

Reevaluating the Applicability of the Reservation Doctrine to Public Water Reserve No. 107

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The control of water in the arid Western states has been a focal point of controversy for more than a century. During the early development of the West, cunning and violence accompanied the water rights struggle.¹ Today, government agencies and the courts resolve water-related conflicts.

A common issue underlying water rights adjudication is whether the federal government has reserved certain water rights to itself, or whether state laws control appropriation of those waters.² Litigation has focused on cases involving Indian reservations, national forests, and national monuments,³ but in recent years, springs and water holes on the public range have developed into a source of friction.⁴ The prevailing sentiment of Western ranchers who utilize the public range is that they should be able to acquire from states the rights to water sources they develop or use.⁵ This contention is supported by the fact that the Desert Land Act of 1877⁶ placed all non-navigable waters under the absolute control of the states in which the waters occur.⁷ However, a 1926 Executive Order, entitled Public Water Reserve No. 107 (PWR 107), specifically reserved public domain lands containing springs and water holes.⁸ This reservation forms the ba-

1. See *infra* notes 47 & 48 and accompanying text.

2. See, e.g., *Cappaert v. United States*, 426 U.S. 128 (1976); *Winters v. United States*, 207 U.S. 564 (1908); *Denver v. United States*, 656 P.2d 1 (Colo. 1982).

3. See, e.g., *Cappaert v. United States*, 426 U.S. 128 (1976) (reserved rights in Death Valley National Monument); *United States v. New Mexico*, 438 U.S. 696 (1978) (reserved rights in Gila National Forest); *Winters v. United States*, 207 U.S. 564 (1908) (reserved rights on Fort Belknap Indian Reservation).

4. The public range comprises a substantial portion of the federally owned lands in the Western states and includes more than 134 million acres of public domain administered by the Bureau of Land Management as grazing districts. UNITED STATES DEPT OF INTERIOR, BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 1982, 84-85. The grazing districts comprise a total of 168 million acres, 156 million of which is public domain land, reserved lands, and other non-specified federal lands. *Id.*

5. N.Y. Times, Feb. 14, 1983, at A10, col. 3.

6. 43 U.S.C. §§ 321-399 (1976).

7. The Supreme Court has read the Desert Land Act of 1877 as effecting a severance from federal control of all the waters on the public domain. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935). The Court held that, following the passage of the Desert Land Act, ". . . all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states. . . ." *Id.*

8. Public Water Reserve No. 107, Executive Order of 1926, was issued pursuant to the Pickett Act, ch. 421, § 1, 36 Stat. 847 (1910) (codified at 43 U.S.C. § 141 (repealed 1976)) [hereinafter

sis for a federal claim to control of the water sources on PWR 107 lands, under the implied-reservation-of-water doctrine.

The judicially created implied reservation of water doctrine provides that when the United States withdraws lands from the public domain, it also withholds unappropriated waters necessary to accomplish the purpose of the land reservation.⁹ The legislative or executive purpose underlying the reservation of land determines whether, and in what quantity, water is reserved.¹⁰ Thus, the Executive Order of 1926 and its authorizing legislation, which indicate the reservation's purpose, provide the framework for applying the implied-reservation-of-water doctrine to PWR 107.

Administrative and judicial decisions conflict over the purpose of PWR 107 and, consequently, over the amount of water reserved to the federal government and therefore not available for appropriation under state laws.¹¹ A 1979 Interior Department Solicitor's Opinion found that PWR 107 had several purposes; the Opinion concluded from this finding that the federal government had reserved the entire yield of springs and water holes on PWR 107 lands.¹² In a 1982 adjudication, however, the Colorado Supreme Court defined the purpose of PWR 107 very narrowly and expressly rejected the United States' claim to the entire yield of PWR 107 waters.¹³

The Interior Department adopted the view of the Colorado court in a 1983 Solicitor's Opinion.¹⁴ In that opinion, Solicitor Coldiron found that the federal government had reserved only an amount of water necessary for human and animal consumption.¹⁵ State law would therefore control rights to PWR 107 waters to be used for any other purposes.¹⁶ The Solicitor's narrow interpretation of the PWR 107 purpose is of questionable va-

cited as PWR 107] and the Stock-Raising Homestead Act, § 10, 39 Stat. 865 (1916) (codified at 43 U.S.C. § 300 (repealed 1976)). See *infra* notes 36-48 and accompanying text. Between 1910 and 1916, 106 Public Water Reserves were created in the Western states, but PWR 107 became the major withdrawal of public lands for the purpose of reserving water holes or springs. 2 C.F. WHEATLEY, STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS 188-89, reprinted in PUB. LAND L. REV. COMM'N STUDY REP. PB 187003 (1969).

The 1926 Executive Order is not applicable to the public land states of Alabama, Arkansas, Florida, Louisiana, Michigan, Minnesota, Missouri, Mississippi, and Wisconsin. 43 C.F.R. § 2311.0-8(a)(2) (1980). Executive Order No. 5106 of May 4, 1929 excluded Alaska from the Executive Order of 1926. 43 C.F.R. § 2311.0-8(a)(3) (1980) (43 C.F.R. § 2311.0-8 last appeared in the 1980 Code of Federal Regulations. The author was unable to locate any reference regarding its removal).

9. *Cappaert*, 426 U.S. at 138.

10. See *United States v. New Mexico*, 438 U.S. 696, 700 (1978). See also *infra* notes 26-30 and accompanying text.

11. See generally *infra* notes 52-83 and accompanying text.

12. 86 Interior Dec. 553 (1979). See *infra* notes 55-63 and accompanying text.

13. *City and County of Denver v. United States*, 656 P.2d 1 (Colo. 1982). See also *infra* notes 67-69 and accompanying text.

The Colorado adjudication was concerned, among other things, with the reserved water rights in more than 1,500 public springs and water holes on PWR 107 lands. 656 P.2d at 11. The reserved springs and water holes in the Colorado adjudication have a total flow of 15.39 cubic feet per second and impoundments of 7,223 acre-feet. Trelease, *Federal Reserved Water Rights Since PLLRC*, 54 DEN. L.J. 473, 487 (1977), citing M. White, Partial Master-Referee Report Governing All of the Claims of the United States of America In and For the State of Colorado 15 (1976).

14. 90 Interior Dec. 81 (1983).

15. *Id.* at 83.

16. *Id.*

lidity. An analysis of the 1926 Executive Order and its authorizing legislation reveals that the springs and water holes were intended to be held open for public use.¹⁷ The legislative intent would be defeated if the waters are available for private appropriation.¹⁸ By ignoring the intent behind the creation of PWR 107 and narrowing its purpose, the Solicitor and the Colorado court have created a troublesome precedent for applying the reservation doctrine.

This Note provides a brief overview of the implied reservation of water doctrine, followed by a historical perspective of PWR 107. The Note provides a comparative analysis of the administrative and judicial decisions regarding PWR 107. An attempt is then made to apply the reservation doctrine to PWR 107 without reliance on the conflicting administrative and judicial decisions. The Note concludes with a discussion of the implications of that analysis for present policy regarding PWR 107.

Implied Reservation of Water Doctrine

The United States Supreme Court first implied the existence of a federal reserved water right in 1899.¹⁹ The Court held that this right applied to Indian reservations in the 1908 *Winters* decision.²⁰ In the 1955 *Pelton Dam* case, the Court held that the federal government had the authority to license a power project on reserved lands.²¹ While the case did not deal directly with water rights, the Court's holding in *Pelton Dam* can be construed to mean that the federal government reserved the use of the water when it reserved the power site.²² The decision was considered a "bombshell" by Western water lawyers, as it suggested an extension of the reservation doctrine to non-Indian lands.²³ In 1963 the Court finally and conclusively established the existence of a federal reserved water right on non-Indian reserved lands in *Arizona v. California*.²⁴ The Court found that the

17. See *infra* notes 112-135 and accompanying text.

18. See *infra* notes 126-28 and accompanying text.

19. *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899). "[A] state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far at least as may be necessary for the beneficial uses of the government property." *Id.* at 703.

20. *Winters v. United States*, 207 U.S. 564 (1908). The Court held that the United States had an implied reservation of waters of the Milk River for irrigation purposes, in favor of the Indians on the Fort Belknap Reservation. The reservation of water was implied in a May 1, 1888 agreement in which the Indians ceded to the United States all of their lands except than contained within the Fort Belknap Indian Reservation. *Id.* at 577.

21. *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 444-45 (1955).

22. See F.J. TRELEASE, *FEDERAL-STATE RELATIONS IN WATER LAW*, NAT'L WATER COMM'N REP. L-71-014 at 106 (1971). The report states that it is understood that the power company which received the license in the *Pelton Dam* case "is now exercising the right of the United States to use the water which it reserved from the jurisdiction of the State of Oregon when it reserved the power site."

23. Trelease, *supra* note 13, at 477.

24. 373 U.S. 546, 601, *reh'g denied*, 375 U.S. 892 (1963). The Court found that the principle underlying the reservation of water rights for Indian reservations was also applicable to other types of federal reservations. The Court stated "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." 373 U.S. at 601.

For further clarification of the reservation doctrine, see Colorado River Water Conservation

United States had the power to reserve water under the commerce clause (article I, section 8) and the property clause (article IV, section 3) of the Constitution.²⁵

The contemporary version of the reservation doctrine, as articulated by the Supreme Court, provides that when the United States withdraws land from the public domain and reserves it for a federal purpose, unappropriated appurtenant waters are also reserved, by implication, in the amount needed to accomplish the purpose of the land reservation.²⁶ In applying the doctrine to a particular federal land withdrawal, the Court examines the asserted water right and the purpose of the federal reservation.²⁷ The Court will find a reservation of water if the absence of the water would defeat the purpose of the reservation.²⁸ Although the doctrine requires a governmental intent to reserve water at the time the land is reserved,²⁹ the intent need not be express but will be inferred if the water is necessary to the purpose of the reservation.³⁰

Western water lawyers began protesting the reservation doctrine immediately following the 1955 *Pelton Dam* decision.³¹ The doctrine has been termed a "perversion and a prevarication,"³² and its creators have been accused of heresy.³³ One of the primary criticisms of the reservation doctrine, for example, is that while it allows the federal government to take water from persons who have previously put it to use, it does not require the United States to pay for the taking.³⁴

Congress has considered legislative proposals to affirm, abolish, or clarify the judicially created doctrine, but it has taken no action.³⁵ Thus,

Dist. v. United States, 424 U.S. 800, *reh'g denied*, 426 U.S. 192 (1976); United States v. District Court, 401 U.S. 520 (1971). Both cases deal with the adjudication of water rights under the McCarran Amendment, § 208, 66 Stat. 560 (1952) (codified at 43 U.S.C. § 666 (1964)). An analysis of the McCarran Amendment is beyond the scope of this Note.

25. 373 U.S. 546, *reh'g denied*, 375 U.S. 892 (1963). "We have no doubt about the power of the United States under [the property and commerce clauses] to reserve water rights for its reservations and its property." *Id.* at 597-98.

26. *Cappaert*, 426 U.S. at 138 (1976).

27. United States v. New Mexico, 438 U.S. 696, 700 (1978).

28. *Id.*, citing *Winters v. United States*, 207 U.S. 564 (1908); *Cappaert v. United States*, 426 U.S. 128 (1976); *Arizona v. California*, 373 U.S. 546, *reh'g denied*, 375 U.S. 892 (1963).

29. *Cappaert*, 426 U.S. at 139.

30. *Id.*

31. Trelease, *supra* note 13, at 477. Trelease states:

[After the *Pelton Dam* case] Senator Barrett of Wyoming rushed into Congress with the first of what was to be a long series of "Western Water Rights Settlement Acts," and a number of western state water officials and others raised a chorus of protest at this reversal of what they had always thought to be the law. (citations omitted).

32. Corker, *A Real Live Problem or Two for the Waning Energies of Frank J. Trelease*, 54 DEN. L.J. 499, 500 (1977).

33. Reply Brief for the City and County of Denver at 35, *Denver v. United States*, 656 P.2d 1 (Colo. 1982). In an impassioned plea to the Supreme Court of Colorado, attorneys for the city of Denver argued against the existence of a federal reserved water right, stating, "Even so revered a body as the United States Supreme Court may sometime be led into the adoption of a heresy. If that should occur, we may rest assured that the Court will purge itself of the heresy as soon as it is discovered." *Id.*

34. F.J. TRELEASE, *supra* note 22, at 147m. See also ONE THIRD OF THE NATION'S LANDS, Rep. of the Pub. Land L. Rev. Comm'n, 149 (1970), which recommends that compensation be paid "where the utilization of the implied reservation doctrine interferes with uses under water rights vested under state law prior to the 1963 decision in *Arizona v. California*."

35. Rep. of the Pub. Land L. Rev. Comm'n, *supra* note 34, at 144. See generally F.J.

in spite of the controversy, the reservation doctrine remains an integral aspect of all adjudications involving federal water rights on reserved lands.

Public Water Reserve No. 107

The administrative and judicial decisions applying the reservation doctrine to PWR 107 reach conflicting conclusions. Common to all of the opinions, however, is a discussion of the history of PWR 107 and its authorizing legislation.

In an Executive Order dated April 17, 1926, President Coolidge withdrew public lands containing water holes and springs.³⁶ The order read in part:

It is hereby ordered that every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and *reserved for public use* in accordance with the provisions of section 10 of the act of December 29, 1916 (39 Stat. 862). . . .³⁷

The authority for this withdrawal is found in the Pickett Act of June 25, 1910,³⁸ and the 1916 Stock-Raising Homestead Act.³⁹

The Pickett Act gave the President the authority to withdraw public lands and to reserve lands for water-power sites, irrigation, classification of lands, or *other public purposes*.⁴⁰ The Act allowed only for "temporary" withdrawal, but the word "temporary" essentially had no significance, since another provision in the Act provided that any withdrawal or reservation would remain in force until revoked by the President or Congress.⁴¹ The Pickett Act did not define "other public purposes" for which public lands could be withdrawn. The Act did require, however, that the "public purpose" be specified in the orders of withdrawals.⁴²

In 1916, Congress passed the Stock-Raising Homestead Act, which

TRELEASE, *supra* note 22, at 130-33, which provides a glimpse of a few of the bills introduced in Congress which would reverse the reservation doctrine; Morreale, *Federal-State Conflicts Over Western Waters—A Decade of Attempted "Clarifying Legislation,"* 20 RUTGERS L. REV. 423 (1966), which provides a comprehensive analysis of various proposed legislation regarding reserved water rights.

36. Public Water Reserve No. 107, Exec. Order of 1926, *reprinted in* 51 Interior Dec. 457 (1926).

37. *Id.* (emphasis added).

38. Pickett Act, ch. 421, § 1, 36 Stat. 847 (1910), codified at 43 U.S.C. § 141 (repealed 1976)).

39. Stock-Raising Homestead Act, § 10, 39 Stat. 865 (1916), codified at 43 U.S.C. § 300 (repealed 1976)).

40. 43 U.S.C. § 141 (repealed 1976). The Pickett Act provides:

That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale or entry any of the Public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

41. Swenson, *Legal Aspects of Mineral Resources Exploitation* in HISTORY OF PUBLIC LAND LAW DEVELOPMENT 699, 735 (1968).

42. *See supra* note 40.

described certain lands that could be withdrawn under the Pickett Act's "public purpose" provision.⁴³ Section 10 of the Stock-Raising Homestead Act provided that lands containing water holes or other bodies of water needed or used by the public for watering purposes could be reserved and held open to the public.⁴⁴ Section 10 was written in response to legislative concern that, under then existing water law, a person could locate a homestead along a water course, monopolize the only available water supply, and thus destroy the value of surrounding lands.⁴⁵

President Coolidge withdrew PWR 107 lands in his Executive Order of 1926, pursuant to the Pickett and Stock-Raising Homestead acts, to prevent the monopolization of water sources.⁴⁶ Homesteading experiences throughout the arid West indicated that unless the government retained control of the watering places, monopolization by large stock raisers would result.⁴⁷ The public range was overcrowded, and any stock raiser without access to water faced financial ruin.⁴⁸ By reserving for public use land containing springs and water holes, PWR 107 addressed this problem and thus prevented private appropriation and control of the waters.⁴⁹

Administrative and Judicial Interpretations of PWR 107

Recent decisions applying the reservation doctrine to PWR 107 reach conflicting conclusions.⁵⁰ These decisions focus on the purpose of PWR 107 because the scope of an implied water reservation is determined solely by the purpose of the land reservation.⁵¹ A 1979 Interior Decision determined that a variety of purposes underlay PWR 107 and that it resulted in

43. 43 U.S.C. § 300 (repealed 1976).

44. *Id.* Section 10 provides in part:

That lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but may be reserved under the provisions of the Act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall while so reserved, be kept and held open to the public for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe.

45. See 53 CONG. REC. H 1127 (1st Sess. 1916). See also H.R. Rep. No. 35, 64th Cong., 1st Sess. 18 (1916).

46. 86 Interior Dec. 553, 580 (1979).

47. V. WESTPHALL, *THE PUBLIC DOMAIN IN NEW MEXICO 1854-91* (1965). Westphall cites abuses of both the Homestead Act of 1862 and the Desert Land Act of 1887. Westphall states: Because control of one waterhole could gain command over thousands of acres of grazing land, such control provided a good living for a family. Control of several watering places controlled more land and might bring wealth. This became the goal and achievement of some persons. Such was their greed that they knowingly broke the law in order to acquire whatever might and cunning would avail them.

Id. at 48.

See also Mosk, *Land Policy and Stock Raising in the Western United States* in *THE PUBLIC LANDS* 411 (V. Carstensen, ed. 1962). Mosk points out that many stockmen in New Mexico bought more state lands than they could pay for, developed water on a few tracts, and then defaulted on the contracts for undeveloped tracts. *Id.* at 420. "Through their control of the water they have ordinarily been able to dominate grazing on the adjacent state lands without actually owning them." *Id.*

48. U.S. GEOLOGICAL SURV. BULL. 537, 542-43, reprinted in B.H. HIBBARD, *A HISTORY OF THE PUBLIC LAND POLICIES* 509 (1924).

49. See *infra* notes 112-35 and accompanying text.

50. See generally *infra* notes 52-83 and accompanying text.

51. See *supra* notes 26-30 and accompanying text.

a blanket withdrawal of all waters on PWR 107 lands.⁵² In 1982, however, the Colorado Supreme Court held that PWR 107 was created for very narrowly defined watering purposes, and that the reservation of water was limited to an amount less than the entire yield.⁵³ The analysis of the Colorado court ignored pertinent Interior Decisions regarding the scope of PWR 107.⁵⁴ Due to the conflicting conclusions of the 1979 Solicitor's Opinion and the 1982 Colorado decision, each requires critical analysis.

The Department of Interior's 1979 opinion, authored by Solicitor Krulitz, is the most comprehensive analysis of the reservation doctrine as it applies to PWR 107.⁵⁵ The opinion came in response to President Carter's instruction to federal agencies to inventory and quantify federal reserved water rights.⁵⁶

Krulitz found that PWR 107 lands were withdrawn for watering and other purposes,⁵⁷ that the total yield of the springs and water holes was necessary to achieve these purposes, and therefore, that the entire yield was impliedly reserved.⁵⁸ In determining the purposes of PWR 107, Krulitz found that the intent to withdraw water for stockwatering and human consumption was clear.⁵⁹ Rather than construing the "watering" purpose of PWR 107 broadly enough to warrant a reservation of the entire yield, Krulitz found additional purposes for which the water was needed at the time of the withdrawal.⁶⁰ In Krulitz' opinion, other purposes of the PWR 107 withdrawal included:

- 1) water for growing crops and sustaining fish and wildlife to allow the settlers on the public land to obtain food for their families and provide forage for their livestock; and
- 2) water for flood, soil, fire and erosion control. . . .⁶¹

Finally, Krulitz found that PWR 107 was intended to prevent private acquisition and monopolization of the waters.⁶² On these bases, Krulitz concluded that the purposes necessitated a reservation of the total yield of each spring and water hole.⁶³

Critics of the Krulitz opinion predicted that it would create conflicts between the United States government and oil companies, mining claimants, and ranchers who had previously appropriated waters surplus to stockwatering requirements.⁶⁴ The anticipated conflict materialized in *City and County of Denver v. United States*.⁶⁵ This Colorado adjudication dealt

52. 86 Interior Dec. 553, 581 (1979).

53. *City and County of Denver v. United States*, 656 P.2d 1 (Colo. 1982). A 1983 Interior Decision adopted the holding of the Colorado court. See 90 Interior Dec. 81 (1983).

54. See *infra* notes 86-103 and accompanying text.

55. 86 Interior Dec. 553 (1979).

56. Freudenthal, *Federal Non-Reserved Water Rights*, 15 LAND & WATER L. REV. 67, 71 (1980).

57. 86 Interior Dec. at 581.

58. *Id.* at 582.

59. *Id.* at 581.

60. *Id.*

61. *Id.* at 581-82.

62. *Id.* at 582.

63. *Id.* at 580-82.

64. Trelease, *State Water Law/National Water Uses*, 55 WASH. L. REV. 751, 762 (1980).

65. 656 P.2d 1 (Colo. 1982).

with myriad reserved water rights claims, including the claimed reserved rights to more than 1,500 springs and water holes administered by the Bureau of Land Management.⁶⁶

In *City and County of Denver v. United States*, the United States asserted a right to the entire yield of springs and water holes on PWR 107 lands, for watering purposes, agriculture, and irrigation.⁶⁷ The Colorado Supreme Court rejected this asserted water right, stating, "[n]othing in the [Stock-Raising Homestead Act] or its legislative history indicates a congressional intent to open public springs and waterholes to the many public uses which the United States is now claiming."⁶⁸ The court held that the water on PWR 107 lands was reserved only for the purpose of human and animal consumption, in the amount necessary to prevent monopolization of the springs and water holes.⁶⁹

Persuaded by the reasoning of the Colorado court, the Interior Department issued a 1983 opinion modifying the 1979 Krulitz opinion and adopting the Colorado court's holding.⁷⁰ The Interior Department's desire to maintain a "good neighbor" relationship with the Western interests may also have influenced the 1983 opinion.⁷¹ The cattle industry, for example,

66. *Id.* at 11. The suit originated when the United States was joined as a necessary party in several Colorado water rights adjudications, pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1964). *Id.* at 9-10. The United States advanced a sovereign immunity claim, seeking to bar the Colorado courts from asserting jurisdiction over the water rights of the United States. *Id.* When the United States Supreme Court rejected the sovereign immunity claim, the federal government proceeded to assert its claims to federal reserved water rights in each of the suits in which it had been joined. *Id.* at 10. After a Colorado water court issued its initial opinion, both the United States and Denver appealed to the Colorado Supreme Court. *Id.* at 11-12.

67. Opening Brief of the United States of America at 11, *City and County of Denver v. United States*, Dist. Ct. Water Div. Nos. 4, 5 & 6.

68. 656 P.2d at 32. The Colorado court relied partially on *State of Utah*, 45 Pub. Lands Dec. 551 (1916), which was issued contemporaneously with the Stock-Raising Homestead Act. That decision contained the following statement: "There is in the withdrawal of these lands nothing which prevents any person filing such [a water] appropriation under the laws of Utah at any time." *Id.* at 32 n.50, citing 45 Pub. Lands Dec. at 554. The Colorado court attributed this quote to the Assistant Secretary of Interior, who authored *State of Utah*. *Id.* In fact, the Assistant Secretary did not write this statement. The quote originated in a Geological Survey report which is reprinted within *State of Utah*, 45 Pub. Lands Dec. at 551.

Due diligence on the part of the United States in the Colorado adjudication would have revealed this error and pointed out the apparent contradiction. The thrust of *State of Utah* is that it is necessary to retain public water reserves in order to prevent one person from excluding others from springs and water holes. 45 Pub. Lands Dec. at 552. If private appropriation of the waters were permitted, access to the waters could not be assured, and retention of the reserve would be futile.

69. 656 P.2d at 32.

70. 90 Interior Dec. 81 (1983). Solicitor Coldiron also noted that the Justice Department, with the concurrence of the Department of Interior, had reached a conclusion similar to that of the Colorado Supreme Court in signing a settlement agreement with the State of Wyoming on Nov. 22, 1982, in *In Re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming*, Civil No. 4993, 5th Jud. Dist. In the Wyoming settlement, the Department of Interior found that the United States' interests would be adequately protected under a decree providing that reserved water in PWR 107 lands is limited to the amount required for human and animal consumption. 90 Interior Dec. at 83 n.1.

71. Cattlemen are "much happier" with the federal range policy under the Reagan Administration. Former Secretary of Interior James G. Watt has described his "good neighbor policy" as calling for closer cooperation and consultation with Western interests. N.Y. Times, Feb. 14, 1983, at A10, col. 3.

See also W. CALEF, PRIVATE GRAZING AND PUBLIC LANDS (1960), for a discussion of the politics of the Bureau of Land Management. Calef states that, "[t]he relationships between the

was urging a total rescission of the 1926 Executive Order.⁷² While the 1983 opinion did not rescind PWR 107, it gave cattlemen and others the right to assert a claim for the surplus waters in state proceedings.⁷³

Solicitor Coldiron's 1983 Interior Decision merely restated the holding in *City and County of Denver v. United States*. Thus, a comparative analysis of the conflicting interpretations of PWR 107's purpose requires only a discussion of Krulitz' 1979 opinion and *City and County of Denver v. United States*.

The Krulitz opinion and the Colorado decision recognize that the purpose of the PWR 107 withdrawal was "watering," thereby continuing a line of thought begun with the creation of PWR 107.⁷⁴ In PWR 107, President Coolidge withdrew lands pursuant to Section 10 of the Stock-Raising Homestead Act,⁷⁵ which authorized withdrawals for watering purposes.⁷⁶ An instructive Interior Decision issued two months after the 1926 Executive Order stated that the purpose of PWR 107 was "watering."⁷⁷ This 1926 Interior Decision found that PWR 107 was intended to reserve for public use land containing water sources needed or used for watering purposes.⁷⁸ On this ground, the decision held that the PWR 107 withdrawal did not apply to lands having springs and water holes containing only enough water for the use of one family.⁷⁹ According to this decision, the order withdrew only "springs and water holes capable of providing enough water for general use for watering purposes."⁸⁰

Both the Krulitz opinion and the Colorado decision construed the phrase "watering purposes" narrowly. While the Krulitz opinion noted that the purposes of PWR 107 obviously included stockwatering and human consumption, Krulitz did not find that this watering purpose excluded other purposes, such as irrigation and flood, fire, and erosion control.⁸¹ The Colorado Supreme Court, on the other hand, viewed the watering purposes under PWR 107 as more limited, excluding any purpose other than animal and human consumption.⁸² Neither Krulitz nor the

BLM and western ranchers are . . . biased in a way favorable to the ranchers. . . ."; nearly all BLM staff members are westerners. *Id.* at 261-62.

72. THE NATIONAL CATTLEMEN'S ASSOCIATION 1983 POLICY BOOK states:

WHEREAS, President Calvin Coolidge in 1926 issued Public Water Reserve No. 107 withdrawing public land surrounding a spring or waterhole from settlement, location, sale or entry; and WHEREAS, Said withdrawal hinders the growth and economic well-being of public land states; and WHEREAS, The water within the boundaries of a state have been reserved for that state; THEREFORE, BE IT RESOLVED, That the National Cattlemen's Association urge the President of the United States to rescind Public Water Reserve No. 107.

See also N.Y. Times, Feb. 14, 1983, at A10, col. 1.

73. 90 Interior Dec. at 83.

74. See *infra* notes 76-80 and accompanying text.

75. See *supra* note 37 and accompanying text.

76. See *supra* note 44.

77. Selections, Filings or Entries of Lands Containing Springs or Water Holes, 51 Interior Dec. 457 (1926).

78. *Id.* at 457.

79. *Id.*

80. *Id.* (codified at 43 C.F.R. § 2311.0-3(a)(2) (1980)).

81. 86 Interior Dec. at 581.

82. 656 P.2d at 32.

Colorado court considered that "watering purposes" could encompass more than direct human and animal consumption.⁸³

That the purpose of PWR 107 was broader than direct consumption, and warranted a reservation of the entire yield of PWR 107 water sources, can be inferred from the fact that private appropriation of the waters has historically been considered inconsistent with the purpose of the reservation.⁸⁴ Private appropriation pursuant to state law is compatible with PWR 107 only if surplus waters are available beyond that reserved by the federal government.⁸⁵ Two early Interior Decisions, written in 1935⁸⁶ and 1947,⁸⁷ considered the scope of the federal water rights under PWR 107 and the propriety of private appropriation and state control over these water rights. Both opinions concluded that the United States retains broad control over PWR 107 waters.

The first Interior Decision to address the issue of appropriation of water from springs or water holes was *Death Valley National Monument—Appropriation of Water*, announced in 1935.⁸⁸ Neither Solicitor Krulitz nor the Colorado Supreme Court referred to this opinion, possibly because it is based on the riparian rights doctrine rather than on the implied reservation of water doctrine.⁸⁹ The opinion is, nonetheless, significant in that it reveals that, nine years after the creation of PWR 107, the Interior Department did not believe that PWR 107 waters were subject to appropriation under state law.

In *Death Valley*, the National Park Service sought a ruling on the propriety of applying to the state of California to appropriate water from springs located on federal lands.⁹⁰ The Interior Decision concluded that if the springs were located on tracts withdrawn by PWR 107, the National Park Service should request that the President except the lands in question

83. The plain meaning of "watering" is broad and is not limited to consumption. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1968) states that the verb "water" is defined as "to wet or supply with water," or to "irrigate," or "to supply with water for drink," or "to spray or sprinkle [the ground] with water to lay dust. . . ." *Id.* at 2581. See *supra* note 45 and accompanying text, which reveals Congress' intent to maintain the value of the arid Western land to the homesteader. As the Krulitz opinion points out, a homesteader would have had water needs beyond those of stockwatering and human consumption. 86 Interior Dec. at 581. A viable life on the public range would require water for growing crops, sustaining fish and wildlife, and controlling prairie fires. *Id.* at 581-82.

84. See *supra* notes 86-101 and accompanying text.

85. By holding that less than the entire yield of PWR 107 was impliedly reserved, both the Colorado court in *City and County of Denver v. United States*, 656 P.2d 1 (Colo. 1982), and Solicitor Coldiron, 90 Interior Dec. 81 (1983), recognized that waters were available for private appropriation pursuant to state law. See *supra* notes 13-16 and accompanying text.

86. *Death Valley Nat'l Monument—Appropriation of Water*, 55 Interior Dec. 371 (1935).

87. Jack A. Medd, 60 Interior Dec. 83 (1947).

88. 55 Interior Dec. 371 (1935).

89. The reservation doctrine is based on the federal government's power under the commerce clause (art. I § 8), and the property clause (art. IV § 3) of the Constitution. See *supra* note 27. Thus, state riparian or prior appropriation systems of water law are inapplicable to reserved rights. In reference to reserved water rights claims, the Supreme Court has stated, ". . . these claims are wholly dissimilar to normal state water claims, because they are not based on actual beneficial use of water but rather on an intention formed at the time the federal land use was established to reserve a certain amount of water to support the federal reservations." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 824-25 (1976). The Court added that federal reserved water rights issues are issues of federal law. *Id.*

90. 55 Interior Dec. at 372.

from the withdrawal to permit appropriation of the springs.⁹¹ The decision states that “[i]f the said waters be eliminated from the withdrawal of April 17, 1926, the said waters will then be subject to appropriation and use by the National Park Service. . . .”⁹² If the National Park Service chose this line of action, the laws of California would govern appropriation and use.⁹³ It can be inferred, therefore, that if the lands were within the 1926 Executive Order, the waters were not subject to appropriation under California law.

Although neither Krulitz nor the Colorado court cited *Death Valley*, Krulitz did rely on *Jack A. Medd*.⁹⁴ In this 1947 Interior Decision, Medd sought to have a tract of land within the PWR 107 withdrawal restored to the public domain.⁹⁵ Solicitor White denied the petition for restoration.⁹⁶ White reviewed the legislative history of Section 10 of the Stock-Raising Homestead Act⁹⁷ and found that Congress “wisely foresaw” that any homesteader could have monopolized the waters by patenting lands containing springs and water holes.⁹⁸ Especially pertinent to a discussion of the purpose of PWR 107 is White’s definition of the public for whose use the springs were withdrawn. White stated:

. . . whoever uses the surrounding lands, whether today or tomorrow . . . is the public for whose benefit the springs have been reserved. [*Medd*] overlooks the fact that yesterday the Kelleys, today he himself, his family and his ranch set-up, and tomorrow his successors, whether many or few, all as users of lands to which these waters are necessary, are a vital part of the public for whose benefit the waters have been reserved.⁹⁹

White thus found that private appropriation of the PWR 107 waters would defeat the purpose of the reservation.¹⁰⁰ On this basis, the Solicitor concluded that President Coolidge had reserved the waters in their entirety.¹⁰¹

Krulitz relied on *Medd* in determining that the Executive Order of 1926 was a “blanket withdrawal” of the land and the water.¹⁰² The brief for the United States in the Colorado water rights adjudication also cited *Medd*.¹⁰³ The Colorado Supreme Court, however, did not attempt to reconcile the *Medd* decision with its restrictive interpretation of the purpose of PWR 107.

91. *Id.* at 374.

92. *Id.*

93. *Id.*

94. 60 Interior Dec. 83 (1947).

95. *Id.* at 85.

96. *Id.* at 100.

97. 39 Stat. 865 (1916) (codified at 43 U.S.C. § 300 (repealed 1976)).

98. 60 Interior Dec. at 96.

99. *Id.* at 97.

100. *Id.*

101. *Id.* at 99.

102. 86 Interior Dec. at 580.

103. Opening Brief for the United States of America at 12, City and County of Denver v. United States, Dist. Ct. Water Divs. Nos. 4, 5 & 6.

Reservation Doctrine and PWR 107

Both the Colorado court's narrow interpretation of the purpose of PWR 107¹⁰⁴ and the subsequent Coldiron opinion¹⁰⁵ deny the broad public purpose intended by Congress and President Coolidge in PWR 107.¹⁰⁶ In fact, no extensive discussion of the broad public purpose of PWR 107 appears in any administrative or judicial opinions, with the exception of *Jack A. Medd*.¹⁰⁷ A reading of the language of the 1926 Executive Order and its authorizing legislation in light of the implied reservation of water doctrine, however, reveals a legislative intent to reserve the entire yield of PWR 107 for public use.¹⁰⁸

The Pickett Act, which authorized the 1926 Executive Order, provided that the President could withdraw public lands from settlement, location, sale, or entry for public purposes.¹⁰⁹ The courts have not provided a definition of "public purpose" as it is used in the Pickett Act; initially, the legislative branch determines what is or is not a public purpose.¹¹⁰ The Pickett Act thus required that the "public purpose" be specified in each particular order of withdrawal.¹¹¹

Section 10 of the Stock-Raising Homestead Act specified a public purpose by providing that lands containing water holes and other bodies of water could be reserved to the public under the Pickett Act.¹¹² Section 10 implied that the *waters* are to be held open to the public, since the lands to be reserved were those containing water sources "needed or used by the public."¹¹³ Public watering needs would obviously not be served if only the land were held open.¹¹⁴ Moreover, the legislative history of Section 10 reveals that the purpose of the provision was to prevent monopolization of large tracts of land through control of the only available water supply.¹¹⁵ The legislative intent would therefore be defeated if only the reserved lands, but not the waters, were held open to the public.¹¹⁶

If the purpose of Section 10 of the Stock-Raising Homestead Act was the sole basis for application of the reservation doctrine, the reservation of water would concededly be narrow. Technically, monopolization of the water sources can be prevented by a federal reservation as minute as one gallon of water from each spring and water hole.¹¹⁷ The language of the

104. *See supra* note 69 and accompanying text.

105. *See supra* note 70 and accompanying text.

106. *See supra* notes 75-83 and accompanying text.

107. *See supra* notes 94-101 and accompanying text.

108. *See infra* notes 112-36 and accompanying text.

109. *See supra* note 40.

110. *Visina v. Freeman*, 252 Minn. 177, 184, 89 N.W.2d 635, 643 (1958).

111. *See supra* note 40.

112. *See supra* note 44.

113. *Id.*

114. *Cf.* State of Arizona, 59 Interior Dec. 14 (1945). This decision reversed a Commissioner's ruling that land containing a spring which had been privately appropriated prior to 1926 was within PWR 107. The decision states, "No purpose of the order would be served by a withdrawal of a subdivision of public land containing a spring, although of the character contemplated by the withdrawal, if the right to use of its waters is vested under State law in private parties." *Id.* at 18.

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

116. *See supra* note 114.

117. *See* 656 P.2d 1 (Colo. 1982). The Colorado Supreme Court stated: "Monopolization . . .

PWR 107 reserving document, which further illuminates the intent behind Section 10 and PWR 107, refutes this conclusion.¹¹⁸

The Executive Order creating PWR 107 states that PWR 107 land is withdrawn and "reserved for public use."¹¹⁹ The term "public use," though not defined in the Executive Order or its authorizing legislation, has been defined within the context of eminent domain law.¹²⁰ Generally, in eminent domain law, "[t]he public use of anything is the employment or application of the thing to the public."¹²¹ Specifically, "public use" has been defined as use by the public as a legal right.¹²² Once defined as "public," a use belongs to the people or is open to all people to the extent its capacity allows.¹²³ All persons must have a common right to the public use, regardless of how few people actually exercise the right.¹²⁴ A use does not fail to be public, however, simply because its immediate use is limited to one or a few persons.¹²⁵

Both the Stock-Raising Homestead Act and the Executive Order of 1926 clearly indicate that to the extent lands containing water holes or other bodies of water were reserved, they would be held open to public use.¹²⁶ Assuming that the intent was that the *waters* were to be held open, and borrowing from "public use" definitions in the context of eminent domain, it appears that the springs and water holes were intended for use by all persons in common as a legal right.¹²⁷ Any private appropriation of these water sources would thus be an infringement on the "common" right of the public.¹²⁸

The legislative use of the term "watering purposes" clarified the intent that the waters themselves be held open to the public.¹²⁹ The phrase "watering purposes" in the Stock-Raising Homestead Act has a broad meaning which can include drinking and irrigating.¹³⁰ In addition, a broad definition of "watering purposes" is harmonious with the public use concept which lies at the core of PWR 107.¹³¹ The Executive Order's use of

is prevented when no one appropriator has *complete* control of the resource." *Id.* at 53. (Emphasis added.)

118. See *supra* note 37 and accompanying text and *infra* notes 119-36 and accompanying text.

119. *Id.*

120. The fifth amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation.

121. J. LEWIS, EMINENT DOMAIN 506 (3rd ed. 1909).

122. *Allen v. R.R. Comm'n*, 179 Cal. 68, 88, 175 P. 466, 474 (1918), *cert. denied*, 249 U.S. 601 (1919).

123. *City of St. Louis v. Mississippi River Fuel Corp.*, 97 F.2d 726, 730 (8th Cir. 1938).

124. *Id.*

125. *United States v. Boyle*, 52 F. Supp. 906, 908 (N.D. Ohio 1943), *aff'd*, 323 U.S. 329 (1945).

126. See *supra* notes 112-19 and accompanying text.

127. See Jack A. Medd, 60 Interior Dec. 83, 97 (1947). Solicitor White's statement that ". . . whoever uses the surrounding lands, whether today or tomorrow . . . is the public for whose benefit the springs have been reserved. . . ." is well within the possible meanings of "public use" in the eminent domain context.

128. Cf. J. LEWIS, *supra* note 121, at 501-02. Lewis states that while the use may be limited to persons in a particular locality, the use must not be limited to particular individuals. *Id.* at 501, citing *Pocantico W.W. Co. v. Bird*, 130 N.Y. 249, 29 N.E. 246 (1891).

129. See *supra* notes 112-16 and accompanying text.

130. See *supra* notes 75-83 and accompanying text.

131. See *supra* notes 126-28 and accompanying text.

the term "public use,"¹³² coupled with the meaning of "watering purposes,"¹³³ indicate that the purpose of the withdrawal was to hold these waters open to any persons needing or using the water for drinking, stockwatering, or irrigating.

Defining the purpose of PWR 107 in terms of public use answers the related question of what quantity of water was reserved to the federal government under PWR 107. Under eminent domain law, a "public use" is open to the public to the extent its capacity allows.¹³⁴ The allowable capacity of PWR 107 is the entire yield, thus suggesting that the springs and water holes on PWR 107 lands were intended to be held open for public use in their entirety. Any attempt to limit the amount of water reserved to a quantity less than the total yield would prevent public access to the full capacity of those springs and water holes. In addition, even though the entire yield of reserved springs and water holes may not be utilized, the use remains public regardless of how few people exercise the right to use.¹³⁵ Therefore, the current level of use is not a limiting factor on the quantity reserved, since the entire yield is reserved for present *and future* use.¹³⁶

In sum, application of the implied reservation of water doctrine to the language of PWR 107 and its authorizing legislation clearly reveals that the legislature and President Coolidge intended a reservation of the entire yield of PWR 107 springs and water holes. Without a reservation of the entire yield, the public use purpose of the reservation would be defeated.

Conclusion

Controversy concerning water rights on federal reservations is not unique to PWR 107. Private entities generally prefer state control of water rights in order to assure optimum economic resource development.¹³⁷ Federal land managers, on the other hand, feel that federal control of water resources on reserved lands is essential to the management of public lands.¹³⁸ The implied reservation of water doctrine, when properly applied, fairly resolves this type of controversy. However, the *City and County of Denver v. United States* court and Solicitor Coldiron have manipulated the doctrine and achieved a dubious result.

The *City and County of Denver v. United States* holding and Solicitor Coldiron's recent opinion limit the PWR 107 reservation of water to the quantity needed for direct human and animal consumption. Neither opinion considered an expansive reading of "watering purposes" or the "public use" concept behind PWR 107. In light of the fact that PWR 107 was created in response to abuses of homestead laws by those who would monopolize water sources, clearly the "public use" concept is at the very heart of the reservation. By construing the language of the Executive Order of

132. See *supra* notes 112-28 and accompanying text.

133. See *supra* notes 75-83 and accompanying text.

134. *City of St. Louis v. Mississippi River Fuel Corp.*, 97 F.2d at 730.

135. *Id.*

136. See *supra* note 99 and accompanying text.

137. See, e.g., *supra* note 72 and accompanying text.

138. N.Y. Times, Feb. 14, 1983, at A10, col. 1.

1926 very narrowly, the Colorado court and Solicitor Coldiron ignored the obvious intent of the reservation that the entire yield of springs and water holes be reserved.

As a result of Coldiron's opinion, the springs and water holes on PWR 107 lands will no longer be held open for public use for watering purposes. Rather, they will be held open only for direct human and animal consumption; PWR 107 waters intended for any other purpose will be appropriate under state law. It is ironic that this narrow interpretation results in a reservation of water to meet the human and animal needs of stockgrowers. If the National Cattlemen's Association's call for a revocation of PWR 107 is any indication, stockgrowers would prefer to appropriate their water through state filing systems.

It may be that in the 1980s the purposes of PWR 107 are obsolete. If so, the federal government should respond accordingly and rescind the 1926 Executive Order. Manipulating the implied reservation of water doctrine to meet the political end of securing a good-neighbor policy with the Western states is a costly exercise. In response to the Colorado holding and Solicitor Coldiron's 1983 opinion, federal land managers must now quantify the amounts of water needed on PWR 107 lands for direct human and animal consumption.¹³⁹ More troublesome than the economic cost, however, is the questionable application of the reservation doctrine and the precedent these decisions create.

139. See *City and County of Denver v. United States*, 656 P.2d at 33.

