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The United States Supreme Court's decision in *Cappaert v. United States* lays the foundation for extensive federal claims to groundwater. In this Note, Dean Meyers analyzes those federal claims and offers some principles to resolve the competition between federal and private groundwater users.

## FEDERAL GROUNDWATER RIGHTS: A NOTE ON CAPPAERT V. UNITED STATES

*Charles J. Meyers\**

I am pleased to contribute this case commentary to a symposium honoring Frank J. Trelease. One cannot write on any aspect of water law without drawing on Trelease's scholarship, and this piece concerns a subject of central importance in his recent work: federal-state relations in water law. I have been strongly influenced by his study for the National Water Commission,<sup>1</sup> which remains the basic text in the area. His call for legislation, valid when made, is even more urgent today, in view of the United States Supreme Court's decision in *Cappaert v. United States*,<sup>2</sup> which lays the foundation for extensive and disruptive federal claims to groundwater. This Note analyzes those claims and suggests some principles to resolve the competition between federal and private groundwater users.

Narrowly stated, the holding in *Cappaert* is this: A groundwater user whose withdrawals commenced in 1968 cannot reduce the water level in an inter-connected pool of surface water on federal land so as to endanger the habitat of a unique species of fish living in the pool, when prior

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1. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW (1971).
2. 426 U.S. 128 (1976).

to 1968 the pool had been withdrawn from entry by Executive Order, under statutory authority, to preserve its character.

An abstract statement of the "rule" of the case under this formulation might read as follows: when the Government reserves water for a specific use, uses by others commencing thereafter may not interfere with the prior federal use.

These statements may be accurate but, in my view, conceal more than they reveal about the controversies the case will generate. A better statement of the rule of the case—one that foretells the claims that are likely to arise—would be this: The withdrawal of federal lands from entry and their reservation for other purposes (such as National Parks, Forests, Monuments, Wildlife Refuges and, most important, Indian Reservations) reserves groundwater as may be useful to realize the purposes of the reservation, and the Government (and its Indian beneficiaries) may pump groundwater, although the pumping interferes with groundwater use by others. Moreover, the Government may enjoin groundwater pumping by others if such pumping interferes with Government use of groundwater for a reservation purpose.

In short, the Government will claim that it is entitled to harm others by pumping and to prevent harm to itself from pumping, regardless of contrary provisions of state law. I shall call these claims the Government's Golden Rule.

The Government's Golden Rule, as derived from *Cappaert*, is probably subject to one qualification in states applying the law of prior appropriation to groundwater: a landowner who initiated an appropriative right in groundwater before a federal reservation is withdrawn is entitled to continue his pumping though it harms the Government. For example, if the rancher in *Cappaert* had obtained his state permit and commenced his pumping in 1950, two years before the Devil's Hole pool was withdrawn from entry, he could continue to pump pursuant to his state permit even though fish would die as the water level in the pool declined. The Government's recourse is condemnation of the rancher's water right. Similarly, if the Govern-

ment pumped water on its reservation so as to interfere with the rancher's prior appropriative right, the rancher would have a claim at least for compensation for the taking of a property right and possibly to an injunction. The Government should not be troubled with this exception to its Golden Rule, for the number of significant pumping operations that ante-date Government withdrawals is minuscule.

While the broad formulation of the *Cappaert* rule included Indian Reservations, the analysis which follows separates non-Indian federal reserved groundwater rights from Indian groundwater rights. I have come to the conclusion, which I attempt to justify at the end of the Note, that Indian groundwater rights stand on a broader base than other federal groundwater rights, and in truth owe little, if anything to *Cappaert*. But, if this proposition is wrong, no great harm is done by the separation: one can be sure that whatever claims, with whatever success, the Government makes for itself in groundwater will be made for the Indians with no less success.

In speculating over the claims the Government will make for groundwater and how they will be received by the federal courts, I begin with the proposition that state law will have no perceptible influence on the outcome of the litigation. Federal surface water law ignores the two principal elements of western water law: (1) priority of appropriation and (2) beneficial use. We can expect similar judicial behavior with respect to groundwater and for similar reasons: the Government is a late comer and western water law penalizes late comers. If the Government is to be allowed use of any water—without having to pay for it<sup>3</sup>—the usual state rule of priority of appropriation must be set aside. Thus, I expect the federal courts to approach federal groundwater as *tabula rasa* and to create a new body of jurisprudence for it. One way to systematize speculation over the shape and content of the new jurisprudence is to identify the types of conflicts that arise over groundwater pumping and to formulate the claims the Government will make against its opponents in these contests.

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3. There has never been any question of the power of the Government to obtain water; it can always apply for unappropriated water under state law or buy or condemn water already appropriated. The fight is over getting the water for nothing.

Three kinds of conflicts dominate groundwater litigation:<sup>4</sup>

(1) Well interference: a new pumper enters an aquifer with a powerful pump reducing (or terminating) production from an older well with a less powerful pump.

(2) Overdraft in rechargeable aquifers: the number of pumpers in the aquifer and their rate of water withdrawal is such that the water table steadily declines, increasing pumping costs (which at some point can become uneconomic) and threatening destruction of the aquifer through compaction and exhaustion of supply.

(3) Mining a non-recharging aquifer: Production of any water from a non-recharging aquifer is mining, just as removal of gold from a vein or oil from a reservoir is mining. When the water supply is exhausted or falls below economic pumping levels, the economy based on the use of the water will disappear.

Our questions are: (1) What will the Government claim in these circumstances, both as privileged conduct on its behalf and as breach of duty when engaged in by others? (2) What is likely to be the response of the federal courts?

### *Well Interference*

The number of cases in this category may turn out to be limited since federal and private wells are not commonly interspersed in the same aquifer. But conflicts could arise along the boundaries of federal reservations and in certain other circumstances.<sup>5</sup>

*Cappaert* provides the ammunition for an attack on private pumping which interferes with a Government well. The Government may argue that, if a private pumper cannot lower the water level in the Devil's Hole Pool, it follows that a private pumper may not interfere with a Government well. When a Government well interferes with a private pumper, *Winters v. United States*<sup>6</sup> and *Arizona v. California*<sup>7</sup> will be

4. I exclude from consideration subsidence and pollution and deal exclusively with supply.

5. If allotted Indian lands have passed into non-Indian ownership and if (a big if) such lands are governed by state water law, the conflict could arise.

6. 207 U.S. 564 (1908).

7. 373 U.S. 546 (1963), decree 376 U.S. 340 (1964).

wheeled in to support the claim that the Government's conduct is privileged, for those cases hold that the Government is entitled to take what surface water it needs to fulfill the purposes of a reservation, despite disruption of existing uses.<sup>8</sup>

#### *Overdraft in Rechargeable Aquifers*

Conventional hydrologic theory holds that rechargeable aquifers should be operated so as to take advantage of the storage capacity of the reservoir. While an aquifer may be drawn down below its natural level, once its optimal level has been reached, inflow and extraction should balance over time.<sup>9</sup> Some courts have accepted this concept of safe annual yield as the legal norm for groundwater withdrawals.

When federal and private pumpers are operating in a rechargeable aquifer, two questions may arise: (1) what are the Government's rights and duties regarding pump depths? (2) how is safe annual yield to be divided among federal and private pumpers?

The Government may take an extreme position in both cases: it may claim entitlement to the aquifer in the condition that prevailed when the reservation was established, which usually will be the natural level. Thus, if water tables were at fifty feet below the surface when the Fort Belknap Indian Reservation was established in 1888, the Government is entitled to stop all pumping (except its own) until that level is restored. Obviously, less drastic claims are possible: the level when the Government sinks its first well; the optimal level taking into account pumping costs and the value of the water; or even a sub-optimal level based on general practice in the state. The basic issue is money: how deep must the Government drill and how much will it have to pay in lifting costs? Exactly the same questions arise when the Government is the defendant. Do private pumpers have any protection against Government pumping that lowers the water table

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8. Conflicts over well interference—as well as falling water tables and mining of groundwater—can arise in aquifers in which all pumpers hold federal groundwater rights. A paradigm case would be litigation among Indians over pumping rights on the Reservation. In such a case the Government's Golden Rule offers an inadequate guide to decision, and Government lawyers and federal judges will be forced to make more complex choices. Later in the Note, I suggest some principles that ought to apply in litigation between the Government and private pumpers. Those principles, based on sound groundwater management, are equally applicable here.

9. As benefits and costs change, the optimal water level would also change.

and increases their drilling and pumping costs? Whatever the answers may be when the Government is the plaintiff, I think a negative answer is likely when the Government is the defendant. If the Government proves that groundwater pumping serves the purposes for which the reservation was established, a court is unlikely to curtail the Government's pumping because it lowers the water table. The acid test will come when the Government's pumping is uneconomic but continues because the Government can afford it while the other pumpers who cannot go out of business.

The other major question of federal rights in rechargeable aquifers is allocation of safe annual yield when the basin is subjected to that regimen. I would expect the Government to claim that its water requirements come off the top, and if that proves correct, I would also expect the Government to seek to apply the safe annual yield regimen to all aquifers in which it has an interest. After the Government's requirements are satisfied, any remaining supply would be allocated among private pumpers according to state law. In appropriation states, junior pumpers could very well be shut down.

#### *Mining a Non-recharging Aquifer*

Few, if any, aquifers have literally zero recharge; but, quite a number are functionally non-recharging because the rate of recharge is measured in decades or centuries. The Ogallala aquifer, which underlies parts of Texas, Oklahoma, Kansas and Nebraska is a well-known example of a functionally non-recharging aquifer.

Of course, a non-recharging aquifer has no safe annual yield; to produce water from it is to mine. Whether or not to mine and, if so, at what rate, are the questions facing the manager of such a basin. The Government could make a plausible claim that it alone may produce water from a non-recharging basin. If groundwater is useful in accomplishing the purpose of the reservation, then the depletion of the resource by other pumpers frustrates those purposes and violates the Government's right.

Consider this case: both federal and private users are pumping from a closed aquifer. At present rates of extraction,

the aquifer will be exhausted in twenty years, but if the private pumpers are shut down the aquifer will produce for forty years. We can expect the Government to contend that its superior right entitles it to the aquifer's full supply because the full supply is necessary (or useful) to accomplish the purposes of the reservation.

RECAPITULATION OF THE GOVERNMENT'S CLAIMS:  
SOME ARGUMENTS IN OPPOSITION

The Government's Golden Rule when applied to specific groundwater conflicts is likely to produce the following claims on behalf of the Government as plaintiff:

(1) It may enjoin private wells that interfere with Government wells.

(2) It has a protected legal interest in pump depths, possibly the depth in a state of nature, probably a depth no lower than that of the Government's first well.

(3) Safe annual yield is the limit on extraction from recharging aquifers and the Government takes its requirements off the top.

(4) The Government alone can pump from non-recharging aquifers.

When the Government is the defendant, the correlative propositions derived from the Government's Golden Rule are:

(1) No private pumper is protected from well interference by Government pumping.

(2) The Government's draw down of water tables is unlimited.

(3) If safe annual yield is the limit on extraction of water from an aquifer, private pumpers receive what remains after Government requirements are fully satisfied.

(4) Private pumpers cannot extract water from a non-recharging aquifer if the Government objects.

I do not have the knowledge and imagination to predict the magnitude of havoc these claims will produce. It seems



clear, however, that if sustained, they will destroy existing private investment in groundwater operations in aquifers where the Government has an interest.

I see two arguments in opposition to the Government's claims, though both run into some trouble from the Court's language in *Cappaert*. The first argument relates to the intent that existed when the reservation was established. *Winters v. United States* and *Arizona v. California* hold that a right to surface water may be reserved for federal purposes when a reservation is established, because an inference may be drawn from the stated purposes of the reservation and surrounding circumstances that surface water was required for their accomplishment. The inference is quite strong for Indian Reservations, because the Indians were expected to become farmers and needed water to do so. The inference may be less strong for some other federal reservations (e.g., a National Forest) because their need for a water right was not self-evident. National Forests use water of course, but typically they are sources of water and do not now, and did not when created, need a *water right* in order to accomplish their purpose of sustaining arboreal life.

The Government's response might be: this argument was plausible before 1963, but since then, *Arizona v. California* has declared that National Parks, Monuments, Forests, Wildlife Refuges, etc. are entitled to *water rights*. The inference of intent to reserve water was so lightly made that the presumption is in favor of a reserved water right and opponents must prove a contrary intent.

The Government response would be overstated. The sole statement in *Arizona v. California* on non-Indian reserved water rights is in its entirety this:

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

Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.<sup>10</sup>

The Decree quantified the water rights of the two Wildlife Refuges, whose need for water is self-evident, but did not quantify the right of either the Recreation Area or the National Forest. For further guidance we must turn to the Master's Report, which makes three points about the Recreation Area:<sup>11</sup> (1) The Government had the power to reserve Colorado River water for the Recreation Area; (2) The Government intended to reserve water because the Recreation Area's purposes could not be fully carried out without the water; (3) quantification of future requirements is unnecessary because the general order of magnitude is the same as present uses, 300 acre feet per year.

The same points are made again about the National Forest, and the Master concludes as follows: "As in the case of the Lake Mead National Recreation Area, the future water requirements of the Gila National Forest appear to be so modest that it is unnecessary to put maximum limits on the reserved water rights created for its benefit."<sup>12</sup>

I conclude from the scant attention paid to non-Indian federal reservations by both the Supreme Court and the Special Master in *Arizona v. California* that while the power to reserve water for federal reservations is not in doubt (and never was), intent is still an arguable proposition and that trivial amounts of water require little proof of intent, but that large quantities of water will require correspondingly greater proof.

I also suggest that non-Indian federal reservations which have an adequate supply of surface water to satisfy reservation purposes may not have any groundwater right at all. If intent is an element in the creation of a federal reserved water right, that intent has been effectuated when a reservation's requirements are supplied by a surface water right. It seems highly improbable that groundwater was intended to be reserved at a time when surface water was available to satisfy

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10. *Arizona v. California*, 373 U.S. 546, 601 (1963).

11. Master's Report, *Arizona v. California*, at 292-94 (1960).

12. *Id.* at 335.

reservation needs and when groundwater use was non-existent or limited to trivial domestic uses.

Neither the holding nor the language in *Cappaert* forecloses this approach to federal groundwater rights. Although in its general discussion of reserved water rights the Court's language suggests that a withdrawal of land from entry automatically reserves appurtenant water,<sup>13</sup> the Court later holds that "the water right reserved by the 1952 Proclamation was thus explicit, not implied."<sup>14</sup>

Moreover, the Court specifically notes that quantity is tied to need and need is tied to purpose.<sup>15</sup> This language, especially the phrase "minimal need", allows room for the contention that groundwater is reserved only if groundwater, *qua* groundwater, is necessary to accomplish the reservation purposes, as it was for the pupfish in Devil's Hole.

Instances will occur, however, where the intent to reserve groundwater should be inferred from the purposes of the reservation and the circumstances at the time of the withdrawal. Accordingly, conflicts between federal and private pumpers will have to be adjudicated. Some better norm than the Government's Golden Rule is needed. The Government should be entitled to use some groundwater, even if it is the last pumper in the basin. But, the Government should not be allowed to destroy existing capital investments (*e.g.*, by closing down a non-recharging aquifer) to save pumping costs or extend the life of the aquifer solely for its own benefit.

Statutory authority is needed to appoint a basin manager for aquifers in which the Government has an interest. The manager should be given the power and the responsibility to administer the basin in accordance with modern techniques of aquifer management.<sup>16</sup> The key element of the statute,

13. *Cappaert v. United States*, *supra* note 2, at 138.

14. *Id.* at 140.

15. "Thus, as the District Court has correctly determined, *the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool as the natural habitat of the species sought to be preserved.* The District Court thus tailored its injunction, very appropriately, to minimal need, curtailing pumping only to the extent necessary to preserve an adequate water level at Devil's Hole, thus implementing the stated objectives of the Proclamation." *Id.* at 141 (emphasis added).

16. This Note is no place to discuss proper standards of groundwater management. The interested reader will find a useful introduction to the subject in the NATIONAL WATER COMMISSION, *WATER POLICIES FOR THE FUTURE* 230-43 (1973).

however, would be a provision treating federal pumpers like private pumpers. I advocate Congressional rejection of the extreme Government claims, the institution of a sound groundwater management regimen, and the treatment of *all* pumpers as equals, with the same rules on well interference, pump lifts, division of safe annual yield, and right to mine. I do not advocate application of state law, because state law might forbid government pumping altogether (*e.g.*, in a basin already closed by the State Engineer) or impose other restrictions that would interfere with reservation purposes. The groundwater law should be federal law, but it ought to be a fair federal law under which the Government is simply another competitor for the resource.

The likelihood of Congressional action along this, or any other line, is remote. What then should the federal courts do when presented with conflicting federal and private groundwater claims? They have no choice, it seems to me, but to construct some system of federal groundwater law, and they are free to develop a fair system that seeks to maximize the total social gain from the resource while accommodating the competing interests in distributing the resource. They are free to reject the Government's Golden Rule and adopt a system that is economically sound and distributionally fair.

The one hurdle in this path is language in *Cappaert* stating that the doctrine of federally reserved water rights does not involve a "balancing test."<sup>17</sup> I believe the obstacle can be overcome: the Court's language responds to a contention of the State of Nevada that the Supreme Court "in the *Winters* case was undoubtedly weighing the conflicting equities . . ."; that "[t]he doctrine that grew out of the *Winters* case was a doctrine of need, an equitable doctrine."<sup>18</sup>

This is a preposterous argument, which the Court sees, not incorrectly, as an invitation to overrule *Arizona v. California* and the Eagle County case.<sup>19</sup> In response, the Court rejects the proposed "balancing of the equities" test, but the rejection goes only to the *creation* of the federal reserved right, not to its ambit. The opinion makes clear that intent to

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17. *Cappaert v. United States*, *supra* note 2, at 138; *see also Id.* at 139 n.4.

18. Brief for Intervenor-Appellant State of Nevada, p. 15.

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

reserve water can be an issue and that the issue is resolved in terms of the need for a water right to accomplish reservation purposes. It also states that the amount of water reserved depends on need, indeed "minimal need."<sup>20</sup> It rejects a balancing test to determine whether a reserved right was created; it does not reject a rule of reason in adjudicating and administering conflicting claims on well interference, pump depths, safe annual yield or mining groundwater.<sup>21</sup>

### *Indian Groundwater Rights*

I am unsure how much of the foregoing analysis applies to Indian groundwater rights. Early readings of *Cappaert* led me to believe that just as Indian water rights under *Winters* provided the foundation for federal reserved water rights on non-Indian reservations, federal groundwater rights on a National Monument under *Cappaert* would provide the basis for Indian groundwater rights.

I no longer hold that view. I would argue that when an Indian Reservation was created, whether by treaty, statute or executive order, a property interest comparable to a fee simple absolute was set aside in trust for the tribe. The Indians own the beneficial interest in all the resources on their land: soil, oil and gas, coal, other minerals and groundwater.

If this conceptualization is accepted, then Indian groundwater rights are different in one important respect from non-Indian federal reserved groundwater rights: the question of intent to reserve does not arise. Equitable title to the groundwater passed to the tribe in precisely the same manner as title passed to the land and its other resources.

But the conflicts over use of the resource between Indian and non-Indian pumpers are no different from those between federal and private pumpers. The Indians are likely to claim—and to receive—all the protections afforded the Government, and unlike the Government's non-Indian groundwater claims, Congressional solutions are probably not tenable in theory,

20. *Cappaert v. United States*, *supra* note 2, at 141.

21. Nevada's Brief is not the first instance of extreme claims backfiring. In *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275, 292 (1958), the district contended that Section 8 of the Reclamation Law, directing the Secretary to comply with state water law, nullified the 160-acre limitation of Section 5 of the Reclamation Law. The Supreme Court properly rejected that preposterous argument and in doing so began the process that eviscerated Section 8.

even if available in fact. As to its own proprietary claims, the United States by legislative action can surrender what a court has awarded it. As to Indian claims, apart from condemnation and indemnification, only a court can define the rights and privileges in groundwater and only the Indians can surrender them.

The Indians can be expected to press for every advantage and the outcome can be considerably more significant to non-Indian interests than Indian rights in surface water have been. While Indian Reservations have surface water claims that could absorb the full supply of many rivers, those claims (even when adjudicated and placed in a decree) do not mean much until investment capital is available to build projects to use the water.<sup>22</sup> Until quite recently, an Indian water project meant an irrigation project and since most irrigation projects (Indian or non-Indian) are uneconomical, the only source of capital was the federal government. Under those circumstances, the political process limited public investment in Indian projects.

Groundwater development requires less capital and is, therefore, less inhibited by the political process. Thus, we can anticipate more rapid development of Indian groundwater than of Indian surface water, resulting in direct conflicts with non-Indian users, the resolution of which will have immediate and palpable effects on the non-Indian users.

To my mind, a rule of reason is also appropriate in adjudicating Indians' claims on well interference, pump depths, safe annual yield and groundwater mining. While the Indians' source of title differs from other Government groundwater rights, characterizing the Indians' rights as derived from a grant of a fee simple absolute does not resolve the competition between Indians and non-Indians, who also have a fee simple absolute in their overlying land. The federal courts should apply sound management principles and precedures to the aquifer, seeking to maximize its productivity and distribute its wealth so that Indians receive a share without destroying prior non-Indian investment.

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22. Indian Reservations in the Lower Colorado River Basin were decreed nearly one million acre feet of water in *Arizona v. California*, 376 U.S. 340 (1964), but the decreed rights have had no noticeable effect on the supply of non-Indian users.