the associated groundwater withdrawals threatened the continued existence of the Desert Pupfish living in a pool of water within the monument.[49] The Court found that water necessary to sustain the Pupfish had been reserved at the time the monument was created.[50]

Just two years later, the U.S. Supreme Court addressed the nature and scope of the implied federal reserved right established when the Gila National Forest was established in 1899.[51] It reaffirmed the authority of the United States to make such reservations of water, even following statehood.[52] Noting, however, the limited availability of water in the western states, its importance to the economies of these states, and the history it found of congressional deference to states on matters of water, the Court stated: "Each time this Court has applied the 'implied-reservation-of-water doctrine,' it has carefully examined both the

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[44] Colo. River Water Cons. Dist. v. United States, 424 U.S. 800 (1976).

[45] *Id.* at 806. (The federal court asserted the McCarran Amendment had removed its jurisdiction to consider such federal claims.).

[46] *Id.* at 807–09, 819–20.

[47] *Id.* at 820.

[48] *Id.* at 811–12.

[49] 426 U.S. 128 (1976).

[50] *Id.* at 147. In the words of the Court: "The implied-reservation-of-water-rights doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." *Id.* at 141.

[51] United States v. New Mexico, 438 U.S. 696 (1978). The Court had already decided that reserved rights for the Gila National Forest existed. Arizona v. California, 373 U.S. 546, 601 (1963).

[52] *New Mexico*, 438 U.S. at 699–700.

asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated."[53] The Court then examined the purposes for establishment of national forests stated in the 1987 Organic Act, finding these to be "securing favorable conditions of water flows, and to furnish a continuous supply of timber . . . ."[54] The Court rejected claims for reserved rights for recreation and wildlife protection as outside these purposes.[55] The Court introduced the rule that implied reserved rights can exist only if necessary to achieve the *primary* purposes for which a reservation is established, not for *secondary* purposes.[56]

The authority of state courts to adjudicate Indian reserved water rights again reached the U.S. Supreme Court in 1983, this time in the context of whether tribes themselves could be the subject of state court jurisdiction.[57] The Court first reviewed its ruling in *Colorado River Conservation District*, noting it had explicitly determined that under the McCarran Amendment Indian reserved rights could be determined in state courts.[58] It then held that passage of the McCarran Amendment had removed any potential barriers to state court jurisdiction over federal and Indian water claims in a general stream adjudication.[59]

In its discussion of whether a different result should apply when it is a tribe and not the United States that is being brought into state court, the Court summarized the arguments supporting this view:

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[53] *Id.* at 700.

[54] *Id.* at 706–07.

[55] *Id.* at 711–12. For a strong critique of this holding, see Tarlock, *supra* note 1, § 9:53.

[56] *New Mexico*, 438 U.S. at 715. This distinction arose in the context of the significance of the Multiple-Use, Sustained-Yield Act of 1960, which expressly directed national forests to be managed for recreation and wildlife protection.

[57] Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545 (1983). At issue here were provisions in state constitutions explicitly acknowledging the exclusive authority of the United States respecting lands set aside as Indian reservations within the boundaries of the state. Such provisions were included in the Enabling Acts of Montana and Arizona in which the specific disputes considered in this case arose. The language provided that the states,

> agree and declare that they forever disclaim all right and title to . . . all lands . . . owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . .

Id. at 556.

[58] *Id.* at 550–51.

[59] *Id.* at 564 ("But the Amendment was designed to deal with a general problem arising out of the limitations that federal sovereign immunity placed on the ability of the States to adjudicate water rights, and nowhere in its text or legislative history do we find any indication that Congress intended the efficacy of the remedy to differ from one State to another."). The other issue that had arisen in the cases was the effect of a federal statute known as Public Law 280 addressing state court jurisdiction of certain tribal matters.

> The United States and the various Indian respondents raise a series of arguments why dismissal or stay of the federal suit is not appropriate when it is brought by an Indian tribe and only seeks to adjudicate Indian rights. (1) Indian rights have traditionally been left free of interference from the States. (2) State courts may be inhospitable to Indian rights. (3) The McCarran Amendment, although it waived United States sovereign immunity in state comprehensive water adjudications, did not waive *Indian* sovereign immunity. It is therefore unfair to force Indian claimants to choose between waiving their sovereign immunity by intervening in the state proceedings and relying on the United States to represent their interests in state court, particularly in light of the frequent conflict of interest between Indian claims and other federal interests and the right of the Indians under 28 U.S.C. § 1362 to bring suit on their own behalf in federal court. (4) Indian water rights claims are generally based on federal rather than state law. (5) Because Indian water claims are based on the doctrine of "reserved rights," and take priority over most water rights created by state law, they need not as a practical matter be adjudicated *inter sese* with other water rights, and could simply be incorporated into the comprehensive state decree at the conclusion of the state proceedings.[60]

Acknowledging that each of these arguments "has a good deal of force," the Court nevertheless concluded: "If the state proceedings have jurisdiction over the Indian water rights at issue here, as appears to be the case, then concurrent federal proceedings are likely to be duplicative and wasteful, generating 'additional litigation through permitting inconsistent dispositions of property.'"[61] Moreover, the Court expressed concern about "unseemly" races to the courthouse and potentially competing judgments.[62] The Court added:

> The McCarran Amendment, as interpreted in *Colorado River,* allows and encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications. Although adjudication of those rights in federal court instead might in the abstract be practical, and even wise, it will be neither practical nor wise as long as it creates the possibility of duplicative litigation, tension and

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[60] *Id.* at 566–67 (footnote omitted).

[61] *Id.* at 567 (quoting Colo. River Water Cons. Dist. v. United States, 424 U.S. 800, 819 (1976).

[62] *Id.* at 567–68.

> controversy between the federal and state forums, hurried and pressured decisionmaking, and confusion over the disposition of property rights.[63]

In short, the Court majority in both *Colorado River District* and *San Carlos Apache* seems far more concerned with matters of federalism and deference to state court jurisdiction than with the consequences of this deference for tribal or federal interests. It bases this view on its interpretation of the McCarran Amendment, a rider attached to an appropriations bill enacted prior to the emergence of state concerns about the extent of tribal reserved rights and prior to the determination that other federal land reservations might hold reserved water rights.[64] It has prompted western states to initiate GSAs, simply for the purpose of being able to determine the existence and scope of Indian and federal reserved rights in state courts.[65] It has given life to an archaic judicial process that had all but disappeared from states that had developed their own procedures for determining the priority and extent of water rights established under state statutory provisions.[66] It adopts the mistaken assumption that federal and Indian reserved water rights can only be determined in a GSA involving all users of water from the same source when, in fact, the existence and extent of such reserved rights is in no way dependent on other uses of water from the same source.[67]

The existence of an implied reserved right is determined solely on the basis of a consideration of the purposes for which a federal reservation of land is made and whether the achievement of those purposes requires the use of water.[68] Assuming it is determined the reservation purposes do require the use of water, the existence of the reserved water right dates from the creation of the reservation.[69] As in the *Winters* case, those with state-law-based water rights established subsequent to such reservations are necessarily junior in priority and must limit their uses as necessary to ensure the reserved rights are met.[70]

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[63] *Id.* at 569. Later, the Court stated: "But water rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute, and we cannot in this context be guided by general propositions." *Id.* at 571.

[64] The existence of other kinds of federal reserved rights was not made clear until 1963 in Arizona v. California, 373 U.S. 546, 601 (1963).

[65] *See, e.g.*, Jason A. Robison, *Wyoming's* Big Horn *General Stream Adjudication*, 15 WYO. L. REV. 243, 267–69 (2015) (Big Horn adjudication).

[66] A more complete examination of general stream adjudications is provided in Rethinking, *supra* note 8.

[67] *Id.* As an illustration of a legal process determining Indian reserved rights not involving a general adjudication, see United States v. Adair, 723 F.2d 1394 (9th Cir. 1983).

[68] *See, e.g.,* Cappaert v. United States, 426 U.S. 128, 138 (1976).

[69] *See, e.g.*, Winters v. United States, 207 U.S. 564 (1908).

[70] *Id.*

Integration of reserved water rights with state water rights has proved problematic. Numerous legal issues have arisen that plague such efforts including determining the purposes for which reservations were established, whether these purposes require water for their fulfillment, how much water was reserved and how that is determined, whether groundwater was reserved, what uses to which this water can be put, who determines present and future uses, who administers these uses, how disputes between uses of reserved rights and state-authorized uses are addressed, and what legal differences exist between federal reserved water rights and Indian reserved rights.[71] The U.S. Supreme Court's decision to allow state courts to determine these complex issues in the context of general stream adjudications unsurprisingly has produced different results.[72] As a consequence, the meaning of federal law now sometimes depends on the state. The Court initially dismissed concerns that state courts might not treat these claims fairly.[73] When once again presented with this issue, the Court stated:

> State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.[74]

Justice Stevens, in dissent, responded:

> Not all of the issues arising from the application of the *Winters* doctrine have been resolved, because in the past the scope of Indian reserved rights has infrequently been adjudicated. The important task of elaborating and clarifying these federal law issues in the cases now before the Court, and in future cases, should be performed by federal rather than state courts whenever possible.[75]

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[71] The current state of the law in this area is presented in Reserved Water Rights, *supra* note 12.

[72] *See supra* notes 38–46, 55–61 and accompanying text.

[73] Colo. River Water Cons. Dist. v. United States, 424 U.S. 800, 812 (1976) ("The Government has not abdicated any responsibility fully to defend Indian rights in state court, and Indian interests may be satisfactorily protected under regimes of state law."). Justice Stewart, in dissent, noted these are issues of federal law, that federal courts are more likely to be familiar with these laws, that there is appellate court review available so that conflicts need not only be reviewable by the U.S. Supreme Court under its certiorari jurisdiction, and that "a federal court is a more appropriate forum than a state court for determination of questions of life-and-death importance to Indians." *Id.* at 825–26 (Stewart, J., dissenting). For a thoughtful discussion of this decision and its implications for tribes, see McElroy & Davis, *supra* note 9.

[74] Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 571 (1983).

[75] *Id.* at 573.

Experience supports Justice Stevens' concern.[76] It is useful to recall these words of Justice Brennan:

> We also emphasize, as we did in *Colorado River,* that our decision in no way changes the substantive law by which Indian rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.[77]

III. EXPERIENCE WITH STATE ADJUDICATION OF RESERVED RIGHTS

The appellate courts of eight states have decided cases involving substantive aspects of federal/Indian reserved rights.[78] What is particularly striking about reading these cases is that, while they all tend to state the general principles of the reserved rights doctrine as articulated by the U.S. Supreme Court with reasonable consistency, they have applied these principles with considerable variation, sometimes directly inconsistently.[79] The result is the emergence of a law of federal and Indian reserved rights that is, in some cases, particularly distinctive to the state in which the decisions are being made—differing state law versions of a federal law.

This part provides a summary of these decisions on a state-by-state basis, more or less according to the chronology of the major decisions. It separates treatment of Indian reserved rights from other federal reserved rights. It then discusses some of the important doctrinal results that have been reached and compares results across the states. It begins with decisions of the New Mexico Supreme Court.

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[76] *See infra* notes 178–233 and accompanying text.

[77] *San Carlos Apache*, 463 U.S. at 571.

[78] This article only treats those cases involving substantive issues of law that required some interpretation of principles previously articulated by the U.S. Supreme Court. It omits discussion of In re *Determination of Rights to Water of Hallett Creek Stream System* because of the sui generis nature of the issue in this case. 44 Cal. 3d 448, 749 P.2d 324 (1988) (finding that the U.S. held riparian rights for national forests in the state).

[79] An analysis of the Idaho adjudication court's decision relating to Indian water rights claims in that state makes this point as well. *See* Michael C. Blumm et al., *Judicial Termination of Treaty Water Rights: The Snake River Case*, 36 IDAHO L. REV. 449, 453 (2000).

A. New Mexico

In 1977, the New Mexico Supreme Court decided that the purposes for which the Gila National Forest was established did not include recreation and rejected a claim for implied reserved water rights for instream flows to support aesthetic, environmental, recreational, and fish purposes.[80] The U.S. Supreme Court upheld this determination in *United States v. New Mexico*.[81]

A state process to adjudicate all rights to use the waters of the Rio Hondo system, initiated in 1973, involved the reserved rights of the Mescalero Apache Tribe.[82] The New Mexico Supreme Court upheld the State's jurisdiction to consider Indian reserved rights in the adjudication process.[83] In the adjudication, the United States and the Mescalero Apache Tribe claimed a right to 17,750 acre-feet of water with a priority date of time immemorial or 1852, based on the treaty entered into between the Apaches and the United States in that year.[84] The district court, however, awarded the Tribe a total of 2,322.4 acre-feet with an 1873 priority date.[85] The New Mexico Court of Appeals determined instead that the priority date should be the 1852 treaty but upheld the trial court's quantification of rights.[86]

In 1993 the New Mexico Supreme Court upheld joinder of the Unites States in an adjudication proceeding including only that portion of the Rio Grande downstream from Elephant Butte Reservoir to the Texas border, despite finding that this segment did not constitute a "river system" as provided in the McCarran Amendment.[87] The court found that the interstate compact regulating deliveries to Texas only in this portion of the Rio Grande warranted an "exception" to the McCarran Amendment.[88]

B. Colorado

In 1971 the U.S. Supreme Court decided that Colorado's system of continuing adjudication of water rights met the requirements of the McCarran Amendment

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[80] Mimbres Valley Irr. Co. v. Salopek, 90 N.M. 410, 412, 564 P.2d 615, 617 (1977).

[81] 455 U.S. 720 (1982).

[82] State *ex rel.* Reynolds v. Lewis, 88 N.M. 636, 545 P.2d 1014 (1976).

[83] *Id.* at 640, 545 P.2d at 1018.

[84] State *ex rel.* Martinez v. Lewis, 116 N.M. 194, 197, 861 P.2d 235, 238 (1993).

[85] *Id.*

[86] The quantification dispute turned on the differences in view respecting the practicably irrigable acreage analysis. The Tribe submitted evidence respecting two water development projects that the trial court found not economically feasible. *Id.*, at 209, 861 P.2d at 250.

[87] Elephant Butte Irrigation Dist. v. Regents of New Mexico State Univ., 115 N.M. 229, 235–36, 849 P.2d 372, 378–79 (1993).

[88] *Id.*

so that state water court proceedings could determine federal reserved water rights.[89] In 1972, the United States sought to adjudicate certain federal reserved rights in the Colorado federal district court. The federal district court determined that, under the abstention doctrine, the United States claims should be heard in an ongoing state court proceeding.[90] In 1976, the U.S. Supreme Court held that the McCarran Amendment did not remove federal district court jurisdiction[91] but that principles of "wise judicial administration" warranted dismissal of the federal case in favor of the state proceeding.[92] The Court also affirmed that Indian reserved water rights may be determined in McCarran Amendment state general adjudications.[93]

Federal claims for reserved rights in Water Divisions 4, 5, and 6 reached the Colorado Supreme Court in 1982.[94] The water court had ruled that federal reserved rights for national forests were subordinate to all state-based appropriations within the forests.[95] The Colorado Supreme Court rejected this holding, noting that reserved rights are regarded as having a priority as of the date the reservation was established and that any subsequent appropriations are necessarily junior to such federal rights.[96] The Colorado Supreme Court upheld the water court's rejection of United States claims for instream flows for recreational, scenic, and wildlife protection purposes in national forests, citing to the U.S. Supreme Court decision in *United States v. New Mexico*.[97] The United States had argued that the Multiple Use-Sustained Yield Act of 1960, which declared that national forests are established and are to be administered for the "supplemental" purposes of outdoor recreation, range, timber, watershed, and wildlife and fish, impliedly reserved water necessary to accomplish those purposes.[98] Since it had not asserted reserved rights on this basis in *New Mexico*, the United States argued this issue had not yet been decided.[99] The Colorado Supreme Court disagreed, holding that this issue had been decided in *New Mexico*.[100]

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[89] United States v. Dist. Ct. in and for the Cnty. of Eagle 401 U.S. 520 (1971); *see also* United States v. Dist. Court in and for Water Div. No. 5, Colorado, 401 U.S. 527 (1971).

[90] Colo. River Water Cons. Dist. v. United States, 424 U.S. 800, 806 (1976).

[91] *Id. at* 809.

[92] *Id. at* 817. The Court, however, rejected the federal district court's adoption of the abstention doctrine as a basis for dismissing the case. *Id*. at 813–16.

[93] *Id.* at 810.

[94] United States v. City and Cnty. of Denver, 656 P.2d 1 (Colo. 1982).

[95] *Id*. at 13–14.

[96] *Id.* at 21.

[97] *Id.* at 22–23.

[98] *Id.* at 24.

[99] In *New Mexico*, the United States had argued the Multiple Use-Sustained Yield Act supported its view that instream flows had been reserved under the 1897 Organic Act. It had not asserted reserved rights on the basis of this 1960 act.

[100] *Denver*, 656 P.2d at 24–26.

The Colorado Supreme Court upheld the water court determination that the reservation of Dinosaur National Monument had not reserved water for recreational uses.[101] Its examination of the authorizing language found only scientific and historic purposes, not recreational.[102] It rejected United States arguments that placing the supervision of the monument under the Park Service in 1938 broadened the reservation's purposes to include those authorized for national parks.[103]

The water court had ruled that the withdrawal of public lands in 1926 containing water holes and springs reserved only the amount of water required for stock watering and drinking uses, and only for those sources determined to be nontributary to surface water.[104] The Colorado Supreme Court agreed that the reservation governed only the minimum amount necessary for these purposes and that any additional uses of this water are governed by state law.[105] It rejected, however, the water court's restriction of reservation only to nontributary water, finding no support in the withdrawal order of such intention.[106] Finally, the Colorado Supreme Court upheld the water court's determination that reserved rights existed for mineral hot springs withdrawn under federal law, but that the reservation did not extend to the use of these hot springs for power production.[107]

In *United States v. Bell*, the Colorado Supreme Court determined that the United States was bound by Colorado's postponement doctrine so that its amendment of its original filing meant that its claims could not relate back to the original filing date.[108] It further rejected the attempt to amend its claim to assert reserved rights in sources of water not located directly in or on the reserved federal lands.[109]

In *United States v. Jesse*, the Colorado Supreme Court overruled a water court decision that instream flows cannot be reserved for national forests as a matter of

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[101] *Id.* at 26. The Court stated that determination of this matter "is particularly important in this context because of the enormous potential economic impact of minimum stream flows on vested and conditional Colorado water rights." *Id.* at 27.

[102] *Id.* at 27–28.

[103] *Id.* at 28.

[104] *Id.* at 31.

[105] *Id.* at 31–32 ("It appears to us that the reservation documents indicate no intent to reserve the entire yield of public springs and waterholes involved here.").

[106] *Id.* at 32–33.

[107] *Id. at* 33–34. Congress had authorized the leasing of federally-owned geothermal resources for power production in 1970.

[108] United States v. Bell, 724 P.2d 631, 634 (Colo. 1986). The postponement doctrine holds that the decreed date of a water right determines its priority, not the time at which the appropriation was initiated. Colo. Rev. Stat. § 37-92-306.

[109] *Bell*, 724 P.2d at 639.

law, and that the City of Denver decision collaterally estopped the United States from asserting this claim in another proceeding.[110] Here the federal government was asserting that new science supported the need for instream flows to maintain channels within the forests to meet the Organic Act's watershed purpose.[111] The court noted that *New Mexico* rejected the United States claim because it had failed to demonstrate the need for instream flows, but that here the federal government was attempting to do just that.[112]

In a case involving quantification of reserved rights for the Black Canyon of the Gunnison, the Colorado Supreme Court upheld the water court's decision to postpone its process until resolution of a case pending in federal district court disputing the federal government's quantification process.[113] It found the federal case dealt with matters of federal law independent of the state court adjudication process.[114]

C. Wyoming

The matter of Indian reserved water rights for the Wind River Reservation reached the Wyoming Supreme Court in 1988. In its decision, the court upheld the trial court's determination that the 1868 treaty creating the reservation impliedly reserved appurtenant water, and that subsequent actions had not abrogated that intent.[115] Based on its reading of the treaty, the court decided the sole purpose for which the reservation was established was agriculture.[116] The court determined that implied reserved water rights for the reservation did not extend to underlying groundwater.[117] The court applied the practicably irrigable acreage measure to quantify the tribes' reserved rights to water for agricultural purposes.[118] Finally, the court upheld the district court's order that disputes between state water users and the tribes should first go to the State Engineer for resolution rather than to the courts.[119]

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[110] United States v. Jesse, 744 P.2d 491 (Colo. 1987).

[111] *Id.* at 493.

[112] *Id.* at 502–03.

[113] *In re* Application for Water Rights of the U.S., 101 P.3d 1072 (Colo. 2004).

[114] *Id.* at 1080.

[115] *In re* The General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76, 90–94 (Wyo. 1988) (*Big Horn I*).

[116] *Id.* at 99. The Special Master had determined that the purpose of the reservation was to establish a permanent homeland for the Indians. *Id.* at 94. The district court ruled instead that the sole purpose was agriculture. *Id.* at 95.

[117] *Id.* at 100.

[118] *Id.* at 100–01.

[119] *Id.* at 115.

In 1992, the Wyoming Supreme Court considered whether the tribes could change the use of that portion of their reserved water rights determined available for future irrigation activities to instream flow uses.[120] In a highly splintered set of opinions, the court determined the tribes could not make such a change of use.[121]

In 2002, the Wyoming Supreme Court determined that non-Indian purchasers of Indian allotments could claim a reserved right with an 1868 priority date even though actual irrigation use had not occurred until from ten to twenty years after purchase.[122] Under the standard developed in the *Walton* case, for allotted lands to have a reserved right it is necessary that either the Indian allotment owner had irrigated the land or that the non-Indian purchaser had initiated irrigation within a reasonable time following purchase.[123]

D. Washington

The State of Washington initiated a general adjudication in the Yakima River basin in 1977.[124] The Yakama Indian Reservation is located in the basin so the adjudication addressed the nature and extent of the Indian reserved rights impliedly reserved under the 1855 Stevens Treaty that established the reservation.[125] A Ninth Circuit Court decision in 1956 had previously determined the existence of Indian reserved water rights in a tributary to the Yakima River.[126] The court decided:

> [T]he paramount right of the Indians to the waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation.[127]

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[120] *In re* The General Adjudication of All Rights to Use Water in the Big Horn River System, 835 P.2d 273 (Wyo. 1992) (*Big Horn III*).

[121] *Id.* at 278. Because of the varying opinions, there is no majority rule governing why the tribes cannot make this change of use. The trial court had supported the tribes' ability to make this change of use, following procedures established under tribal code. *Id.* at 276.

[122] *In re* The General Adjudication of All Rights to Use Water in the Big Horn River System, 48 P.3d 1040, 1046–51 (2002).

[123] Colville Confederated Tribes v. Walton, 647 F.2d 42, 51 (9th Cir. 1981).

[124] State, Dep't of Ecology v. Acquavella, 674 P.2d 160, 161 (Wash. 1983); *see generally* Sidney P. Ottem, *The General Adjudication of the Yakima River: Tributeries for the Twenty-First Century and a Changing Climate*, 23 J. Envtl. L. & Litig. 275 (2008).

[125] State, Dep't of Ecology v. Yakima Reservation Irr. Dist., 850 P.2d 1306 (Wash. 1993).

[126] United States v. Ahtanum Irr. Dist., 236 F.2d 321, 325 (9th Cir. 1956).

[127] *Id.* at 327.

In 1993 the Washington Supreme Court reviewed the trial court's rulings respecting Indian reserved rights. The court largely upheld the trial court determinations respecting the quantities of water available to the tribe for irrigation on the reservation, based on previous Secretarial actions, acts of Congress, and other litigation.[128] The court also decided that these previous determinations had not abrogated the Tribe's implied rights to water necessary to maintain fisheries in the basin, although it agreed with the trial court that the right had been "substantially diminished."[129] The Washington Supreme Court affirmed without discussing the trial court determination that "[t]he maximum quantity to which the Indians are entitled as reserved treaty rights is the minimum instream flow necessary to maintain anadromous fish life in the river, according to annual prevailing conditions. This diminished reserved right for water for fish has a priority date of time immemorial."[130] According to one source, "[t]he Yakama Nation retains the right to have the state court enforce minimum flows under prior orders in the Acquavella adjudication, but to date it has not had to do so."[131]

E. Arizona

As the late Professor Feller explained in a 2007 article, the Gila River Basin adjudication began in 1974, initiated by the Salt River Valley Water Users Association in an effort to curtail junior users in the Verde River from diverting

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[128] *Yakima*, 850 P.2d at 1306 (1993). The trial court had considered the effect of a Secretarial order in 1906 limiting diversions of water for irrigation on the reservation, a 1914 Congressional act enlarging these diversion rights, Warren Act contracts for water from the Yakima Reclamation Project, and a 1945 consent decree in a case in which the United States was representing the tribe. Based on its analysis of these various actions, it established quantifications for tribal irrigation rights without going through the usual practicably irrigable acreage analysis.

[129] As summarized by the Washington Supreme Court:

> The trial court found insufficient evidence to conclude that the rights to water for fulfillment of treaty fishing rights had been extinguished, but found that those rights had been substantially diminished and that generally the rights to water for fishing purposes were subordinate to other irrigation rights. The trial court held, however, that the Indians were entitled to the minimum instream flow which is necessary to maintain anadromous fish life in the river. The trial court held that the specific amount which is necessary for fish life should be determined according to the annual prevailing conditions as determined by the Project Superintendent in consultation with the Yakima River Basin Systems Operations Advisory Committee, Irrigation Districts and company managers and others.

Id. at 1318–19.

According to Professor Blumm and his co-authors, "This unprecedented interpretation of diminishing—or partially abrogating—treaty rights, despite a lack of clear intent to abrogate, was inconsistent with Supreme Court standards." Michael C. Blumm, et al., *The Mirage of Indian Reserved Water Rights and Western Streamflow Restoration in the McCarran Amendment Era: A Promise Unfulfilled*, 36 ENVTL. L. 1157, 1180 (2006) [hereinafter Mirage].

[130] *Yakima*, 850 P.2d at 1310.

[131] Mirage, *supra* note 129, at 1181–82.

water out of priority.[132] Litigation challenging consideration of Indian reserved rights in this adjudication ultimately reached the U.S. Supreme Court, resulting in a 1983 decision holding that determination of Indian reserved rights should be made in the ongoing state proceeding.[133]

In 1999 the Arizona Supreme Court issued its first substantive ruling respecting Indian reserved rights in the Gila River Adjudication.[134] In particular, it addressed two issues raised on interlocutory appeal: whether federal reserved rights extend to groundwater and whether such groundwater rights have greater protection than state water rights.[135] The court noted that reserved rights had not previously been extended to groundwater and that the Wyoming Supreme Court in the Big Horn Adjudication had decided that groundwater underlying the Wind River Reservation was not included in tribal reserved rights.[136] Nevertheless the court concluded:

> In summary, the cases we have cited lead us to conclude that if the United States implicitly intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations' needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand. The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.[137]

The court restricted its ruling to general principles since it was not making specific determinations for individual reservations.[138] Because of the unique

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[132] Joseph M. Feller, *The Adjudication that Ate Arizona Water Law*, 49 Ariz. L. Rev. 405 (2008); *see also* the background on this litigation provided in McElroy & Davis, *supra* note 9, at 613–24.

[133] Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

[134] *In re* the General Adjudication of All Rights to Use Water in the Gila River System and Source, 989 P.2d 739 (Ariz. 1999) (*Gila River*); *see also* Mirage, *supra* note 126, at 1186–87.

[135] *Gila River*, 989 P.2d at 741.

[136] *Id.* at 745.

[137] *Id.* at 747.

[138] *Id.* at 748 ("We decide this issue in the abstract at this time as a necessary step in determining the scope of interests to be encompassed by this adjudication. We do not, however, decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater. A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation.").

purpose of federal reserved rights for achieving the purpose of the reservation, the court also held that such rights have more protection than state-based rights from impairment by off-reservation water uses.[139]

In 2001 the Arizona Supreme Court addressed the proper standard for quantifying Indian reserved water rights.[140] The trial court had applied the practicably irrigable acreage measure, adopted by the U.S. Supreme Court in *Arizona v. California*.[141] In its discussion, the court articulated what it believed was a critical distinction between reserved rights for non-Indian federal reservations and for Indian reservations. According to the court, the primary purpose of a non-Indian federal reservation is to be defined strictly, but the federal government has unlimited discretion in its use and disposition of such reserved rights.[142] The purposes of Indian reserved rights are, the court stated, viewed broadly "in order to further the federal policy of Indian self-sufficiency."[143] Thus, irrespective of treaty language or other documentation, the Arizona Supreme Court decided that the purpose of all Indian reservations was "to provide Native American people with a 'permanent home and abiding place,' that is, a 'livable' environment."[144] Following that same line of thinking, the court determined the primary/secondary distinction developed in *United States v. New Mexico* in relation to the purposes for which national forests were reserved does not apply in the context of Indian reservations.[145]

Next, the court examined the practicably irrigable acreage standard adopted by the trial court for quantifying Indian reserved water rights.[146] It rejected this

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[139] *Id.* at 749–50.

[140] *In re* the General Adjudication of All Rights to Use Water in the Gila River System and Source, 35 P.3d 68 (Ariz. 2001).

[141] *Id.* at 71.

[142] *Id.* at 73–74 (citing State of Montana *ex rel.* Greely v. Confederated Salish & Kootenai Tribes, 712 P.2d 754, 767 (Mont. 1985)) ("[T]he United States can lease, sell, quitclaim, release, encumber or convey its own federal reserved water rights.").

[143] *Id.* at 73–74 (quoting *Greely*, 712 P.2d at 768).

[144] *Id.* at 73–74 (quoting Winters v. United States, 207 U.S. 564, 565 (1908), Arizona v. California, 373 U.S. 546, 599 (1963)).

[145] "It is true that some courts have utilized the primary-secondary purpose test or looked to it for guidance when dealing with Indian lands. Nevertheless, we believe the significant differences between Indian and non-Indian reservations preclude application of the test to the former." *Id.* at 76 (citing United States v. Adair, 723 F.2d 1394, 1408 (9th Cir. 1983) (stating that *New Mexico* is not directly applicable, but establishes "several useful guidelines"), Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981) (applying the test), *In re* the General Adjudication of all Rights to Use Water in the Big Horn River System, 835 P.2d 273, 278–79 (Wyo.1992) (*Big Horn II*) (following the test)).

[146] *In re* the General Adjudication of All Rights to Use Water in the Gila River System and Source, 35 P.3d 68, 78–80 (Ariz. 2001).

approach, noting the potential adverse consequences for tribes living on largely nonirrigable lands, the notion that reserved rights are only for irrigation thus forcing tribes to pursue undesired irrigation projects to be able to use their water rights, and the potential for allocating too much water to tribes.[147] In its place the court adopted a multiple-factor analysis tailored specifically to each reservation.[148] Among the factors to be considered, the court mentioned the use of master land use plans with specific uses of water identified and quantified, tribal history, tribal culture, the geography, topography, and natural resources of reservation lands, its economic base, past water uses, and population.[149] Responding to state arguments respecting the need to apply the so-called sensitivity doctrine, the court stated:

> The court's function is to determine the amount of water necessary to effectuate this purpose, tailored to the reservation's minimal need. We believe that such a minimalist approach demonstrates appropriate sensitivity and consideration of existing users' water rights, and at the same time provides a realistic basis for measuring tribal entitlements.[150]

In a 2012 opinion, the Arizona Supreme Court considered whether federal reserved water rights attached to federal lands given to the State at statehood (state trust lands).[151] Concluding they did not, the court found that state trust lands had not been withdrawn or reserved and that there is no indication that Congress intended to reserve water necessary to carry out the purposes of these lands.[152]

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[147] *Id.* at 78–79.

[148] *Id.* at 79.

[149] *Id.* at 80. The Court added:

> [T]he foregoing list of factors is not exclusive. The lower court must be given the latitude to consider other information it deems relevant to determining tribal water rights. We require only that proposed uses be reasonably feasible. As with PIA, this entails a two-part analysis. First, development projects need to be achievable from a practical standpoint—they must not be pie-in-the-sky ideas that will likely never reach fruition. Second, projects must be economically sound. When water, a scarce resource, is put to efficient uses on the reservation, tribal economies and members are the beneficiaries.

Id. at 81.

[150] *Id.* The sensitivity doctrine calls for consideration of the impact of quantification of Indian reserved rights on existing, state-based water users.

[151] *In re* the General Adjudication of All Rights to Use Water in the Gila River System and Source, 289 P.3d 936 (Ariz. 2012).

[152] *Id.* at 945.

F. Idaho

In the 1970s, Idaho irrigators filed suits seeking adjudication of rights to certain water sources.[153] The United States intervened in these cases, asserting federal reserved rights "in amounts reasonably necessary and sufficient to carry out the limited purposes for which the forest service lands were reserved; namely timber management and production and related purposes, including fish and wildlife management, livestock grazing and recreational activities."[154] In 1974, the Idaho Supreme Court concluded: "We hold that under 43 U.S.C. § 666, the United States is bound by Idaho state law, and therefore must quantify the amount of water claimed under the reservation doctrine at the time of the general adjudication of water rights."[155] In 1978, the Idaho Supreme Court ruled that national forests had been established only for the purposes of timber production and watershed management and ordered the United States to quantify its claims on the basis of these purposes.[156]

The State of Idaho initiated the Snake River Basin Adjudication in 1987.[157] The United States filed approximately 25,000 reserved water rights claims.[158] Six disputes related to these claims made it to the Idaho Supreme Court.[159] In the 1998 decision, *United States v. State of Idaho*, the Idaho Supreme Court upheld federal claims for reserved rights associated with lands withdrawn for stock watering.[160] In *United States v. City of Challis*, the Idaho Supreme Court denied the claim of the United States for reserved rights based on the Multiple Use-Sustained Yield Act of 1960.[161] In 1989, the Idaho Supreme Court upheld federal reserved rights claims for two wilderness areas and one national recreation area.[162] A year later, the court reversed itself, deciding that the purposes of the Wilderness Act did not

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[153] Avondale Irrigation Dist. v. North Idaho Properties, Inc., 523 P.2d 818 (Idaho 1974) (*Avondale I*); Avondale Irrigation Dist. v. North Idaho Properties, Inc. 577 P.2d 9 (1978) (*Avondale II*) (consolidating Soderman v. Kackley).

[154] *Avondale I*, 523 P.2d at 818.

[155] *Id.* at 821–22.

[156] *Avondale II*, 577 P.2d at 17.

[157] Clive J. Strong, *The First Twenty Years of the Snake River Basin Adjudication: Is There an End in Sight?*, 50 ADVOCATE (IDAHO) 14 (Jan. 2007) [hereinafter Strong]. The State finalized the adjudication on August 25, 2014. Brian Smith, *As Water Rights Review Closes, Management Questions Loom*, TWIN FALLS TIMES NEWS, Aug. 26, 2014; Clive J. Strong, *SRBA Retrospective: A 27-Year Effort*, 57 ADVOCATE (IDAHO) 28 (Dec. 2014).

[158] Strong, *supra* note 157, at 14.

[159] *Id.*

[160] United States v. State of Idaho, 959 P.2d 449, 450 (Idaho 1998). The court concluded: "We hold that PWR 107 is a valid basis for a federal reserved water right for the limited purpose of stockwatering." *Id.* at 453.

[161] United States v. City of Challis, 988 P.2d 1125 (Idaho 1999).

[162] In re SRBA, Case No. 39576—Wilderness Reserved Claims, 1999 WL 778325 (not reported in Pacific 3d.).

require reserved water rights.[163] Also that year, the court upheld federal reserved rights for two wild and scenic rivers.[164] In still another decision that year, the court denied a federal reserved right for the Sawtooth National Recreation Area.[165] The following year the court denied a reserved rights claim for the Deer Flat National Wildlife Refuge.[166]

G. Montana

The State of Montana initiated a statewide adjudication of water rights in 1979.[167] As of 2007, approximately 219,000 claims had been filed.[168] In 1984, the State asked the Montana Supreme Court to determine whether the adjudication procedures under Montana's Water Use Act were sufficient to enable determination of federal and Indian reserved water rights.[169] In an extensive 1985 decision, the Montana Supreme Court decided that state law and procedures enabled consideration of federal and Indian reserved water rights.[170] The court provided a lengthy comparison of Indian reserved water rights and state appropriative water rights, concluding that state law and procedure could adequately reflect these differences.[171] The court then compared federal reserved rights and state appropriative rights, as well as federal and Indian reserved rights.[172]

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[163] Potlatch Corp. v. United States, 12 P.3d 1260 (Idaho 2000); *see* Michael C. Blumm, *Reversing the Winters Doctrine?: Denying Reserved Water Rights for Idaho Wilderness and Its Implications*, 73 U. Colo. L. Rev. 173 (2002) [hereinafter Blumm]; *see also* Gregory J. Hobbs, Jr., *State Water Politics Versus an Independent Judiciary: The Colorado and Idaho Experiences*, 5 U. Denv. Water L. Rev. 122 (2001). The original decision prompted a political firestorm in Idaho, resulting in the defeat for reelection of the justice who authored the decision.

[164] *Potlatch*, 12 P.3d at 1256 (holding the Wild and Scenic Rivers Act creates an express federal reserved right).

[165] State of Idaho v. United States, 12 P.3d 1284 (2000) (legislation establishing Sawtooth NRA "for the preservation and protection of the natural, scenic, historic, pastoral, and fish and wildlife values and provide for the enhancement of the recreational values associated therewith" did not create a federal reserved water right for these purposes).

[166] United States v. State of Idaho, 23 P.3d 117, 126 (Idaho 2001) ("The United States has not shown that the principal objects of the reservations will be defeated without a reserved water right.").

[167] State *ex rel.* Greely v. Water Court of State of Montana, 691 P.2d 833 (Mont. 1984); State *ex rel.* Greely v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 712 P.2d 754, 756 (Mont. 1985).

[168] Strong, *supra* note 157, at 14.

[169] *Confederated Salish and Kootenai*, 712 P.2d at 756.

[170] *Id. at* 758. The court also decided that a Montana constitutional provision expressing Congressional control over Indian lands within the State did not preclude inclusion of tribes in the general adjudication proceeding. *Id*. at 762.

[171] *Id.* at 762–66.

[172] *Id*. at 766–68. The court stated: "Federal reserved water rights differ from Indian reserved water rights in origin, ownership, determination of priority date, the manner in which the purpose of the reservation is determined, and quantification standards." *Id.* at 766.

In 2007, the Montana Supreme Court considered whether the State could process a change of a state water right used by non-Indians on an Indian reservation before the tribes' reserved water rights were quantified.[173] The court overruled the district court's denial of this authority and remanded for consideration of state authority based on the court's analysis of tribal and state sovereignty.[174] Previously, the court had denied the State's authority to issue new permits to use water from sources within the Flathead Reservation because new uses would necessarily interfere with the Tribes' reserved water rights.[175] In response to the first of these decisions, the Montana legislature amended the State's Water Use Act to allow permitting to move forward pending completion of the State's adjudication process.[176] The Montana Supreme Court determined this provision could not authorize new permits for water uses on Indian reservations until Indian reserved rights were quantified.[177] Nevertheless, the Montana Department of Natural Resources and Conservation (DNRC) proposed to issue another permit for a new use on the Flathead Reservation, noting that the water would come from a groundwater source.[178] Once again, the Montana Supreme Court ruled that the DNRC could not issue permits until the Indian reserved water rights were quantified.[179] Thus, the court's most recent decision to allow changes of water rights represents a modification of its earlier views.[180]

H. A Comparison of Key Holdings

1. Implied Federal Reserved Rights

Only three state appellate courts have considered state trial court determinations respecting implied reserved rights for non-Indian federal land reservations—New Mexico, Colorado, and Idaho. The New Mexico decision was affirmed by the U.S. Supreme Court in *United States v. New Mexico*[181] and is firmly embedded in the federal law doctrine of implied reserved rights for

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[173] Confederated Salish and Kootenai Tribes v. Clinch, 158 P.3d 377 (Mont. 2007).

[174] *Id.* at 389. Earlier the court stated: "we must inquire whether the DNRC regulatory process at issue here would 'threaten[ ] or ha[ve] some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" *Id.* at 387.

[175] In The Matter of the Application for Beneficial Water Use Permits Nos. 66459-76L (*Ciotti I*) 923 P.2d 1073 (Mont. 1996); Confederated Salish and Kootenai Tribes v. Clinch (*Ciotti II*), 992 P.2d 244 (Mont. 1999); Confederated Salish and Kootenai Tribes v. Stults, 59 P.3d 1093 (Mont. 2002).

[176] *Ciotti II*, 992 P.2d at 248.

[177] *Id.* at 250.

[178] *Stultz*, 59 P.3d at 1053.

[179] *Id.* at 1097.

[180] *Ciotti I* had also involved a proposed change of use.

[181] 438 U.S. 696 (1978). This decision affirmed *Mimbres Valley Irrigation Co. v. Salopek,* 564 P.2d 615 (N.M. 1977).

non-Indian reservations. Both the Colorado and Idaho supreme courts were asked to consider whether enactment of the Multiple Use-Sustained Yield Act of 1960 (MUSY), which stated that national forests are to be managed for outdoor recreation, range, timber, watershed, and wildlife and fish purposes,[182] created an implied reserved water right needed to accomplish these purposes.[183] In *United States v. New Mexico*, the U.S. Supreme Court rejected an argument by the federal government that MUSY merely confirmed Congress's original intention in the 1897 Organic Act to manage national forests for these purposes.[184] In Colorado, the United States argued that MUSY itself created implied reserved rights (with a 1960 rather than 1897 priority date) and that, since the United States had not made this argument in *New Mexico*, the U.S. Supreme Court had not decided the question.[185] The Colorado Supreme Court rejected the federal government's arguments, noting the U.S. Supreme Court had characterized the purposes in MUSY as secondary and thus not the basis of an implied reserved right.[186] The United States repeated its arguments in the Snake River adjudication.[187] The Idaho Supreme Court found that MUSY did not reserve land, only directed the Forest Service respecting management of lands already reserved.[188]

Both the Idaho and Colorado supreme courts found federal reserved rights established under the 1926 executive order, Public Water Reserve No. 107.[189] The executive order itself stated its purpose was to reserve water located in springs and water holes on these public lands for "public use."[190] The Colorado Supreme Court decided these reservations were for "the purposes of human and animal consumption in the amount necessary to prevent monopolization of the water resources."[191] The Idaho Supreme Court found the sole purpose of these reservations to be stock watering.[192]

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[182] 16 U.S.C. § 528.

[183] United States v. City and County of Denver, 656 P.2d 1 (Colo. 1982); United States v. City of Challis, 988 P.2d 1125 (Colo. 1999).

[184] *New Mexico*, 438 U.S. at 715 ("Without legislative history to the contrary, we are led to conclude that Congress did not intend in enacting the Multiple-Use Sustained-Yield Act of 1960 to reserve water for the *secondary* purposes there established.").

[185] *Denver*, 656 P.2d at 24.

[186] *Id.* 25–26.

[187] *Challis*, 988 P.2d at 1204.

[188] *Id.* at 1205. Such a conclusion raises a fundamental doctrinal question—are implied reserved rights only based on the original law under which land reservations were made or can subsequent enactments/federal actions also imply the reservation of water necessary for their achievement.

[189] *Denver*, 656 P.2d at 33; United States v. State of Idaho, 959 P.2d 449, 450 (Idaho 1998).

[190] *State of Idaho*, 959 P.2d at 451.

[191] *Denver*, 656 P.2d at 32.

[192] *State of Idaho*, 959 P.2d at 453 ("We hold that PWR 107 is a valid basis for a federal reserved water right for the limited purpose of stockwatering.").

In addition, the Idaho Supreme Court determined that designation of already reserved lands as wilderness under the 1964 Wilderness Act did not create any implied reserved rights.[193] Initially, the trial court ruled that Idaho wilderness areas held reserved rights that effectively reserved all unappropriated water still available at the time of their designation.[194] On appeal, the Idaho Supreme Court upheld this finding.[195] The court noted that national forests designated as wilderness areas no longer can serve the original purpose of providing a continuous supply of timber.[196] As a result, the court found the primary purpose of such area is changed to wilderness preservation.[197] That purpose, the court concluded, requires the reservation of all unappropriated water at the date of the reservation.[198]

A year later, the court reversed itself and determined that wilderness areas do not hold implied federal reserved water rights.[199] It reached this conclusion on the basis that the purposes of the Wilderness Act ("these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character"[200]) would not be defeated without the reservation of water.[201] In the court's view, the purpose of the Wilderness Act is to "prevent the development of land within the designated wilderness areas and to preserve those lands in their natural state for future generations."[202] Preservation of the wilderness ensures there will be no development of water within wilderness areas. Therefore, the court concluded, there is no need for a reserved water right.[203] As to uses of water outside of wilderness areas (upstream),[204] the court denied that the Wilderness Act could extend outside wilderness areas to preclude or regulate them.[205] In sum, the court

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[193] *Challis*, 988 P.2d 1125 (1999).

[194] In re SRBA, Case No. 39576—Wilderness Reserved Claims, 1999 WL 778325, at 1.

[195] *Id.* at 8.

[196] *Id.* at 5.

[197] *Id.* at 6.

[198] *Id.* at 9.

[199] Potlatch Corp. v. United States, 12 P.3d 1260 (Idaho 2000).

[200] 16 U.S.C. § 1131(a).

[201] *Potlatch*, 12 P.3d at 1266 ("There is no language in the Wilderness Act compelling the conclusion that there must be reserved water rights to fulfill the purposes of the Act.").

[202] *Id.*

[203] *Id.* at 1267.

[204] The Frank Church Wilderness Area is located downstream from streams with state-law-based appropriations. Blumm, *supra* note 160, at 187.

[205] According to the court:

> If all naturally flowing waters since the designation of the respective wilderness areas were reserved, appropriations made since the wilderness areas were designated would

stated: "A clear indication of the creation of implied water rights as claimed by the United States does not exist in the language of the Wilderness Act or in its legislative history."[206]

In its decision regarding the Sawtooth National Recreation Area, the Idaho Supreme Court decided that a reservation "to assure the preservation and protection of the natural, scenic, historic, pastoral, and fish and wildlife values and provide for the enhancement of the recreational values associated therewith"[207] did not create an implied reserved right.[208] Determining that the statutory language is ambiguous, the court decided the primary purpose of the reservation is to regulate development and mining.[209] It then concluded that these purposes can be achieved without a reservation of water.[210]

The Idaho Supreme Court followed a similar approach in denying reserved rights for a wildlife refuge.[211] The executive orders establishing this refuge stated that the lands (islands in the Snake River) were to serve "as a refuge and breeding ground for migratory birds and other wildlife . . . ."[212] In its examination of the history behind the executive orders, the court determined the underlying "purpose was to create sanctuaries for migratory birds to protect them from hunters and trappers so they would not become extinct and so they could continue to benefit husbandry."[213] While an island is, by definition, land surrounded by water, the court emphasized its view of the difficulties of quantifying the necessary amount of water and suggested that this problem of quantification had also been a problem in finding a reservation of water for wilderness areas.[214] It concluded that an island would still be a sanctuary without water so that refuge purposes would not be entirely defeated without a reserved water right.[215]

> be defeated, and future appropriations of waters that would flow into the wilderness would be precluded. There is nothing within the Wilderness Act that indicates that this is necessary to effectuate the purposes of the Act.

Potlatch, 12 P.3d at 1267.

[206] *Id.* at 1268.

[207] 16 U.S.C. § 460aa.

[208] *Potlatch*, 12 P.3d at 1287.

[209] *Id.* at 1289.

[210] *Id.* at 1290–91.

[211] United States v. State of Idaho, 23 P.3d 117 (Idaho 2001) (Deer Flats National Wildlife Refuge).

[212] The refuge is a consolidation of two areas established under separate executive orders but both declaring the same purpose of the reservation. *Id.* at 122.

[213] *Id.* at 125.

[214] *Id.* ("there is no standard for the amount of water necessary to have an island"). The court cited to its statement in *Potlatch* that "[a]bsence of any standard for quantification is indicative of the fact that quantification was not meant to be determined." *Potlatch*, 12 P.3d at 1287.

[215] *State of Idaho*, 23 P.3d at 126.

In sum, two state courts have held that MUSY did not create implied reserved rights for the additional national forest purposes of recreation and fish and wildlife—one based on how the U.S. Supreme Court had already decided the issue, and another on the basis that MUSY did not reserve lands.[216] These same two state courts found that PWR107 had reserved water—one for stock watering and domestic use and the other only for stock watering.[217] The Idaho Court has decided that the purposes of wilderness areas, national recreation areas, and national wildlife refuges do not require water for their achievement.[218] In the process, it has suggested that courts are free to go beyond the purposes stated in the federal reservation action to discover more specific purposes that might not require the reservation of water for their accomplishment.[219] It has concluded that the absence of a clear quantification standard demonstrates a lack of intention to reserve water.[220] In dicta, it has suggested a reserved water right could not extend upstream to prevent a junior appropriative right.[221]

2. Indian Reserved Water Rights

The question has arisen, either directly or indirectly, whether the U.S. Supreme Court decisions respecting federal reserved rights are applicable in cases involving Indian reserved water rights. The Montana Supreme Court has provided the most extensive discussion of this issue, concluding that the two categories of reserved rights are distinct.[222] Respecting ownership, the court declared that the United States is the trustee, not the owner of Indian reserved water rights.[223] The United States is, however, the owner of federal reserved water rights and "can lease, sell, quitclaim, release, encumber or convey its own federal reserved water rights."[224] Respecting quantification, the court noted federal reserved rights are to be the minimum necessary to achieve the primary purpose of the land reservation narrowly construed, while Indian reserved rights are to achieve broadly the purposes of Indian self-sufficiency that were the basis for establishing the Indian reservation.[225] The Arizona Supreme Court took a very similar approach,

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[216] *See supra* notes 182–88 and accompanying text.

[217] *See supra* notes 189–92 and accompanying text.

[218] *See supra* notes 190–203 and accompanying text.

[219] *See supra* notes 202–15 and accompanying text.

[220] *See supra* note 214 and accompanying text.

[221] *See supra* note 205 and accompanying text.

[222] State *ex rel.* Greely v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 712 P.2d 754, 766–68 (Mont. 1985).

[223] *Id.* at 767.

[224] *Id.* The court suggested such disposition may not be possible for national parks and wilderness areas.

[225] *Id.* at 767–68.

noting that while the purposes of federal non-Indian reservations are to be viewed strictly, the purposes of Indian reservations are to be understood broadly.[226] It followed the Montana Supreme Court in saying that federal reserved rights are freely transferable.[227] It agreed with the Montana court that Indian reservations are established for the purpose of making possible Indian self-sufficiency.[228] The Arizona Supreme Court explicitly rejected application of *New Mexico*'s primary/secondary purpose distinction.[229] By comparison, the Wyoming Supreme Court in the Big Horn adjudication seemed to follow this distinction in its discussion of the purposes of the Wind River Reservation.[230] The Wyoming Supreme Court found that the primary purpose of the Wind River Reservation was agriculture, pointing to references in the treaty to this issue.[231]

Wyoming and Arizona courts also have reached different conclusions respecting whether groundwater can be the source of supplying a reserved water right. While acknowledging the "logic" of potentially using groundwater to satisfy reserved rights, the Wyoming Supreme Court noted the absence of decisions supporting this proposition and ended by stating categorically that "the reserved water doctrine does not extend to groundwater . . . ."[232] The Arizona Supreme Court concluded the water necessary to supply a reserved water right may "come from whatever particular sources each reservation had at hand."[233]

Just as state courts have reached different conclusions respecting the purposes for which Indian reservations were established, so too have they differed in their approaches to quantification. Wyoming adopted the practicably irrigable acreage

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[226] *In re* the General Adjudication of All Rights to Use Water in the Gila River System and Source, 35 P.3d 68 (Ariz. 2001).

[227] *Id.* at 73–74.

[228] *Id.* at 74 (quoting State *ex rel.* Greely v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 712 P.2d 754, 768 (Mont. 1985)).

[229] *Id*. at 76; *see also* Federal Reserved Rights, *supra* note 11, at § 36.02 ("Thus, for non-Indian reservations, water is reserved only for the primary purposes of reservations, not for secondary purposes. Further, the burden of proof is on the government to show that without water, the reservation's primary purpose would be entirely defeated. Whether these principles apply to Indian reserved rights, the Court has never said.").

[230] *In re* The General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76, 96 (Wyo. 1988) (*Big Horn I*) (discussing the use of the "specific purpose" test from *New Mexico* in the Ninth Circuit's *Colville* decision respecting Indian reserved water rights).

[231] *Id*. at 97.

[232] *Id.* at 99–100.

[233] *In re* the General Adjudication of All Rights to Use Water in the Gila River System and Source, 989 P.2d 739, 747 (1999).

standard.[234] Arizona chose to apply what it called a "multiple factor analysis."[235] Wyoming decided the State Engineer should "monitor" decreed Indian reserved water rights, while Washington apparently relies on courts.[236] The Wyoming Supreme Court also has rejected the ability of tribes with decreed reserved rights for future agricultural water use to change those rights to instream flow purposes, though the precise legal basis for this decision is unclear.[237]

IV. SUMMARY

Allowing state courts to determine federal and tribal water rights is an experiment that has failed.[238] While the courts endeavor to consistently apply federal law, they are inevitably affected by their position as state courts. They are subject to state political influences.[239] They are often sensitive to the potential adverse effects of newly decreed senior reserved water rights on junior water users with rights established under state law. Whether consciously or not, they may well tend to apply federal law in a way that produces results protective of state interests and constrictive of federal interests. It is difficult, in reading many of these state court decisions, not to be aware of the explicit or implicit hostility toward reserved

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[234] *Big Horn I*, 753 P.2d at 100–01.

[235] *In re* the General Adjudication of All Rights to Use Water in the Gila River System and Source, 35 P.3d 68, 79 (Ariz. 2001).

[236] The Wyoming Supreme Court in *Big Horn I* used the term "monitoring" while upholding the trial court's decree under which disputes between Indian and non-Indian water users on the Wind River Reservation were first to be addressed by the State Engineer. *Big Horn I*, 753 P.2d at 115 ("The decree only requires the United States and the Tribes first to turn to the state engineer to exercise his authority over the state users to protect their reserved water rights before they seek court assistance to enforce their rights; it does not preclude access to the courts."). The source for Washington's approach is Mirage, *supra* note 126, at 1181–82.

[237] *See In re* The General Adjudication of All Rights to Use Water in the Big Horn River System, 835 P.2d 273, 301–04 (Wyo. 1992).

[238] *See also* McElroy & Davis, *supra* note 10, at 600–01 (footnotes omitted):

> Examination of the resulting state court litigation over the nature and extent of tribal water rights reveals that the adjudication of Indian reserved water rights has occurred in distinct proceedings which could have been conducted in federal court and then integrated into the state court proceedings. Moreover, the state courts have not shown any unique ability to address the complicated substantive and procedural issues that are involved in the determination of Indian reserved rights. In addition, there are lingering concerns that the state courts are ill-equipped to deal with the political pressures arrayed against tribal efforts to reclaim water that may have been used by the non-Indian community for many years. Finally, there are frequent indications that tribes, the United States, and the states are weary of the fray and are beginning to question the incredible outlay of resources required for such massive adjudications. For example, in Arizona, the parties have struggled for the last ten to fifteen years just to establish a procedure to deal with the complexities of the federal rights of the United States and Indian tribes.

[239] *See* Blumm, *supra* note 160, at 182–98.

rights they often display. Put simply, the diversity of courts considering these matters has generated a diversity of results. And the promise of oversight by the U.S. Supreme Court to sort out these issues has proven illusory.[240] It is time to remove this authority from state general adjudication courts.

The problem begins with the McCarran Amendment and its adoption of the general adjudication model as the forum to determine federal water rights. The use of general adjudications to determine water rights arose in an era in which there were no reliable records of claims to use water and, thus, no means of resolving conflicts between users except litigation.[241] Since no uses had been validated through some state process, the idea emerged of having all users joined simultaneously in a single proceeding in which priorities and diversion amounts would be fixed.[242] Most states subsequently developed special processes under which new water uses had to be established, processes requiring the issuance of a permit to authorize initiation of an appropriation. These processes ended with some kind of official determination that the authorized beneficial use had been achieved and, thus, that the right had vested.[243] Only a few states such as Wyoming, however, used this process to certify the vested status of pre-existing uses, and some states such as Montana waited many years before establishing any effective state supervision of new uses.[244] Because of the large number of undetermined water uses in some states, statutes authorized the institution of a general adjudication proceeding in state courts to determine priorities and enable resolution of disputes.[245]

But the surge in use of GSAs in recent times is largely related to the desire to determine federal and Indian reserved water rights in state court. The result has been decades-long proceedings in multiple western states that have been enormously expensive to all participants and that, aside from determining federal and Indian claims, have accomplished little more than finally establishing an official priority date and diversion right for uses that pre-existed state supervision

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[240] The only state court general adjudication that has been reviewed and decided by the U.S. Supreme Court on the merits was the New Mexico proceeding for the Rio Mimbres. *See* United States v. New Mexico, 438 U.S. 696 (1978).

[241] Rethinking, *supra* note 8.

[242] *Id.*

[243] *Id.* Wyoming directed that all existing uses be determined in its administrative adjudication process in 1890. *See* Lawrence J. MacDonnell, Treatise on Wyoming Water Law 12–13 (2014).

[244] Rethinking, *supra* note 8. Montana did not put in place a permitting system until 1973.

[245] For a good summary of state adjudication processes, see A. Lynne Krogh, *Water Right Adjudications in Western States: Procedures, Constitutionality, Problems & Solutions*, 30 Land & Water L. Rev. 9 (1995).

of new uses.[246] It is probably not legally necessary to use GSAs simply to validate the existence of uses established under state law and, aside from the influence of the McCarran Amendment, it is certainly not necessary to use GSAs to determine the existence and scope of federal and Indian reserved rights.[247]

How can we disentangle ourselves from this unfortunate situation? Perhaps most straightforward would be for Congress to amend the McCarran Amendment by limiting its waiver of federal sovereign immunity to determination of uses of water based on state law.[248] An alternative would be for the U.S. Supreme Court to reconsider its view that federal and Indian reserved rights can be determined in GSAs. The Court's decisions turned heavily on notions of judicial efficiency and, perhaps, federalism. In part, this view seems to be based on the assumption that water right determinations should be made in general adjudication processes.[249] This assumption is based on the mistaken notion that all water users from the same source of supply need to be party to the proceeding, that the process is fundamentally adversarial, and that it is fair for the United States and tribes to have to go through the same process as all other users of water from the same source.

Moreover, we now have substantial experience with state court determination of federal and Indian reserved rights. This experience tends to bear out the concerns expressed in the dissents to *Colorado River District* and *San Carlos Apache*.[250] Justice Marshall, for example, dismissed concerns of duplicative proceedings

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[246] By far the most comprehensive treatment of GSAs in the west is found in two lengthy articles published in 2005 and 2006. John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams Part I*, 8 U. DENV. WATER L. REV. 355 (2005); John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams Part II*, 9 U. DENV. WATER L. REV. 299 (2006).

[247] See Rethinking, *supra* note 8, for the argument that GSAs are not necessary to determine the priority and extent of uses established under state law. The priority and extent of an appropriative water right are based on actions of the individual appropriator and are totally independent of the existence of other uses of water from the same source. Their determination is based on the specific facts of the appropriation—the date the appropriation was initiated, the diligence with which water was placed to beneficial use, and the requirements of the use. None of these considerations is in any way dependent on the existence of other uses. Similarly, the existence and scope of federal and Indian reserved rights are determined based on the particular facts associated with the reservation of land, not on the existence of other water uses from the same source of supply.

[248] Arguably, this was Congress's original intent. *See supra* note 9 and accompanying text. For the reasons expressed in Rethinking, *supra* note 8, however, the amendment should remove the requirement of a general adjudication and simply direct that determinations of federal water use rights based on state law must be established under state law, as with Section 8 of the 1902 Reclamation Act. 43 U.S.C. § 383.

[249] *See, e.g.*, Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 571 (1983) ("But water rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute, and we cannot in this context be guided by general propositions.").

[250] *See supra* notes 73, 75 and accompanying text.

by noting that federal district courts need only decide the matter of federal and Indian reserved rights.[251] Justice Stevens, joined by Justice Blackmun, presciently noted the important uncertainties remaining in the law of reserved rights and the importance of having these issues determined in the federal court system with its opportunities for appellate review.[252] Justice Stevens further noted the great difference in the legal issues to be considered in determining federal and Indian reserved water rights, a difference that would, he accurately predicted, result in separate proceedings within the state adjudication process to determine these rights.[253] Now added to these valid concerns is the experience with state court determinations, a decidedly mixed experience with sometimes directly conflicting results that are not being addressed through U.S. Supreme Court review, and with prominent examples of exactly the kinds of concerns expressed about expecting state courts to evenhandedly decide matters that are perceived as favoring federal or tribal interests at the expense of local concerns.[254] For all these reasons it is time to return determination of federal and Indian reserved water rights to federal courts.

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[251] *San Carlos Apache*, 463 U.S. at 572 (1983) (Marshall, J., dissenting).

[252] *Id.* at 573 (Stevens, J., dissenting) ("Not all of the issues arising from the application of the *Winters* doctrine have been resolved, because in the past the scope of Indian reserved rights has infrequently been adjudicated. The important task of elaborating and clarifying these federal law issues in the cases now before the Court, and in future cases, should be performed by federal rather than state courts whenever possible.").

[253] *Id.* ("Federal adjudication of Indian water rights would not fragment an otherwise unified state court proceeding. Since Indian reserved claims are wholly dissimilar to state-law water claims, and since their amount does not depend on the total volume of water available in the water source or on the quantity of competing claims, it will be necessary to conduct separate proceedings to determine these claims even if the adjudication takes place in state court. Subsequently the state court will incorporate these claims—like claims under state law or federal Government claims that have been formally adjudicated in the past—into a single inclusive, binding decree for each water source.").

[254] The Idaho Supreme Court's reversal of its decision respecting wilderness water rights is the most prominent example (*see supra* note 199), but other decisions reflect that same problem. *See, e.g.*, *In re* The General Adjudication of All Rights to Use Water in the Big Horn River System, 835 P.2d 273 (Wyo. 1992) (denying the tribe's right to use its reserved rights for instream flows).