10-1975

Cappaert v. United States

Lewis F. Powell Jr.

DISCUSS

Preliminary Memo

May 16, 1975 Conference
List 1, Sheet 2

No. 74-1107

CAPPAERT

v.

UNITED STATES

Timely

Cert to CA 9
(Carter & Choy, CJJ.,
& Solomon, DJ.)
Federal/Civil

DENY
DB

This is a non-Indian Indian-type case.
DB

1. SUMMARY: Petrs claim that the Government did not reserve ground water rights when it withdrew Devil's Hole from the public domain in 1952, and that to permit the Government to do so now would conflict with the right of the various Western States to control the disposition of water within their jurisdictions.

2. FACTS: In 1906, Congress passed an act for the protection of American antiquities; in 1933, Death Valley

National Monument was created under the provisions of that act, thereby withdrawing that area from the public domain. In 1952, President Truman, by proclamation, withdrew "a remarkable underground pool known as Devil's Hole . . . and the 40 acres surrounding it . . . from the public domain and established [it] as a detached portion of Death Valley National Monument." The pool in Devil's Hole was and is of interest because it is the sole natural habitat of a "peculiar race of desert fish" known as pupfish. In 1966, Congress first legislated to protect "endangered species" of animals and in 1970 pupfish were officially declared to be an endangered species. In 1968, petrs, having recently acquired a large tract of land near Devil's Hole, began to pump underground water on their land for use in irrigation of their cultivated land, now about 4,000 acres; shortly thereafter the water level in Devil's Hole began to drop, partially exposing a rock shelf on which the pupfish were feeding and reproducing. The Government initiated an action to enjoin further pumping until such time as the court could determine, through a Master, the lowest level of water acceptable for Devil's Hole consistent with the preservation of the pupfish. Through somewhat protracted litigation, the District Court concluded that a certain level was required; petrs claim that the maintenance of that level will, in effect, put them out of business.

3. CONTENTIONS: Petrs claim that certain 19th century congressional legislation severing water rights from land in the

public domain and the silence of the 1952 proclamation on the question of reservation of water rights at Devil's Hole prevent the drawing of an inference that the 1952 proclamation was intended to reserve the water rights for the Government. Based on the assumed correctness of this contention, petrs argue that they were essentially first in time in claiming the water under state law because the Government has otherwise never sought to perfect any claim to the water under state law, and its only assertion of a claim must be the declaration of the pupfish as an endangered species in 1970, two years after petrs began to pump the water. (This claim appears to be based on a common law right to the water, a right that was abolished by Nevada in 1939.) Petrs also contend that the Proclamation issued in 1952 had nothing to do with pupfish, because there was no legislation in effect at that time protecting endangered species and that therefore the Government should not be permitted to read into the Proclamation more than was there. (This appears to be petrs' first contention in different dress.) Petrs finally contend that the only way to reserve water rights in Nevada is to follow the state procedures, that the Government is bound to follow state procedures and has not done so, and that therefore the Government's claim must fail.

3. DISCUSSION: Petrs' first two contentions turn on the proper interpretation of the 1952 Proclamation and the proper construction of the 1906 Act upon which the Proclamation was based. The CA held that the application of the "reservation"

doctrine -- the power of the Government to reserve, free from state law, water rights for itself where public lands are withdrawn from the public domain -- was within this Court's decisions in Arizona v. California, 373 U.S. 546, and United States v. District Court for Eagle County, 401 U.S. 520. This was so, said the CA, because the implied reservation of the water rights in this case was required to accomplish the purposes for which the land was reserved. The third contention made by petrs would appear to be controlled by Federal Power Commission v. Oregon, 349 U.S. 435, which held that the Government does not have to comply with state law when reserving water on such land. Petrs seek to distinguish these cases by arguing that they involved surface water as opposed to ground water, but that distinction would seem to be of no force, since the focus of the relevant cases is upon the Government's being able to achieve whatever purpose it set out to achieve. According to scholarly authority relied on by petrs, there have been several attempts in Congress to reverse this Court's acceptance of the implied reservation doctrine, all of which have failed. 47 Den. L.J., at 203-204. This problem would appear to be one more congenial to the halls of Congress. 1/

There is a response.

5/6/75 Simms CA 9 Opinion in Petn.

2/ This case presents no issue remotely related to the abstention issue presented in Colorado River Water District v. United States, No. 74-940, cert. granted, April 28, 1975, this case involving a rule change and that case involving who is to get the home court advantage.

Grant
Goltz
Of course.
pc

May 16, 1975 Conference
List 3, Sheet 2

No. 74-1107

Motion to Defer Consideration
(See petn listed page 2)

CAPPAERT, et al.

v.

UNITED STATES

Petrs request that the Court defer consideration of their cert petn until such time as the petn for cert filed by the State of Nevada in No. 74-1304 is scheduled for Conference consideration.

Petrs filed their petn on March 6. It is scheduled for consideration at this Conference (see, List 1, Sheet 2). On April 17, the State of Nevada--intervenor in petrs' case below--filed its petn for cert in the same case. No. 74-1304 is not yet scheduled for Conference consideration.

DISCUSSION: Nos. 74-1107 and 74-1304 are separate petns for cert to CA 9 arising from its decision in a single case.

There is no response.

5/14/75
PJN

Goltz

G

DISCUSS

May 16, 1975 Conference
List 3, Sheet 2

No. 74-1107

Motion to Defer Consideration
(See petn listed page 2)

CAPPAERT, et al.

v.

UNITED STATES

GRANT

We thought the case was a deny, but it made the discuss list. With that in mind it would seem best to consider the two together

Petrs request that the Court defer consideration of their cert petn until such time as the petn for cert filed by the State of Nevada in No. 74-1304 is scheduled for Conference consideration.

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DISCUSSION: Nos. 74-1107 and 74-1304 are separate petns for cert to CA 9 arising from its decision in a single case.

There is no response.

5/14/75
PJN

Goltz

Conference 5-16-75

Court CA - 9 ..... Voted on ....., 19...

Argued ....., 19... Assigned ....., 19... No. 74-1107

Submitted ....., 19... Announced ....., 19...

FRANCIS LEO CAPPAERT, ET AL., Petitioners

vs.

UNITED STATES, ET AL.

3/6/75 Cert. filed.

consider with 73-1304

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....														
Rehnquist, J.														
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.														

Conference 5-16-75

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 74-1107

Submitted ....., 19... *Announced* ....., 19...

DISCUSS

CAPPAERT

vs.

UNITED STATES MOTION

74-1304

Grant motion & Relist with 74-1304

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Rehnquist, J.	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Powell, J.	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Blackmun, J.	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Marshall, J.	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
White, J.	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Stewart, J.	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Brennan, J.	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Douglas, J.	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Burger, Ch. J.	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

Penny -
Do you think 74-940 presents this issue? (Not pressed)
If we grant this case should we grant or Hold 74-1107?
Controversy between Nevada & U.S. over extent to which implied reservation doctrine (rights in U.S.) restricts power of and states to regulate their underground water.
Issue is important.
We have granted Col. Water Dist 74-940. This may afford opportunity to consider this quest. — but I'm not sure & should take a look at 74-940

Deny?

Preliminary Memo

Conf. of June 19, 1975
List 1, Sheet 1

No. 74-1304

NEVADA ex rel. WESTGARD
v.
UNITED STATES

Cert. to CA 9
(Carter, Choy; Solomon, DJ)

Timely

Federal/Civil

It's a close question, but I would be inclined to deny. The issue of general importance is very broad — the proper accommodation of federal water rights with state control over water apportionment. Col. Water Dist, No. 74-940, has a potential for aiding the current federal-state conflict in that area, and though it may not settle all issues, I would be inclined to make that the major effort and see what effect it will have.

Two cases

1. This petition seeks review of the same judgment as is at issue in No. 74-1107, Cappaert v. United States. It is filed by the intervenor state of Nevada, and has a somewhat different focus from that of the Cappaerts. It is thus necessary to write an additional memo. The issues involve the extent to which the

Penny

implied reservation doctrine may frustrate the power of arid states to administer their own scarce underground water resources, and whether the McCarran Amendment, 43 U.S.C. § 666(a), requires the federal government to comply with state procedures for administering groundwater.

2. FACTS: Aside from the facts set forth in the Preliminary Memo for No. 74-1107, which should be consulted, it is relevant that prior to filing of this federal action the Cappaerts had instituted a state proceeding for appropriation of groundwater. The United States protested the application, and fully participated in the hearing (before the State Engineer). The State Engineer rendered a decision to issue permits to the Cappaerts, and this decision was not appealed by the United States.

3. CONTENTIONS AND CA OPINION: Petr echoes the arguments presented by the Cappaerts that federal statutes long ago severed control of water from federal ownership of public lands, leaving such control to the states. Pursuant to this authority, petr had devised procedures for establishing rights in water, procedures which are as open to the U.S. government as to any other land owner. The implied reservation doctrine, as applied in this case, completely undermines petr's authority and procedures, for it permits the United States to re-establish control over water rights by simply withdrawing critical portions of land from the public domain. This is especially troublesome with regard to

underground water, since the water under any particular piece of land is often hydrologically connected with reservoirs covering hundreds of square miles. The CA dismissed petr's claim to control of underground water with the statement that state water laws do not apply to lands withdrawn from the public domain, citing F.P.C. v. Oregon, 349 U.S. 435, 444, 448 (1955). Petr contends that Oregon should not control, because it made the distinction between public domain and reserved land without discussion, and because the decision in that case could have been grounded on provisions of the Federal Power Act which explicitly stated that certain land and appurtenant waters should be used for power generation (there was thus no need to imply a reservation of water rights). Petr goes on to argue that cases applying the implied reservation doctrine have on their facts been based on necessity (for power generation, for effectuating Congressional enactments for the national defense, and for providing a living for resettled Indians), rather than on ownership of water arising from ownership of land. They claim that the present result works a "demonstrable injustice," suggesting that the extinction of man is of greater importance than the extinction of desert pupfish.

The SG contends that the implied reservation theory is well established, pointing to language in Eagle County, 401 U.S., at 522-523, and Arizona v. California, 373 U.S. 546, 597-602 (1963), as well as in Oregon and Winters v. U.S., 207 U.S. 564 (1908).

Petr contends that water rights have been left to the states to control, through a single, comprehensive system of administration and adjudication. It especially relies on the McCarran Amendment, 43 U.S.C. § 666, which waives sovereign immunity as to state proceedings for the adjudication and administration of water rights. The CA treated the Amendment as being no more than what it purports to be, a waiver of immunity from suit, and not as a limitation on the fora available to the United States. It relied on U.S. v. Nevada, 412 U.S. 534, 538 (1973), which noted that a federal district court had jurisdiction to hear a water rights case brought by the United States. Petr contends that the CA gave inadequate consideration to U.S. v. District Ct. for Eagle County, 401 U.S. 520 (1971), and U.S. v. District Ct. for Division No. 5, 401 U.S. 527 (1971), which held that claims to reserved water rights could be litigated in state courts, subject to this Court's review of federal questions. According to petr, these cases recognize the desirability of a single, expert system for water rights determinations, and rigid reliance on the statutory term "defendant" should not be allowed to undermine that approach.

Seven states have filed two similar amicus briefs in support of the petn. Aside from expressing fear that the decision imperils their existence, they raise three points. First, they contend that President Truman did not have statutory authority to reserve waters for the purpose of protecting fish (the Antiquities Act

was intended to protect places and inanimate things, not wildlife, and congressional history indicates that it was to be used sparingly, taking only such land as "absolutely necessary"). Second, the reservation doctrine should not be extended to percolating groundwater, since this would affect the right of adjacent landowners to withdraw water to which they were entitled under state law. Whereas surface water could have been obvious to Congress at the time it withdrew public lands, such cannot be said for groundwater. Moreover, the effect of groundwater removal may not be obvious for years, during which time the adjacent landowner may well have made very substantial good faith investments; thus application of implied reservation theory, rather than reliance on the emminent domain power, could be "unconscionable."

Third, the amici raise a contention which is reserved by Nevada, but not discussed -- that the U.S. is barred by collateral estoppel arising from the unappealed state administrative proceeding. Having intervened in the state proceedings, the United States was stuck with them (subject to this Court's review of federal questions), even though it had not been formally served as a party defendant. The CA rejected this contention on the grounds the state proceeding was merely administrative in nature, the McCarran Amendment did not constitute a waiver of sovereign immunity save for proceedings in which the U.S. was a defendant, and the rights of the U.S. were not in issue since it appeared merely to explain the factual basis of its opposition to the Cappaert's application.

4. DISCUSSION: Questions regarding the Antiquities Act and the Truman proclamation are probably too narrow to merit review, absent some indication that this might be a recurring problem (the reach of those documents is highly relevant to this case, however, for the implied reservation doctrine is a matter of congressional intent). The issues dealing with administration of western groundwater strike me as somewhat more substantial. The CA opinion is certainly plausible and defensible. But there are some substantial reasons for distinguishing between surface water and groundwater, and the combination of the severance of control over water on public lands and the waiver of immunity in state proceedings suggests that Congress intends western water rights to be administered in comprehensive fashion by the respective states, at least to the extent of binding the United States to the results of proceedings in which it enters an appearance. Moreover, amicus briefs indicate that the CA's decision may represent a very substantial and unpredictable encroachment upon the authority of the states to ration a vital and scarce resource.

There is a response in No. 74-1107.

6/11/75 Jacobs CA opn in petn app.

THE McCARRAN AMENDMENT, 43 U.S.C. § 666(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 is 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 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, orders, 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.

SUPPLEMENTAL MEMO FROM PENNY CLARK re No 74-1304

No. 74-940 presents the following issue: whether a federal court should abstain [redacted] in an action brought by the United States to adjudicate water rights, deferring to the State's comprehensive machinery for adjudicating and administering rights to scarce water resources. That is not the same issue presented in 74-1304 and 74-1107, although one issue raised by 73-1304 is close. The primary issue in this pair of cases is whether the implied reservation doctrine (which [redacted] turns on congressional intent to reserve water rights along with land) should apply (a) to underground water, or (b) in states that have machinery for adjudicating water rights between competing claimants. By themselves these issues [redacted] offer no strong reason for reversing the decision below; I suspect they both would be answered in the affirmative if taken on the merits. The petition in 73-1304, however, raises another issue: whether the United States, having participated in a state adjudication of water rights, should be bound by that decision, or may later institute its own action in [redacted] federal court for adjudication of its rights under federal law. This issue is a close relative to that in 74-940; the broad question is the same (how to reconcile federal water claims with state apportionment systems), but in one the question is how the federal court should act, and in the other it is what effect the state proceeding should have on the federal claim. [redacted]

issue

SG's response (in opposition) says that issues were not fully litigated in state proceeding and should not be res judicata. Says that state engineer did not have authority to adjudicate U.S. water rights in that proceeding.

[E. JUNE 1975]

Grant(?) in No 74-1304

SUPPLEMENTAL MEMO FROM PENNY CLARK

No. 74-940 presents the following issue: whether a federal court should abstain [redacted] in an action brought by the United States to adjudicate water rights, deferring to the State's comprehensive machinery for adjudicating and administering rights to scarce water resources. That is not the same issue presented in 74-1304 and 74-1107, although one issue raised by 73-1304 is close. The primary issue in this pair of cases is whether the implied reservation doctrine (which [redacted] turns on congressional intent to reserve water rights along with land) should apply (a) to underground water, or (b) in states that have machinery for adjudicating water rights between competing claimants. By themselves these issues [redacted] offer no strong reason for reversing the decision below; I suspect they both would be answered in the affirmative if taken on the merits. The petition in 73-1304, however, raises another issue: whether the United States, having participated in a state adjudication of water rights, should be bound by that decision, or may later institute its own action in [redacted] federal court for adjudication of its rights under federal law. This issue is a close relative to that in 74-940; the broad question is the same (how to reconcile federal water claims with state apportionment systems), but in one the question is how the federal court should act, and in the other it is what effect the state proceeding should have on the federal claim. [redacted]

issue

SG's response (in opposition) says that issues were not fully litigated in state proceeding and should not be res judicata. Says that state engineer did not have authority to adjudicate U.S. water rights in that

The decision in 74-940 will not dictate the outcome in these petitions, although it might be close enough to warrant holding these petitions and remanding to the Court of Appeals for reconsideration following decision in 74-940. Or, if you want to devote the time to two cases (more economical than taking two dissimilar cases, of course), one or both of these petitions could be granted and set for argument with 74-940. If this is the favored course, I would grant No. 74-1304, which more closely presents the "res judicata" issue, and hold 74-1107. I would also ask the parties to brief the question of what effect participation in the state proceeding should have (or perhaps even limit the grant to that issue). If 74-1304 is granted, nothing would be gained by granting 74-1107 along with it.

The decision whether to grant, hold, or deny is a close one. Perhaps one of the most persuasive factors should be the current state of the Court's docket for next Term: whether it is such that you can afford the luxury of having two related cases, or whether you should take only one and hope to resolve the basic question of conflict between federal claims and state adjudicatory machinery.

penny

Conference 6-19-75

Court ..... *Voted on* ....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 74-1107

Submitted ....., *19*... *Announced* ....., *19*...

CAPPAERT

vs.

UNITED STATES

White Minutes
issue is substantial.
May be rightly
decided but we should
settle law.

Grant
+
consolidate
with
74-1107
1304

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Rehnquist, J.	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Powell, J.	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Blackmun, J.	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Marshall, J.	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
White, J.	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Stewart, J.	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Brennan, J.	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Douglas, J.	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Burger, Ch. J.	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

Conference 6-19-75

Court CA - 9 ..... Voted on ....., 19...

Argued ....., 19... Assigned ....., 19... No. 74-1304

Submitted ....., 19... Announced ....., 19... (Vide 74-1107)

NEVADA EX REL. ROLAND D. WESTERGARD, STATE ENGINEER, Petitioner

vs.

UNITED STATES, ET AL.

4/17/75 Cert. filed.

Grant
&
Consolidate
with 74-1107

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Rehnquist, J.						Same vote 74-1107								
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.														

GP/gg 12-29-75

BENCH MEMORANDUM

Truman's Proclamation - p 14

TO: Justice Powell

FROM: Greg Palm DATE: October 31, 1975

Nos. 74-1107 & 74-1304 CAppaert v. United States["Pupfish"]

I had hoped to finish this memo prior to argument. But I still have not had time to consider fully the res judicata issues. As to those my initial impression was that CA 9 was correct and that the Government Brief contains several bases upon which CA 9's decision on that score might be affirmed.

On the"merits" I think the decision below should be affirmed.

I. Federal Reservation Doctrine:

The prior decisions of this Court establish that by reserving public lands the United States may also reserve such appurtenant unappropriated waters as are necessary to accomplish the purposes for which the reservation was created. Arizona v. California, 373 U.S. 546, 597-602 (1963); United States v. Powers, 305 U.S. 527, 528 (1939); Winters v. United States, 207 U.S. 564, 575-78 (1908). Two factors are determinative in the assessment of whether the United States has established a prior claim to a particular water source: (1) Intent: it must be shown that the United States intended to reserve certain water rights when it

reserved theretofore public lands, and (2) Necessity: the appurtenant water rights reserved must be necessary to serve the future requirements of the reserved land. As will be developed below I think that although this is a relatively "easy" case in terms of the necessity branch of the doctrine, it is important that the Court establish an ascertainable standard by which competing private water users can estimate the amounts of water the United States may validly claim in the future as required for the development of the reserved public land. Otherwise, an unnecessary amount of uncertainty will be created so that investment development in Western States may be unfairly impeded.

Prior to engaging in the intent/necessity analysis that is vital to the resolution of reserved water-rights cases, two contentions relating to whether the doctrine should be inapplicable to non-Indian reserved rights and the potentially differentiable role of underground water will be examined.*

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* The S.G.'s Brief adequately deals with petitioners' contention that as to non-navigable water state law, rather than federal law, should determine the federal water right. Brief for United States 25-30. This contention is premised on an interpretation of the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. § 321, and its statutory predecessors. The contention previously has been rejected by the Court, see FPC v. Oregon, 349 U.S. 435 (1955), and petitioners have raised no persuasive reason why it should not be rejected again.

Petitioners in part argue that the implied reservation doctrine is properly applicable only in circumstances involving Indian lands. This contention, in its broadest form, can be rejected rather summarily. In Arizona v. California, supra, at 601, seven Justices * apparently agreed with the conclusion of the Master that the reservation doctrine is applicable to all federal establishments, not just Indian reservations:

> 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 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.

See also Federal Power Comm'n. v. Oregon, 349 U.S. 435, 438, 448 (1955). ** Moreover, notwithstanding precident, there would appear to be no persuasive reason for limiting the doctrine solely to Indian lands. The doctrine is based on the need for the

no reason to limit to Indian lands

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* See 373 U.S. at 602; 603; 627. The Chief Justice took no part in the case. Justice Douglas dissented and did not reach this question. Justices Harlan and Stewart, although dissenting in part, joined this portion of the Court's opinion.

** Eight justices apparently shared a similar view in United States v. District Court for Eagle County, 401 U.S. 520, 522-523(1971

> It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain As we said in Arizona v. California, 373 U.S. 546, the Federal Government had the authority both before and after a State is admitted into the Union "to reserve waters for the use and benefi of federally reserved lands." Id. at 597. The federally reserved lands include any federal enclave. In Arizona v. California, we were primarily concerned with Indian reservations. Id. at 598-601. The reservation of waters may be only implied and the amount will reflect the nature of the federal enclave. Id. at 600-601.

Justice Harlan joined the opinion of the Court but "explicitly disclaim[ed] . . . the intimation of any view as to the existence and scope of the so-called "reserved water rights" of the U.S., either in general or in the particular situations involved here.

otherwise unappropriated water to accomplish the purposes underlying the reservation of the public land. For example, the reservation of public land, in an arid region, but through which passes several non-navigable streams, for use as a national park may be senseless unless there is an implied reservation of the water rights appurtenant to that land. *

Petitioner Nevada and several amici states contend that the reserved water right doctrine should not be "extended" to underground water. Nevada's only significant point with regard to this proposed distinction is the fact that the reservation of underground water rights is potentially harsher on the competing water users since it is more difficult to determine with any precision the sources and movement of groundwater. Moreover, as a consequence of this greater uncertainty private parties will be less willing to invest in the arid West in any project which requires a predictable supply of uninterrupted water since at some point in the future the reservation doctrine may be used to usurp its water rights. This is clearly a significant concern. After considering a number of competing factors, however, I have concluded that it would be inappropriate to limit the reservation doctrine solely to surface water. First, the reservation doctrine appears to

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* This, of course, is not to say that reserved water rights in the context of Indian lands will not be treated differently from federal water rights in other contexts. Cf. Brief for United States 21 n. 13 and sources cited therein.

be based on the need of the reservation, not the character of the water reserved. In Winters v. United States, supra, the Court recognized the tacit reservation of waters from a non-navigable stream and sustained an injunction barring diversions by up-stream land owners. The reason for the implied reservation was that the arid land had been reserved for farming, yet the land would be useless for that purpose without the water from the stream. Assuming that the water had been derived from wells this "need" principle would still appear to dictate that the Indians had a reserved right in any water; otherwise the reservation of the land would have been useless.

Second, as has been increasingly recognized in the water laws of the Western states, ground water and surface water are closely related and interlocking components of the same hydrologic cycle. The National Water Commission points out that:

> Groundwater and surface water are physically interrrelated as integral parts of the hydrologic cycle. Groundwater basins feed and are fed by surface streams. Surface water and groundwater are interchangeable for most purposes. Wells deplete surface streams. Depletion of surface streams depletes water supply to wells. Optimum utilization of ground and surface water usually involves conjunctive operation by which stored ground water supplements and firms up the supply of intermittently available stream water. Different rules of law dependent on the surface or underground point of diversion promote and perpetuate misallocation of the resource.

Corker, Groundwater Law, Management and Administration, National Water Commission Legal Study No. 6, pp. xxxiv-xxv (1971). Although I certainly am no "hydrologic" expert it does seem to make sense

to treat ground water and surface water the same for most purposes. Although it may be difficult to determine the source of groundwater too much reliance should not be placed on that fact since most riparian states, including Nevada, recognize and protect appropriate rights to groundwater. Thus, if some other neighbor of the Cappaerts were now to drill wells- erroneously believing that they would not diminish the flow from the Cappaert wells - and so reduced the water level that the Cappaert wells could no longer draw, the Cappaerts might then obtain an injunction against the subsequent user under Nevada law. * See Nev. Rev. Stat. 534.110; In re Waters of Manse Spring, 60 Nev. 280, 286, 108 P. 2d 311, 314 (1940).

Admittedly this analogy to state appropriation law is not entirely satisfactory for unlike in the case of the United States it is less likely that the adversely affected water user will not begin to complain about the diversion of his water almost immediately after the first diversion occurs. This is so because under the prior appropriation theory unless the new user has some effect on a prior user's water supply he is entitled to

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* Moreover, as the S.G. points out in his Brief, it is not at all clear that the Devils Hole pool should more properly be categorized as ground or surface water. Brief for United States 32. It has characteristics of both.

draw as much water as he wishes and may continue to do so without fear that some other party will assert a valid claim to all or a portion of his water at some point in the future. The special danger represented by the reserved rights doctrine is that years of investment development may be wiped out because the United States subsequently asserts a claim to the private user's water. But although this problem may be aggravated in the context of underground water since it is perhaps somewhat more difficult to predict the sources of supply, this is not a sufficient reason for retaining the current reservation doctrine with respect to surface waters but wholly excluding underground water. It is, however, a reason for the Court to take special care in this case to develop and articulate a more precise standard regarding the critical question of ascertaining how much water a particular piece of federal land may be said to have reserved so that potential private users of water resources can plan with some degree of certainty.

In Arizona v. California, supra, for example, Justice Harlan, in an opinion joined by Justice Stewart, although concurring in that part of the majority opinion which allocated water to certain Indian reservations, indicated that he did so "not without some misgivings regarding the amounts of water allocated to the Indian Reservations." 373 U.S. at 603 (concurring in part and dissenting in part). The majority had adopted the

reasoning of the Master regarding the amount of water intended to be reserved:

> He [Master] found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practically irrigable acreage on the reservations. Arizona, on the other hand, contends that the quantity of water reserved should be measured by the Indians' "reasonably foreseeable needs,' which, in fact, means by the number of Indians. How many Indians will there be and what their future needs can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is by irrigable acreage.

373 U.S. at 600-601. Although it is impossible to ascertain with complete certainty whether Justice Harlan was worried that too much or too little water was being allocated to the Indians, viewed in context, I think the only reasonable interpretation of his statement is that he was concerned that too much water was being reserved. Given a vast reservation with only a few Indians it does seem that the majority allocation scheme is harsh on competing private users. This is particularly so given that the Indian population may never use substantial portions of their water share yet private investors will be leery of making substantial investments dependent upon water that may be claimed at some point in the future. Of course this problem might in part be alleviated through sales by the Indians of part of their water rights to private users. And the majority approach is not unreasonable in light of the fact that the reservation doctrine turns on the intent of the United States in making the original

reservation of land. Assessing such intent in many instances is no doubt a hopeless task. In Arizona the majority may have felt that even though there were relatively few Indians at the time of the creation of the Reservations, the United States likely intended the resident tribes to be self-contained and self-sufficient communities. In order to provide for the tribes future development as farmers it was thus reasonable to assume that the United States intended to reserve sufficient water to make farming possible on all irrigable portions of the Reservations. Crops that were not consumed internally might be sold to off-Reservation consumers in order to obtain cash for the purchase of manufactured goods. The majority approach is no doubt also stems from (1) the unwillingness of the Court to adopt a reasonably foreseeable test turning on a factor as speculative as Indian population projections and (2) on the preferred consideration accorded Indian rights. Moreover, the majority approach was appropriate since the test applied there arguably created relative certainty in the future with regard to the magnitude of the potential Indian water-rights claims throughout the West.

A related consideration that should be touched on briefly is the "necessity" branch of the implied reservation doctrine. The reserved water must be necessary to accomplish the purpose for which the land was reserved. The important point to be derived from the prior opinions of the Court with regard to

this factor is that the focus appears to be entirely on the needs of the reservation. There is no balancing approach evident in any of the cases. Thus, although petitioners in part urge that the needs of the private water users somehow be balanced against the needs underlying the federal water reservation, there is no doctrinal support for this position. Moreover, I do not think that the Court should adopt any such general balancing approach since it would require the federal courts to engage in value-laden and largely subjective assessments of the competing merits of various water users. If the Court is concerned with the effects of the implied reservation doctrine on private water users it should instead tightly construe the occasions when implied reservations are created and/or take special care to limit the quantity of water which it is willing to find reserved in a particular reservation. One alternative would be to allow the amount of proof required to establish a reservation to vary depending upon the nature of the reservation and the source of the water. For example, implied reservations in the context of Indian lands arguably should be construed more liberally than other federal reservations. Similarly, as the amici argue, the existence, extent, and flow of groundwaters underneath reserved lands likely is far less apparent to Congress at the time of withdrawal than in the case of surface waters, and therefore it may be more unreasonable to impute to Congress an intent to reserve

such waters.

But although I find the user distinction attractive, the surface/ground water distinction seems less appropriate. For example, if the United States reserved certain lands for an Indian Reservation I do not think there are persuasive reasons for applying a stricter burden of proof to showing whether the United States intended to reserve sub-surface water. Congress no doubt did not know how much underground water potentially was available or its sources, but the rationale for the reservation of surface waters appears to be equally applicable - the United States must have assumed that sufficient water resources were obtainable to support the intended agrarian economy. Even the reserved user distinction is perhaps of only limited value once one moves beyond the narrow category of reservations involving Indians since the reservation doctrine is in many respects a financial doctrine. The federal government can always obtain water rights through its condemnation power. But it will be required to compensate existing users for waters diverted.

I also find the alternative of carefully limiting the quantity of water reserved to be an attractive means of limiting the potentially unfair aspects of the implied reservation doctrine. For example, in the next decade it is quite likely that coal-to-gas conversion plants will become operational in certain parts of the Western states, both on Indian and federal lands. It is my understanding that these plants will require

large qunatities of water. I assume, however, that the prior appropriation doctrine will not be used to justify creating a prior Indian or federal interest in a sufficient quantity of water to operate these plants. Although the reserved rights claimants may no doubt claim that in reserving certain lands for Indians the United States intended that enough water be reserved to develop all the resources of the reservation I would find this an inappropriate extension of the doctrine since it would seem manifestly unfair to private water users. Although the Arizona Court rejected a "reasonably foreseeable" test turning on projected Indian population a foreseeability test turning on expected land usage seems appropriate. The Arizona Court in fact applied a foreseeability test of this type by focusing on the number of potentially irrigable acres - agriculture being the intended use to which the land was to be put at the time of the reservation.

II. Intent/Necessity:

Application of the intent/necessity test must begin with consideration of the question whether under The Act for the Preservation of American Antiquities, 16 U.S.C. §§ 431-33, President Truman was authorized to reserve the waters contained in Devil's Hole in order to protect an endangered species of pupfish. This is a very close question. The Antiquities Act vests the President with authority to:

> declare by public proclamation historic landmarks, historic and prehistoric structures, and other

> objects of historic or scientific interest that are situated upon lands owned or controlled by the Government of the United States to be national monuments. . . .

§ 432. From the face of the statute, particularly when viewed in the conjunction with the other operative sections, it is difficult to find an intent by Congress to authorize the President to take steps to preserve a species of wildlife, however, rare. The brief legislative history of the Act supports an even narrower interpretation of its purpose than the language itself. Examination of that history reveals that Congress was concerned with the preservation of objects of antiquity, mainly the historic and prehistoric ruins of various Indian civilizations located throughout the Southwest. See S. rep. No. 3797, 59th Cong., 1st Sess. (1906); H.R. Rep. No. 2224, 59th Cong., 1st Sess (1906). Despite any difficulty I might have as an original matter in construing the Act in a manner so as to justify the implied reservation of the water-pupfish habitat a prior decision of this Court does appear to advance significantly the argument for finding an implied reservation power under the Act. In Cameron v. United States, 252 U.S. 450 (1920), the Court sustained the power of the President under the Antiquities Act to establish the Grand Canyon National Monument:

Grand Canyon

> The defendants insist that the monument reserve should be disregarded on the ground that there was no authority for its creation. To this we cannot assent. The act under which the President proceeded empowered him to establish reserves embracing "objects of historic or scientific interest." The Grand Canyon, as stated in his proclamation, "is an object of unusual scientific interest."

Id. at 455-56. Although the Grand Canyon is certainly a more important and well known object of historic and scientific interest than Devil's Hole it is also true that Devil's Hole can be fairly characterized as an object of "scientific interest" so that its change in status to a monument reserve was authorized by the Act. The essential question still remains, however, whether the power to reserve objects of "scientific interest" such as the Grand Canyon or Devil's Hole embraced the power to reserve the water rights involved here. My current feeling is that the power to create an implied reservation of water rights is present whenever the presence of the water is necessary to ensure one of the prime reasons for the objects' scientific value.

In the case of the Grand Canyon, although the principal reason for considering it an object of scientific interest is its present configuration as a mile-deep canyon whose walls reveal several million years of geologic history, I think that the proclamation establishing it as a monument reserve likely can also be fairly interpreted as embracing the water flowing through the Canyon. This river of water was the driving force behind the Canyon's formation and should fairly be regarded as a key component of its continuing historical or scientific value since it serves as a reminder of the forces which led to the Canyon's formation, and more important, contributes to its continued deepening. Consequently, application of the implied reservation

doctrine to the waters of the Canyon would likely lead to the result that the United States could enjoin other users of the Colorado River if their activities unduely impeded the natural flow of the river.

A similar chain of logic could be applied to the Devil's Hole Proclamation of President Truman. Broadly read the Antiquities Act authorized him to reserve objects of scientific interest. There is no serious contention that Devil's Hole as a geologic formation falls into that category. The issue then becomes (1) whether the pool and the resident pupfish are key components which make an important contribution to the scientific value of Devil's Hole so as to be encompassed within the broad power to preserve objects of scientific interest conferred by the Antiquities Act and (2) whether President Truman's Proclamation, fairly read, can be construed as embracing an implied reservation of sufficient water in the pool for the pupfish to survive. My tentative answer to both these questions is Yes, although I recognize that a defensible opinion could be written which reached an opposite result. The first link in the chain is the toughest to forge. There is no clear statutory language or legislative history to support its creation. Finding the power turns on how broadly the Court is willing to interpret the power to establish as national monuments "objects of . . . scientific interest." The Cameron decision appears to support a

broad construction of the statute with regard to the types of objects of scientific interest which fairly may be encompassed within the Act. And although the petitioners raise a number of nonfrivolous contentions with regard to the absence of any general power under the Act to take actions with respect to wildlife, I do not find them controlling given what I regard as the unique linkage between the pool as a geologic formation and the continuing existence of the pupfish as its sole inhabitants. It is this linkage between the pupfish and the pool which establishes Devil's Hole as an object of scientific interest.

Establishing the second link in the chain is substantially easier. The Truman Proclamation in part provided that:

> Whereas, there is located outside the boundaries of the said monument [Death Valley] but in the vicinity thereof a forty-acre tract of public land in Nevada containing a remarkable underground pool known as Devil's Hole; and
>
> Whereas, the said pool is a unique subsurface remant of the prehistoric chain of lakes which in Pleistocene times formed the Death Valley Lake System, and is unusual among caverns in that it is a solution area in distinctly striated limestone, while also owing its formation in part to fault action; and
>
> Whereas the geologic evidence that this subterranean pool is an integral part of the hydrographic history of the Death Valley region is further confirmed by the presence in this pool of a peculiar race of desert fish, and zoologists have demonstrated that this race of fish, which is found nowhere else in the world, evolved only after the gradual drying up of the Death Valley Lake System isolated this fish population from the original ancestral stock that in Pleistocene times was common to the entire region, and

> Whereas the said pool is of such outstanding scientific importance that it should be given special protection, and such protection can be best afforded by making the said forty-acre tract containing the pool a part of the said monument. . . .
>
> Warning is hereby expressly given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this addition to the said monument and not to locate or settle on any of the lands thereof.

Although it is possible to read the Proclamation so as to protect the continued existence of the pool, but not the "peculiar race of fish" which is its sole inhabitant, I find that interpretation unacceptable. The fate of the pool and the fish are so closely intertwined that to speak of protecting the continued existence of one without considering the existence of the other is strained. To be sure the Proclamation emphasizes "the pool" rather than the fish that live in it but preservation of the pool in its natural state - a direct purpose of the Act - will also preserve the fish.* Indeed, as the S.G. points out, it is difficult

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* Consider the fact that even if the linkage of the pool and the fish is not accepted, the ability of the fish to survive may play a role in the determination of the amount of reserved water. The Proclamation clearly indicates an interest in preserving the pool. Assuming there is no direct interest in preserving the fish, one measure of whether pumping by other water consumers lowers the level of the pool an impermissible amount below its original or natural level would be the inability of the fish to survive.

to think of a reservation that would more clearly carry with it a reservation of water rights. Assuming that the validity of the conclusions thus far developed, application of the intent/necessity standard inexorably leads to the conclusion that the United States intended to reserve sufficient water in the pool to ensure the survival of the pupfish. Consequently, the DC injunction, which limited pumping from specifically designated wells within a two and one-half-mile radius of Devil's Hole so as to preserve an adequate water supply for the pupfish was entirely appropriate.

A { 74-1304 NEVADA EX REL WESTERGARD v. U.S.
74-1107 CAPPAERT v. U.S. (Cert to CA9)

Argued 1/12/76

Pupfish case.

Lionel (for Petr.)

Petrs have been enjoined from pumping water on 21 sq miles of their land, effectively destroying the viability of their farm.

~~Abbo Proclamation of '52~~

Judgment below wrong for 5 reasons:

1. Terms of Proclamation of 1/52 (¶1-3 of Petr. pr Cert) do not reserve water rights ~~to~~ and says nothing about preserving pupfish. (Pool is of great depth. No water is withdrawn from pool. The hydraulic effect of pumping does reduce level of pool.

2. Judgment is ex post facto law taking (in effect) ~~to~~ Petrs' Rights w/o compensation. Govt should condemn land + thereby protect pupfish.

3. Sole authority cited in 1952 Proclamation is Act of 1906(?). There is nothing in that Act that relates to preservation of water rts.

Lionel (cont.)

Good point

The 1906 Act does not authorize reservation of water for pupfish. Act does not authorize protection of pupfish.

Preservation of Grand Canyon was protected under Act of 1906. (Court decided case on this – which Lionel thinks is wrong).

4. If injunction is sustained, it may prevent pumping on 45 sq. miles – state of Conn. (See Refs B, 15)

5. Failure of Ct. to consider Proclamation in its setting.

Should limit "implied reservation doctrine" (I must learn more about this)

Allesin (Dep AG - Nev.)

Interest of Nev. (& other states that have filed amicus briefs) much broader than issue in this case.

Historically states have controlled water rts, except where Fed Gov't expressly legislated otherwise. This created certainly as to water rights - so imp. to Western States

→ Concern of states derives from the "implied reservation" doctrine applied by Cts. below.

61% of land in Western States (76% of Nev.) owned by Fed Govt. Underground water in many areas, & states are dependent on it.

Doctrine of implied reserve case exists - but Fed gov should have the burden of showing superior Fed need, such a showing to be made before state adm. agencies. Normally such an agency's decision is reviewable in state courts. Here when a Fed. govt becomes Fed Gov. is a party.

(over)

Randolph (S C)

All attempts to transplant pupfish have failed – possibly except at Hoover Dam.

Lionel was inaccurate in saying that injunction stops pumping on 21 sq. miles. See language of injunction. The injunction merely limits extent of pumping, & part of ~~South~~ is not subject to injunction at all.

Lionel wrong in his statement as to effect on 4500 sq. miles. See A 79, 80, 98-99

× × ×

Act of 1906 relates to preservation of antiquities. Pupfish are antiquities.

C & O Canal is a National Monument (like Grand Canyon).* (I think I write, I should check U S Code for it.)

Devils Hole was set aside to protect fish & not just to protect pool. Pool is important because of unique fish. Proclamation recognizes this. If fish are removed, the scientific interest in Pool relates solely to fish.

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* Under 1906 Act.

(Over)

Allen (cont.)

U.S. was a party to the state adm. proceedings for all practical purposes & took part in argument. witnesses & U.S. presented

Acknowledges that Winters case (207 U.S.) recognizes implied reservations doctrine - but requires a consideration & weighing of relevant equities.

No. 74-1304 NEVADA v. U.S.
74-1107 CAPPAERT v. U.S. Conf. 1/14/76

Aff-9-0

The Chief Justice Affirm

~~xxxJxxxxx~~ Stevens, J.

Brennan, J. Affirm

Stewart, J. Affirm
The Proclamation reserved a pool - including the water (obviously).
Nothing to res judicata argument.

White, J.

Affirm

The monument was
the pool.
The Reserve Rts
doctrine OK.

Marshall, J.

Affirm

Blackmun, J. Affirm

No destruction
bet. ground & surface
water;

Powell, J. Affirm

U.S., by reserving public
lands, also may be deemed
to reserve unappropriated
water rights that are necessary
to accomplish purpose
for which reservation was created. Cappaert
Arizona v. Calif.
Doctrine not limited to
Indian lands.
The Antiquities Act
has been broadly construed
to include "objects" of
"scientific interest." Grand Canyon.
Truman's Proclamation
~~[illegible]~~ was a valid
exercise of power under Act
& he intended to protect pool
& fish. The injunction (2½ mile radius)
was not too broad.
Our op. should be narrowly written.

Rehnquist, J. Affirm

Portland v. Beaver
is inconsistent
with Arizona v. Calif.
But Arizona v. Calif
now controls.

Perfect case - run away one.

L.F.P.

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAY 19 1976

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Join

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74–1107 AND 74–1304

Francis Leo Cappaert et al., Petitioners,
74–1107 *v.*
United States et al.

Nevada ex rel. Roland D. Westergard, State Engineer, Petitioner,
74–1304 *v.*
United States et al.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May —, 1976]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented in this case is whether the reservation of Devil's Hole as a National Monument reserved federal water rights in underground water.

Devil's Hole is a deep limestone cavern. Approximately 50 feet below the surface of the cavern is a pool 65 feet long, 10 feet wide and at least 200 feet deep, although its actual depth is unknown. The pool is a remnant of the prehistoric Death Valley Lake System. By the Proclamation of January 17, 1952, President Truman withdrew from the public domain a 40-acre tract of land surrounding Devil's Hole, making it a detached component of the Death Valley National Monument. Proclamation No. 2961, 66 Stat. C18, 17 Fed. Reg. 691.[1] The

[1] The final paragraph of the Proclamation withdrawing Devil's Hole from the public domain reads as follows:

"Now, Therefore, I, Harry S. Truman, President of the United

Proclamation was issued under the Act for the Preservation of American Antiquities, 16 U. S. C. § 431, 34 Stat. 225, which authorizes the President to declare as national monuments "objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States. . . ."

The 1952 Proclamation notes that Death Valley was set aside as a national monument "for the preservation of the unusual features of scenic, scientific, and educational interest therein contained." The Proclamation also notes that Devil's Hole is near Death Valley and contains a "remarkable underground pool." Additional preambular statements in the Proclamation explain why Devil's Hole was being added to the Death Valley National Monument:

> "Whereas the said pool is a unique subsurface remnant of the prehistoric chain of lakes which in Pleistocene times formed the Death Valley Lake System, and is unusual among caverns in that it is a solution area in distinctly straited limestone, while also owing its formation in part to fault action; and
>
> "Whereas the geologic evidence that this subterranean pool is an integral part of the hydrographic

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States of America, under and by virtue of the authority vested in me by section 2 of the act of June 8, 1906, 34 Stat. 225 (16 U. S. C. 431), do proclaim that, subject to the provisions of the act of Congress approved June 13, 1933, 48 Stat. 139 (16 U. S. C. 447), and to all valid existing rights, the following-described tract of land in Nevada is hereby added to and reserved as a part of the Death Valley National Monument, as a detached unit thereof:

"Mount Diablo Meridian, Nevada T. 17 S., R. 50 #., sec. 36, SW ¼ SE ¼.

"Warning is hereby expressly given to all unauthorized persons not to appropriate, innure, destroy, or remove any feature of this addition to the said monument and not to locate or settle on any of the lands thereof."

history of the Death Valley region is further confirmed by the presence in this pool of a peculiar race of desert fish, and zoologists have demonstrated that this race of fish, which is found nowhere else in the world, evolved only after the gradual drying up of the Death Valley Lake System isolated this fish population from the original ancestral stock that in Pleistocene times was common to the entire region; and

"Whereas the said pool is of such outstanding scientific importance that it should be given special protection, and such protection can be best afforded by making the said forty-acre tract containing the pool a part of the said monument. . . ."

The Proclamation provides that Devil's Hole should be supervised, managed and directed by the National Park Service, Department of Interior. Devil's Hole is fenced off and only limited access is allowed by the Park Service.

The Cappaert petitioners own a 12,000-acre ranch near Devil's Hole, 4,000 acres of which are used for growing Bermuda grass, alfalfa, wheat, and barley; 1,700 to 1,800 head of cattle are grazed. The ranch represents an investment of more than 7 million dollars; it employs more than 80 people with an annual payroll of more than $340,000.

In 1968 the Cappaerts began pumping groundwater on their ranch on land two and one-half miles from Devil's Hole; they were the first owners to appropriate water. The groundwater comes from an underground basin or acquifer which is also the source of the water in Devil's Hole. After the Cappaerts began pumping from the wells near Devil's Hole, which they do from March to October, the summer water level of the pool in Devil's Hole began to decrease. Since 1962 the level of water

in Devil's Hole has been measured with reference to a copper washer installed on one of the walls of the hole by the U. S. Geological Survey. Until 1968, the water level, with seasonable variations, had been stable at 1.2 feet below the copper marker. In 1969 the water level in Devil's Hole was 2.3 feet below the copper washer; in 1970, 3.17 feet; in 1971, 3.48 feet; and, in 1972, 3.93 feet.

When the water is at the lowest levels, a large portion of a rock shelf in Devil's Hole is above water. However, when the water level is at 3.0 feet below the marker or higher, most of the rock shelf is below water, enabling algae to grow on it. This in turn enables the desert pupfish, referred to in President Truman's Proclamation, to spawn in the spring. As the rock shelf becomes exposed, the spawning area is decreased, reducing the ability of the fish to spawn in sufficient quantities to prevent extinction.

In April 1970 the Cappaerts, pursuant to Nevada law, Nev. Rev. Stat. § 533.325, applied to the State Engineer, Roland D. Westergard, for permits to change the use of water from several of their wells. Although the United States was not a party to that proceeding and was never served, employees of the National Park Service learned of the Cappaerts' application through a public notice published pursuant to Nevada law. Nev. Rev. Stat. § 533.360. An official of the National Park Service filed a protest as did a private firm. Nevada law permits interested persons to protest an application for a permit; the protest may be considered by the State Engineer at a hearing. Nev. Rev. Stat. § 533.365. A hearing was conducted on December 16, 1970, and a field solicitor of the Department of Interior appeared on behalf of the National Park Service. He presented documentary and testimonial evidence, informing the State Engineer that because of the declining water level of

Devil's Hole the United States had commissioned a study to determine whether the wells on the Cappaerts land were hydrologically connected to Devil's Hole and, if so, which of those wells could be pumped safely and which should be limited to prevent lowering of the water level in Devil's Hole. The Park Service field solicitor requested either that the Cappaerts' application be denied or that decision on the application be postponed until the studies were completed.

The State Engineer declined to postpone decision. At the conclusion of the hearing he stated that there was no recorded federal water right with respect to Devil's Hole, that the testimony indicated that the Cappaerts' pumping would not unreasonably lower the water table or adversely affect existing water rights, and that the permit would be granted since further economic development of the Cappaert's land would be in the public interest. In his oral ruling the State Engineer stated in part "that the protest to the applications that are the subject of this hearing are overruled and the applications will be issued subject to existing rights." The National Park Service did not appeal. See N. R. S. § 533.450.

In August 1971 the United States, invoking 28 U. S. C. § 1345, 62 Stat. 933,[2] sought an injunction in the United States District Court for the District of Nevada to limit, except for domestic purposes, the Cappaerts' pumping from six specific wells and from specific locations near Devil's Hole. The complaint alleged that the United States, in establishing Devil's Hole as part of Death

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[2] 28 U. S. C. § 1345 provides as follows:

"Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

Valley National Monument, reserved the unappropriated waters appurtenant to the land to the extent necessary for the requirements and purposes of the reservation. The complaint further alleged that the Cappaerts had no perfected water rights as of the date of the reservation. The United States asserted that pumping from certain of the Cappaerts' wells had lowered the water level in Devil's Hole, that the lower water level was threatening the survival of a unique species and that irreparable harm would follow if the pumping were not enjoined. On June 2, 1972, the United States filed an amended complaint, adding two other specified wells to the list of those to be enjoined.

The Cappaerts answered, admitting that their wells draw water from the same underlying sources supplying Devil's Hole, but denying that the reservation of Devil's Hole reserved any water rights for the United States. The Cappaerts alleged that the United States was estopped from enjoining use of water under land which it had exchanged with the Cappaerts. The State of Nevada intervened on behalf of the State Engineer as a party defendant but raised no affirmative defenses.

On June 5, 1973, the District Court, by Chief Judge Roger D. Foley, entered a preliminary injunction limiting pumping from designated wells so as to return the level of Devil's Hole to not more than 3.0 feet below the marker. Detailed findings of fact were made and the District Judge then appointed a Special Master to establish specific pumping limits for the wells and to monitor the level of the water at Devil's Hole. The District Court found that the water from certain of the wells was hydrologically connected to Devil's Hole, that the Cappaerts were pumping heavily from those wells, and that that pumping had lowered the water level in Devil's Hole. The Court found that the pumping could be

regulated to stabilize the water level at Devil's Hole and that neither establishing an artificial shelf nor transplanting the fish was a feasible alternative that would preserve the species. The District Court found that if the injunction did not issue "there is grave danger that the Devil's Hole pupfish may be destroyed, resulting in irreparable injury to the United States."

The District Court then held that in establishing Devil's Hole as a National Monument, the President reserved appurtenant, unappropriated waters necessary to the purpose of the reservation; the purpose included preservation of the pool and the pupfish in it. The District Court held that the federal water rights antedated those of the Cappaerts, that the United States was not estopped and that the public interest required granting the injunction. On April 9, 1974, the District Court entered its findings of fact and conclusions of law substantially unchanged in a final decree permanently enjoining pumping that lowers the level of the water below the 3.0 foot level. 375 F. Supp. 456 (Nev. 1974).

The Court of Appeals for the Ninth Circuit affirmed, 508 F. 2d 313 (1974),[3] in a thorough opinion by Senior District Judge Gus J. Solomon, sitting by designation, holding that the implied reservation of water doctrine applied to groundwater as well as to surface water. The Court of Appeals held that "[t]he fundamental purpose of the reservation of the Devil's Hole pool was to assure that the pool would not suffer changes from its condition at the time the Proclamation was issued in 1952 . . . ." 508 F. 2d, at 318. The Court of Appeals held that

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[3] Pending appeal, the Court of Appeals, in response to a motion from the Cappaerts to modify the injunction to permit them to pump to 3.7 feet below the copper water level, had permitted the Cappaerts to pump so long as the water level did not drop more than 3.3 feet below the marker. 483 F. 2d 432 (1973).

neither the Cappaerts nor their successors in interest had any water rights in 1952, nor was the United States estopped from asserting its water rights by exchanging land with the Cappaerts. In answer to contentions raised by the intervenor Nevada, the Court of Appeals held that the United States is not bound by state water law as to lands reserved from the public domain and does not need to take steps to perfect its rights with the State; that the District Court had concurrent jurisdiction with he state courts to resolve this claim; and, that the state administrative procedures granting the Cappaert's permit did not bar resolution of the United States' suit in Federal District Court.

We granted the writ of certiorari in this case to consider the scope of the implied reservation of water rights doctrine. 422 U. S. 1041 (1975). We affirm.

I

Reserved Water Rights Doctrine

This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulations of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams. *Colorado River Water Conservation District* v. *United States*, — U. S. —, [p. 4] (1976); *United States* v. *District Court for Eagle County*, 401 U. S. 520, 522–523 (1971); *Arizona* v. *California*, 373 U. S. 546, 601

(1963); *FPC* v. *Oregon*, 349 U. S. 435 (1955); *United States* v. *Powers*, 305 U. S. 527 (1939); *Winters* v. *United States*, 207 U. S. 564 (1908).[4]

Nevada argues that the cases establishing the doctrine of federal reserved water rights articulate an equitable doctrine calling for a balancing of competing interests. However, an examination of those cases shows they do not analyze the doctrine in terms of a balancing test. For example, in *Winters* v. *United States, supra*, the Court did not mention the use made of the water by the upstream landowners in sustaining an injunction barring their diversions of the water. The "Statement of the Case" in *Winters* notes that the upstream users were homesteaders who had invested heavily in dams to divert the water to irrigate their land, not an unimportant interest. The Court held that when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation.[5]

In determining whether there is a federally reserved water right implicit in a federal reservation of public

[4] The Cappaerts argue that as to nonnavigable waters, the implied reservation doctrine properly applies only to Indian reservations due to the sovereign nature and ward status of Indian tribes; thus, *FPC* v. *Oregon*, 349 U. S. 435 (1955), must be overruled. We disagree. Navigability or nonnavigability of water is irrelevant for the application of the implied reservation doctrine, see *ante*, at [29, this copy]. This court has held that the doctrine applies both to Indian reservations and other federal enclaves. *E. g., Arizona* v. *California*, 373 U. S. 546, 601 (1963).

[5] Nevada is asking, in effect, that the Court overrule *Arizona v. California*, 373 U. S. 546 (1963), and *United States* v. *District Court for the County of Eagle*, 401 U. S. 520 (1971), to the extent that they hold that the implied reservation doctrine applies to all federal enclaves since in so holding those cases did not balance the "competing equities." Nevada's Brief, at 15. However, since balancing the equities is not the test, those cases need not be disturbed.

land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created. See, *e. g.*, *Arizona* v. *California*, 373 U. S., at 599–601; *Winters* v. *United States*, 207 U. S., at 576. Both the District Court and Court of Appeals held that the 1952 Proclamation expressed an intention to reserve unappropriated water and we agree.[6] The Proclamation discussed the pool in Devil's Hole in four of the five preambles and recited that the "pool . . . should be given special protection." Since a pool is a body of water, the protection contemplated is meaningful only if the water remains; the water right reserved by the 1952 Proclamation was thus explicit, not implied.[7]

Also explicit in the 1952 Proclamation is the authority of the Director of the Park Service to manage the lands of Devil's Hole Monument "as provided in the act of Congress entitled 'An Act to establish a National Park Service, and for other purposes,' approved August 25, 1916 (39 Stat. 535; 16 U. S. C. 1–3) . . . ." The National Park Service Act provides that the "fundamental purpose of said national parks, monuments, and reservations" is "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the

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[6] The implied reservation of water doctrine applies only to unappropriated waters. The water rights at issue here were unappropriated in 1952 since neither the Cappaerts nor their successors in interest had beneficially diverted any water as of that date. See n. 8, *infra*.

[7] The 1952 Proclamation forbids unauthorized persons to "appropriate, inure, destroy, or remove any feature" from the reservation. Since water is a "feature" of the reservation, the Cappaerts, by their pumping, are in a sense "appropriating" or "removing" this feature in violation of the Proclamation.

enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U. S. C. § 1.

The implied reservation of water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more. *Arizona* v. *California*, 373 U. S., at 600–601. Here the purpose of the reservation is preservation of the pool. Devil's Hole Monument was reserved "for the preservation of the unusual features of scenic, scientific, and educational interest." The Proclamation notes that the pool contains "a peculiar race of desert fish . . . which is found nowhere else in the world" and that the "pool is of . . . outstanding scientific importance . . . ." The pool need only be preserved, consistent with the intention expressed in the Proclamation, to the extent that its scientific interest is preserved. The fish are one of the features of scientific interest. The preamble noting the scientific interest of the pool follows the preamble describing the fish as unique; the Proclamation must be read in its entirety. 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.

Both petitioners argue that even if the intent of the 1952 Proclamation were to maintain the pool, the Act for the Protection of American Antiquities, 34 Stat. 225, 16 U. S. C. §§ 431–433, did not give the President authority to reserve a pool. Under that Act, according to the Cappaert petitioners, the President may reserve federal

lands only to protect archeologic sites. However, the language of the Act which authorizes the President to proclaim as national monuments "historic landmarks, historic and prehistoric structures, and objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government" is not so limited. The pool in Devil's Hole and its rare inhabitants are "objects of historic and scientific interest." See generally *Cameron* v. *United States,* 252 U. S. 450, 451–456 (1920).

II

Groundwater

No cases of this Court have applied the doctrine of implied reservation of water rights to groundwater. Nevada argues that the implied reservation doctrine is limited to surface water. To recognize such a distinction, however, would be to exalt form over substance, since "groundwater and surface water are physically interrelated as integral parts of the hydrologic cycle." Corker, Groundwater Law, Management and Administration, National Water Commission Legal Study No. 6, p. xxiv (1971). Depletion of water from one source will deplete it from the other. *Ibid.* See also Water Policies for the Future—Final Report to the President and to the Congress of the United States by the National Water Commission 233 (1973). For example, Nevada itself must recognize the interrelationship since it applies the law of prior appropriation to both groundwater and surface water. Nev. Rev. Stat. §§ 533.010 *et seq.;* 534.020; 534.080; 534.090.[8] See also *State* v. *Dor-*

[8] Under the doctrine of prior appropriation, the first to divert and use water beneficially establishes a right to continued use of the water. The right exists only as long as the water is beneficially diverted. See *Colorado River Water Conservation District* v.

ity, 55 N. M. 12, 27, 225 P. 2d 1007, 1016 (1950), appeal dismissed for want of a substantial federal question *sub nom. Dority* v. *New Mexico ex rel. Bliss*, 341 U. S. 924 (1951). Thus, since the implied reservation of water doctrine is based on the necessity of water for the purpose of the federal reservation and since groundwater and surface water are interrelated, we hold that the existence of the water right does not vary as the source of the water varies.[9]

III

State Law

Both petitioners argue that the Federal Government must perfect its implied water rights according to state law. They contend that the Desert Land Act of 1877, 19 Stat. 377, 43 U. S. C. § 321 and its predecessors [10]

United States, — U. S. —, [3–4] (1976). Nev. Rev. Stat. §§ 533.010 *et seq.*; 534.020; 534.080; 534.090. Sax, Water Law, Planning and Policy—Cases and Materials, 218–224 (1968).

[9] Both petitioners argue that the effect of applying the implied reservation doctrine to groundwater is to prohibit pumping from the entire 4500 acres above the aquifer which supplies water to Devil's Hole. First, it must be emphasized that the injunction limits but does not prohibit pumping. ~~it.~~ Second, the findings of fact in this case relate only to wells within two and one-half miles of Devil's Hole. No proof was introduced in the District Court that pumping from the same aquifer which supplies Devil's Hole, but at a greater distance from Devil's Hole, would significantly lower the level in Devil's Hole. Nevada notes that such pumping "will in time affect the water level in Devil's Hole." Brief, at 25. There was testimony from a research hydrologist that substantial pumping 40 miles away "over a period of decades [would have] a small effect." Appendix, at 79.

[10] The predecessors to the Desert Land Act of 1877, 19 Stat. 377, 43 U. S. C. § 321, are the Act of July 26, 1866, 14 Stat. 251, and the Act of July 9, 1870, 16 Stat. 217. Those Acts provide that water rights vested under state law or custom are protected. How-

severed nonnavigable water from public land, subjecting it to state law. That Act, however, provides only that water rights on public land—land that is either patented to a private homesteader or patentable but not reserved—are to be acquired by prior appropriation as determined by state law. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, 154–155 (1935); see Morreale, Federal-State Conflicts Over Western Waters—A Decade of Attempted "Clarifying Legislation," 20 Rutgers L. Rev. 423, 432 (1966).[11] This Court held in *FPC* v. *Oregon*, 349 U. S. 435, 448 (1955),

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ever, the Cappaerts did not have any vested water rights in 1952. See n. 6, *supra*.

[11] The cases relied upon by the Cappaerts are not to the contrary. *E. g., United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725 (1950); *Ickes* v. *Fox*, 300 U. S. 82 (1937); *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 275 U. S. 142 (1935). *Dority* v. *New Mexico ex rel. Bliss*, 341 U. S. 924 (1951). None involve a federal reservation and all involve a determination whether water rights had vested under state law. Here a Federal reservation is involved and neither the Cappaerts nor their predecessors in interest had any vested water rights in 1952 when the United States' water rights vested.

Nebraska v. *Wyoming*, 325 U. S. 589 (1945), also relied upon by the Cappaerts, involved a federal reservation pursuant to the Reclamation Act of June 17, 1902, 32 Stat. 388, which directs the Secretary of Interior to "proceed in conformity with [State] laws" and which provides that "the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." In *Nebraska* v. *Wyoming*, the court noted that the United States had acted in conformity with state law. The court said, "We intimate no opinion whether a different procedure might have been followed so as to appropriate and reserve to the United States all of these water rights. No such attempt was made." 325 U. S., at 615. Here the United States acquired reserved water rights through a reservation authorized not by the Reclamation Act, but by the Antiquities Act.

under 28 U. S. C. § 1345 to adjudicate the water rights claims of the United States.[13] *Colorado River Water Conservation District* v. *United States*, — U. S., at [5–8]. The McCarran amendment, 43 U. S. C. § 666, 66 Stat. 560, did not repeal § 1345 jurisdiction as applied to water rights. *Ibid.* Nor, as Nevada suggests, is the McCarren amendment a substantive statute, requiring the United States to "perfect its water rights in the state forum like all other land owners." Nevada's Brief, at 37. The McCarren amendment merely waives United States' sovereign immunity should the United States be joined as a party in a state court general water rights' adjudication. *Colorado River Water Conservation District* v. *United States*, — U. S., at [p. 6–7].

VI

Res Judicata

Finally Nevada, as intervenor in the Cappaerts' suit, argued in the Court of Appeals that the United States was barred by res judicata or collateral estoppel from litigating its water rights claim in federal court. Nevada bases this conclusion on the fact that the National Park Service filed a protest to the Cappaerts' pumping permit application in the state administrative proceeding. Since we reject that contention, we need not consider whether the issue was timely and properly raised. We note only that the United States was not made a party to the state administrative proceeding;[14] nor was the United States in privity with the Cappaerts. See *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 320–326 (1971). When

[13] See n. 2, *supra*.

[14] The cases petitioners rely upon involve parties who have collaterally attacked an administrative determination. Here the United States was never a party.

the United States appeared to protest in the state proceeding it did not assert any federal water right claims, nor did it seek to adjudicate any claims until the hydrological studies as to the effects of the Cappaerts' pumping had been completed.[15] The fact that the United States did not attempt to adjudicate its water rights in the state proceeding is not significant since the United States was not a party. The State Water Engineer's decree explicitly stated that it was "subject to existing rights"; thus, the issue raised in the District Court was not decided in the proceedings before the State Engineer. See *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U. S., at 323. Cf. *United States* v. *Utah Construction & Mining Co.,* 384 U. S. 394, 422.

We hold, therefore, that as of 1952 when the United States reserved Devil's Hole, it acquired by reservation, water rights in unappropriated appurtenant groundwater sufficient to maintain the level of the pool to preserve its historic value and thereby implement Proclamation No. 2961. Accordingly, the judgment of the Court of Appeals is

Affirmed.

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[15] The United States requested either that the permits be denied or decision postponed until the studies were complete. While the State Engineer did not postpone decision on the permit application, the Cappaerts' attorney said that the studies "will go forward whether or not the applications are granted; so let's not make the mistake of thinking that if these applications are granted the studies are moot, they are not." App. 307.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 20, 1976

Re: 74-1107 - Cappaert, et al. v. United States
74-1304 - Nevada, ex rel Westergard, etc. v. United States

Dear Chief:

Please join me.

Sincerely,

John

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 20, 1976

Nos. 74-1107 and 74-1304
Cappaert v. United States

Dear Chief,

I am glad to join your opinion for the Court in these cases.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

May 21, 1976

No. 74-1107 Cappaert v. United States
No. 74-1304 Nevada v. United States

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 24, 1976

Re: Nos. 74-1107 & 74-1304 - Cappaert v. United States

Dear Chief:

Except for Part II dealing with ground water, I am in substantial agreement with your circulating opinion in this case. As to Part II, however, it seems unnecessary to go farther than holding that reserved water rights may not be defeated by a subsequent appropriation of ground water on which the reserved rights are shown to depend. I would prefer to avoid laying down the general proposition that because "ground water and surface water are interrelated--the existence of the water right does not vary as the source of the water varies."

Ground and surface water are not always interrelated; and where they are not, I would withhold opinion on whether a shortage of surface water in dry years may be cured by drilling and pumping or diverting unrelated ground water to the detriment of prior rights dependent on that water. Query, for example: whether water rights impliedly reserved by the creation of an Indian reservation would give the United States and its wards the right to drill for and appropriate ground water that until that time had no surface manifestation but has been subject to prior appropriation by those owning non-reservation land beneath which the underground pool or stream also lies or runs.

Sincerely,

Byron

The Chief Justice

Copies to Conference

P.S. The attached article from a country newspaper in Colorado indicates the immediate impact of our recent decisions on the allocation of a scarce resource, as well as the proclivity of some government agencies to attempt to turn an inch into a mile.

B.R.W.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 25, 1976

Re: Nos. 74-1107 & 74-1304 - Cappaert v. United States

Dear Chief:

I agree with Byron's observations about this case, including his comments about Part II.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 28, 1976

RE: Nos. 74-1107 & 74-1304 Cappaert and Nevada ex rel. Westergard v. United States, et al.

Dear Chief:

I agree.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1976

Re: No. 74-1107 - Cappaert v. United States
No. 74-1304 - Nevada v. United States

Dear Chief:

Please join me in your recirculation of May 28.

Sincerely,

Harry

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 2, 1976

Re: Nos. 74-1107 & 74-1304 - Cappaert v. U. S.

Dear Chief:

Please join me.

Sincerely,

Byron

The Chief Justice

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 2, 1976

Re: No. 74-1107 -- Cappaert v. United States
No. 74-1304 -- Nevada v. United States

Dear Chief:

Please join me.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 3, 1976

Re: Nos. 74-1107 & 74-1304 - Cappaert v. United States

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

Copies to the Conference

JPS

THE C. J.	~~W. O. D.~~	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
1/28/76								
1st draft 5/19/76 2nd draft 5/28/76	Join CJ 5/20/76	agree 5/28/76	Join CJ 5/20/76	Join CJ 6/3/76	Join CJ 6/2/76	Join CJ 5/31/76	Join CJ 5/21/76	Join CJ 6/3/76
					74-1304 Nevada v. U.S. 74-1107 Cappaert v. U.S.			