January 1965

Winters Doctrine Rights Keystone of National Programs for Western Land and Water Conservation and Utilization

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INTRODUCTION

Every western state in which there are situated Indian reservations, national forests, parks, and similar areas, has a large stake in preserving the principles of the Winters Doctrine enunciated by the Supreme Court in 1908. Since its pronouncement those who seek to strip the Indians of their invaluable rights to the use of water and invade the “reserved rights” of the United States, have attacked the Doctrine by attempting to construe it away or limit its operation. This paper is a consideration of the most recent events in the history of that Doctrine.

Briefly, the Supreme Court in declaring the Winters Doctrine, held that although not mentioned in the treaties, executive orders or other means used to establish the reservations, there is an implied reservation of rights to the use of the waters in streams which rise upon, traverse or border upon Indian reservations, which may be exercised in connection with the Indian lands. Those rights to the use of water are withheld from appropriation by others subsequent to their reservation. A 1939 ruling by the Court recognized that Winters Doctrine Rights passed to the successors in interest of lands to which those rights are appurtenant.

In 1956 Judge Walter L. Pope, speaking for the Court of Appeals for the Ninth Circuit in United States v. Ahtanum Irrigation Dist., ruled that the Doctrine includes rights to provide for the “ultimate needs of the Indians.” More recently the Supreme Court in Arizona v. California, affirming the principles of the Ninth Circuit, decided that the implied reservation “was intended to satisfy the future as well as the present [water] needs of the Indian Reservations.” In the same decision, the Court declared the principles of the Winters Doctrine are likewise applicable to reserved lands of the United States withdrawn for national forests, parks, recreational areas and wildlife refuges. Even more recently, Judge Pope, again speaking...
for the Ninth Circuit, declared that the *Winters Doctrine Rights* are reserved for the "beneficial" use of the Indians.\(^6\)

The importance of the *Winters Doctrine* in the last half of the twentieth century cannot be minimized. It is clearly the keystone of the national programs for land and water conservation. The succeeding paragraphs analyze the source of title, the nature of and the authority to exercise the *Winters Doctrine Rights*.

**QUESTIONS PRESENTED**

To better effectuate the analysis of the *Winters Doctrine Rights* these specific questions are presented:

1. What is the date when title to the "reserved rights to the use of water" became vested in the United States or the Indians, based upon the *Winters Doctrine*?

2. What is the legal nature and measure of the *Winters Doctrine Rights*, title to which resides in the United States or in the Indians?

3. How do the *Winters Doctrine Rights* compare with appurtenant, riparian or prescriptive rights under the laws of the several states?

The response to these questions entails a review of the basic and far-reaching principles upon which the *Winters Doctrine* is predicated and the manner in which it can be applied.

**MONTANA'S INDIAN DECISION DECLARING *WINTERS DOCTRINE*—PROTECTS INDIANS AND IS A BASIS FOR NATIONAL POLICY RESPECTING LAND AND WATER RESOURCES**

The most crucial single opinion relating to the rights to the use of water claimed and exercised by the United States involved Montana's Fort Belknap Indian Reservation. That case concerned the Indian's rights and interests in the Milk River and the conflicting claims of non-Indians who predicated their rights upon Montana law. The principal matter for resolution by the Supreme Court was whether, when the lands were set aside for the Indians, there were reserved rights to the use of water from the Milk River. That query was of particular importance because no mention was made of rights to the use of water when the lands constituting the reservation were withdrawn.

Having summarized the issues, the Supreme Court stated: "The case, as we view it, turns on the agreement of May, 1888, resulting in the

\(^{6}\) *United States v. Ahtanum Irrigation Dist.*, 330 F.2d 897, 915 (9th Cir. 1964), petition for rehearing denied, 338 F.2d 307 (9th Cir. 1964), *cert. pending.*
creation of the Fort Belknap Reservation. . ."7 In rejecting contentions that rights to the use of water were not reserved for the Indians, it further stated:

The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was a cession of the waters, without which they would be valueless, and "civilized communities could not be established thereon." And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession.8

Turning to the assertions that rights claimed pursuant to state law would take precedence over those of the Indians, the Supreme Court also declared:

The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. . . That the Government did reserve them we have decided, and for a use which would be necessarily continued through years.9

The Supreme Court thus affirmed the Winters Doctrine. Since that pronouncement there have been numerous decisions throughout the Western United States reiterating the Winters Doctrine and applying it to specific factual situations.10

In the Ahtanum decision, Judge Pope placed the "reserved rights" in their proper perspective when he declared, "that the paramount right of the Indians . . . was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians. . . ."11

Adopting the rationale of the Ahtanum case the Special Master in Arizona v. California stated: "I have concluded that reservations of water by the United States included enough to supply expanding needs regardless of state water law."12 The Supreme Court in affirming the Special Master, approved this concept: "We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water

7Winters v. United States, supra note 1, at 575.
8Ibid.
9Id. at 577.
10See e.g., United States v. McIntire, 101 F.2d 650 (9th Cir. 1939); Conrad Investment Co. v. United States, 161 F. 829 (9th Cir. 1908); United States v. Walker River Irrigation Dist., 104 F.2d 334 (9th Cir. 1939); United States v. Ahtanum Irrigation Dist., supra note 3.
11United States v. Ahtanum Irrigation Dist., supra note 3, at 327.
was intended to satisfy the future as well as the present needs of the Indian Reservations."\textsuperscript{13}

\textbf{WINTERS DOCTRINE APPLIED TO NATIONAL FORESTS, WILDLIFE REFUGES AND RECEATIONAL AREAS}\textsuperscript{14}

The report of the Special Master in \textit{Arizona v. California} emphasized the principle that:

\[(1)\text{In the Winters case the United States exercised its power to reserve water by a treaty; but the power itself stems from the United States' property rights in the water, not from the treaty power. Since the United States has the power to reserve water, by treaty, against appropriation under state law, there is no reason why it lacks the power to do so by statute or executive order.}\]

(Emphasis supplied.)

Too great a stress can not be placed upon the concept thus expressed, that the "property rights in the water" are the source of the power to "reserve" those rights. The crux of the entire matter does not turn upon some regulatory authority as that term is generally used in regard to interstate commerce. Rather it turns upon the investiture of title in the central government. The nature of those "reserved rights" and the date of the investiture of that title are most important features of this consideration.

Adhering to the above-quoted concept, the Special Master viewed the variety of claims asserted by the United States in \textit{Arizona v. California}. The first of those claims related to the Gila National Forest. In his report the Special Master alluded to the fact that the United States claimed rights to water from sources within the drainage area of the Gila River System for use in national forests.\textsuperscript{6}

The finding is warranted that the United States intended, when it withdrew this Forest from entry, to reserve the water necessary to fulfill the purposes for which the Forest was created.\ldots The power of the United States to make such a reservation with respect to the Forest cannot be logically differentiated from the power of the United States with respect to Indian Reservations.\ldots \textsuperscript{17}

Reflective of this same thinking are comparable statements of the Special Master regarding other areas reserved by the national government from the "public lands" for use by all of the citizens of this country: "I con-
elude that the United States had the power to reserve water in the Colorado River for use in the Lake Mead National Recreation Area for the same reasons that it could reserve such water for Indian Reservations."^{18}

As to wildlife refuges established in furtherance of the objectives of treaties with Mexico and Great Britain, the Special Master likewise declared:

I have previously concluded that the United States had the power to reserve unappropriated water in the Colorado River for the future requirements of the Indian Reservations and a National Recreation Area and I can perceive no material distinction between them and wildlife refuges.\(^{19}\)

In adopting the legal reasoning of the Special Master the Supreme Court first turned to the sources of constitutional power from which stems the nation's authority to administer its properties. It stated:

Arizona's contention that the Federal Government had no power, after Arizona became a State, to reserve waters for the use and benefit of federally reserved land rests largely upon statements in Pollard's Lessee v. Hagan . . . and Shively v. Bowlby. . . . They [the cases] do not determine the problem before us and cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution. We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property.\(^{20}\)

The Supreme Court then reiterated and reaffirmed the Winters Doctrine,\(^{21}\) and stated that these rights "having vested before the [Boulder Canyon Project] Act became effective on June 25, 1929, are 'Present perfected rights'. . . .'\(^{22}\) (Emphasis supplied.)

In these terms the Winter Doctrine was extended to other reservations created by the national government out of lands to which it holds title:

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

\(^{18}\)Id. at 292.

\(^{19}\)Id. at 297.

\(^{20}\)Arizona v. California, supra note 4, at 597-98.

\(^{21}\)Id. at 600.

\(^{22}\)Id.
National Wildlife Refuge and the Gila National Forest. (Emphasis supplied.)

It is impossible to perceive a more far-reaching construction of the principles of the Winters Doctrine.

SOURCES OF TITLE OF, AUTHORITY OVER AND THE ADMINISTRATION OF, RIGHTS TO THE USE OF WATER OWNED BY THE NATIONAL GOVERNMENT

A. RIGHTS TO THE USE OF WATER INTERESTS IN REAL PROPERTY

Rights to the use of water reserved by the United States are interests in real property. Rules governing the sale and transfer of real estate are equally applicable to the conveyance of rights to the use of water. As stated by Weil in Water Rights in the Western United States, "The conveyance must be in writing, as of an interest in real estate within the statute of frauds." The Supreme Court, in keeping with these principles, has declared that unappropriated rights to the use of water to generate electricity are rights in real property.

The date of the investiture of title is the prime element in the value of any right to the use of water in the semi-arid West, whether acquired by the sovereign pursuant to a treaty or by an individual pursuant to the local laws. Where the demand so greatly exceeds the supply, the ownership or control of the legal right first to divert and use water, or to allow others to use it, is of transcendent importance. It is axiomatic that he who controls the rights to the use of water likewise controls the utilization of the land. As a consequence, it is essential to consider the source of the title and the date of investiture of that title to determine the scope of the Winters Doctrine Rights.

B. WINTERS DOCTRINE RIGHTS ACQUIRED BY UNITED STATES THROUGH CESSION FROM INDIANS, FRANCE, MEXICO AND GREAT BRITAIN

Vast areas of lands were ceded by the Indian tribes to the United States in the western part of this country. The nature of the transfer from the Indians to the national government is well stated by the Supreme Court in these terms: "The treaty [between the Yakimas and the United States] was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." The Ahtanum

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23Id. at 601.
241 WIEL, WATER RIGHTS IN THE WESTERN UNITED STATES §§ 18, 283, 285 (3d ed. 1911).
25Id. at § 542.
27Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278 (1893); See also Whitmore v. Murray City, 107 Utah 445, 154 P.2d 748, 751 (1944).
decision relied upon by the Special Master in Arizona v. California,\textsuperscript{29} has this to say:

That the Treaty of 1855 reserved rights in and to the waters of this stream for the Indians, is plain from the decision in\textit{Winters v. United States}. \textsuperscript{30} 'The treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted. . . .'\textit{ Before the treaty the Indians had the right to the use not only of Ahtanum Creek but of all other streams in a vast area. The Indians did not surrender any part of their right to the use of Ahtanum Creek. . . }.\textsuperscript{31} (Emphasis supplied.)

As a consequence it is highly important to keep in the foreground that the treaties between the United States and the Indian tribes resulted in both a reservation of the rights to the use of water from the streams which border upon or traverse their properties and a transfer of the rights in streams which are not similarly situated.

Treaties with France in 1803 invested the United States with title to the vast area of the Louisiana Purchase. In 1848, Mexico, by the Treaty of Guadalupe Hidalgo, conveyed the Southwest to the United States, and Great Britain, in 1846, ceded to the national government the Pacific Northwest.\textsuperscript{32} Each of the cessions passed title, subject to then vested rights, to all of the lands and rights to the use of water which were part and parcel of them.\textsuperscript{33} By those cessions not only the title but complete jurisdiction in the fullest legal sense passed to the central government over "all lands, lakes [and] rivers. . . ."\textsuperscript{34}

C. HISTORY OF WESTERN DEVELOPMENT UNDERSCORES OWNERSHIP AND CONTROL BY UNITED STATES OF RIGHTS TO THE USE OF WATER ON ITS PUBLIC LANDS

Here it is essential to establish the difference between the "public lands" and "reservations" of the United States. The Supreme Court has stated that "'public lands' are lands subject to private appropriation and disposal under public land laws;"\textsuperscript{35} whereas, "'reservations' are not so subject."\textsuperscript{36} The Court has also declared: "It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly sub-

\textsuperscript{29} \textit{Report of the Special Master, supra} note 12, at 258, 261.
\textsuperscript{30} \textit{United States v. Ahtanum Irrigation Dist.}, \textit{supra} note 3, at 325.
\textsuperscript{31} \textit{Id.} at 326.
\textsuperscript{32} \textit{I Wiel, op. cit. supra} note 24, § 66.
\textsuperscript{34} \textit{Vattel, Law of Nations} 120 (1883). Full import of the legal aspects of the investiture of complete title in the United States is reviewed at length by the Supreme Court in United States v. California, 332 U.S. 19 (1947).
ject to sale and disposition because they have been appropriated to some other purpose. 37

To a large extent the history of the West constitutes a review of the manner in which the principles of western water law became established. It likewise evidences the relationship between the national government and the pioneers who went upon the "public lands" and formulated those principles. In that connection Weil has correctly stated:

The law of prior appropriation of water originated among the miners of California in the earliest days of that State. . . . 38

. . . .

Under the theory upon which the law of appropriation arose, and what is still the theory of the California doctrine, several appropriators on the same stream upon public land . . . bear to each other the relation of successive grantees of parcels of one original holding, namely, of the sole right to the waters held by the United States as original owner. Like successive grants between private parties, where they conflict, the later one can hold only what was left after the earlier one was made. 39

The thought expressed in this excerpt is twofold: (1) title to the appropriative right to the use of water upon the public domain stems from the United States, and (2) the "priority date" establishes the relationship between successive holders of appropriative rights on the public lands all of whose rights stemmed from the national government. 40

From the leading case of Jennison v. Kirk, 41 further insight can be gained into the history of the doctrine of prior appropriation. There it is pointed out:

For eighteen years—from 1848 [the date of the Treaty of Guadalupe Hidalgo] to 1866—the regulations and customs of miners, as enforced and moulded by the courts and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands. 42

. . . .

[And those laws] recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition to its retention . . . . The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, except as against the government . . . . But the mines could not be worked without water . . . . To carry water

381 WIEL, op. cit. supra note 24, § 66.
391 WIEL, op. cit. supra note 24, § 299.
41Supra note 33.
to mining localities . . . became, therefore, an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes, was recognized as having, to the extent of actual use, the better right.\footnote{43}

Applying those principles of local law—in the light of the Act of 1866—the Court concluded:

[T]he owner of a mining claim and the owner of a water-right enjoy their respective properties from the dates of their appropriation, \textit{the first in time being the first in right}; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed.\footnote{44} (Emphasis supplied.)

As Congress had not authorized acquisition of rights to the use of water, there was no law other than that which grew up among the miners. To correct this situation Congress adopted the Act of 1866 which provides:

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same. . . .\footnote{45}

This statute has been adjudged by the Supreme Court to have this effect:

The object of the section was to give the sanction of the United States, \textit{the proprietor of the lands}, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands.\footnote{46}

. . . .

[T]he general purpose of the Act \textit{[of 1866]} . . . was to give sanction of the government to possessory rights acquired under the local customs, laws, and decisions of the courts.\footnote{47}

Subsequently, Congress adopted the Desert Land Act of 1877, which declared in connection with settlers on the "public land" that "the right to the use of water . . . shall depend upon bona fide prior appropriation . . . [leaving all 'surplus water' over and above that actually appropriated] free for the appropriation and use of the public. . . ."\footnote{48}
Further light is thrown upon the historical development of western water law by the case of Lux v. Haggin, in which the court stated:

By the Treaty [of Guadalupe Hidalgo] the public property of Mexico passed to the United States.\(^{49}\)

\[\ldots\]

From a very early day the courts of this state [California] have considered the United States government as the owner of such running waters on the public lands of the United States. \(\ldots\) Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation and diversion of the waters as distinct from the lands, the state courts have treated the prior appropriator of water on the public lands of the United States as having a better right than a subsequent appropriator, on the theory that the appropriation was allowed or licensed by the United States.\(^{50}\)

Concurrence with those concepts is to be found in California Oregon Power Co. v. Beaver Portland Cement Co.: "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately."\(^{51}\) In regard to the lands and rights to the use of water ceded to the national government in the arid West, the Supreme Court in the same case declared:

Congress intended to establish the rule that for the future [after 1877] the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named.\(^{52}\)

The full importance of this language can be understood only after a consideration of the Montana federal district court decision of Howell v. Johnson,\(^{53}\) which was relied upon by the Court. At issue in the Howell case was the source of title to claimed rights to divert and utilize waters from a stream flowing over and across the "public lands" of the United States. In answer to this question the court stated:

The rights of plaintiff do not, therefore, rest upon the laws of Wyoming, but upon the laws of congress.

The legislative enactment of Wyoming was only a condition which brought the law of congress into force. The national government is the proprietor and owner of all the land in Wyoming and Montana which it has not sold or granted to some one competent to take and hold the same. Being the owner of these lands, it [the United States] has the power to sell or dispose of

\(^{a}\)Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, 719 (1886).

\(^{b}\)Id. at 721.

\(^{c}\)Supra note 33, at 162.

\(^{d}\)Ibid.

\(^{e}\)88 Fed. 556 (D. Mont. 1898).
any estate therein or any part thereof. The water in an innavigable stream flowing over the public domain is a part thereof, and the national government can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem to it proper.\textsuperscript{54}

In rendering the \textit{California-Oregon Power Co.} decision, the Supreme Court not only relied upon the Montana case of \textit{Howell v. Johnson}, but likewise cited as authoritative the “well reasoned” Oregon decision of \textit{Hough v. Porter}\textsuperscript{55} which compared the power of the national government to grant rights to the use of water upon its lands with that exercised in its disposition of mineral rights upon those lands. The \textit{Hough} case relied upon another Oregon decision which stated:

\begin{quote}
[T]he waters of non-navigable streams are part of such public domain, and hence the property of the government, which may lay hold of and use them, without taking any of the steps made necessary to obtain a usufructuary interest therein by private individuals.\textsuperscript{56}
\end{quote}

Simply stated, the \textit{California-Oregon Power Co.} decision recognized that Congress permitted the states to decide the manner in which there could be acquired, and the character of the title to, rights to the use of water which would pass from the national government into private ownership. That principle was, as has been observed, applicable to “public lands.” In regard to the acquisition of title from the United States through compliance with state law the Supreme Court said in the \textit{California-Oregon Power Co.} opinion:

\begin{quote}
[F]ollowing the act of 1877 . . . all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states . . . with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. . . . The Desert Land Act does not bind or purport to bind states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation. . . .\textsuperscript{57}
\end{quote}

(Emphasis in part supplied.)

This statement makes clear that the source of the title to rights appropriated upon the “public lands” is the United States. Equally manifest is that the unappropriated rights to the use of water which are part and parcel of the “reserved” lands are not open to private acquisition.\textsuperscript{58}

\textsuperscript{54}\textit{Id.} at 558.

\textsuperscript{55}\textit{Supra} note 33.

\textsuperscript{56}N\textit{evada Ditch Co. v. Bennett}, 30 Ore. 59, 104, 45 Pac. 472, 484-85 (1896).

\textsuperscript{57}\textit{California-Oregon Power Co. v. Beaver Portland Cement Co.}, \textit{supra} note 33, at 163-64.

\textsuperscript{58}See also \textit{FP0 v. Oregon, supra} note 35.
D. **Principles of Winters Doctrine Logical Sequitur of Basic Precepts of International Statutory and Decisional Law**

From the authorities reviewed above it is manifest that the national government is empowered by the Constitution to dispose of its public lands and rights to the use of water which were a part of them, together or dispose of them separately. In the comments which follow, the power to "reserve" those rights to the use of water will be considered.

1. **Key Decisions**

Important in regard to the future administration of the national government’s reserved lands and rights to the use of water is the broad constitutional basis upon which it is predicated. That freedom to control the use of its properties is exercisable without regard to state law. “A different rule would place the public domain of the United States completely at the mercy of state legislation.” For example, the United States is independent from interference by local governments in the establishment of national forests and the formulation of needful rules for their administration. The constitutional source of this authority is Article IV, Section 3, Clause 2 of the United States Constitution. When acting within the purview of that authorization the power of Congress over reserved lands and rights to the use of water is unlimited.

2. **Power to “reserve rights”**

In the immediately preceding paragraphs the power of the United States to administer its property has been discussed. The exercise of that power in connection with the Indians gave rise to the **Winters Doctrine** precept that: “The power of the Government to reserve the waters and exempt them from appropriation under state law is not denied, and could not be.” Arizona v. California, further recognized these principles in connection with the national forests and other federal reservations.

**Winters Doctrine Rights of the National Government Differ Greatly from Private Rights Acquired Pursuant to State Law**

To this point certain prime factors of Winters Doctrine Rights of the United States have been reviewed: (a) title to these rights became invested in the national government when they were ceded to it, and (b) they were not open to acquisition by private parties. These Winters Doctrine Rights, moreover, differ greatly from rights which have been pri-
vately acquired pursuant to the laws of the several states. A brief reference to some of the more salient characteristics of the last mentioned rights will demonstrate the differences between those rights and the Winters Doctrine Rights.

A. WINTERS DOCTRINE RIGHTS TO THE USE OF WATER ARE NOT RIPARIAN IN CHARACTER

The doctrine of common law riparian rights to the use of water has been rejected in the states of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming, while other western states in varying degrees do recognize riparian rights. California and the other western states that take cognizance of riparian rights also recognize appropriaive rights to the use of water and are referred to as hybrid states.

Examination of the principal characteristics of the riparian doctrine is thus warranted. Perhaps the prime factor in regard to those rights is that they are part and parcel of the land and do not exist independently of it. Moreover, a riparian right is held and exercised correlatively with all other riparian owners as “a tenancy in common and not a separate or severable estate.” Obviously the concept of the “reserved right” in the national government is wholly at variance with the limitations which are present in a tenancy in common. Further, “a riparian owner has no right to any mathematical or specific amount of the waters of a stream as against other like owners.” That aspect of the riparian right results from the fact that those rights are held correlatively with all other riparians. As a consequence the quantity of water riparian owners may use must be “reasonable” in the light of the claims of all other riparians. Reasonableness is, of course, a variant depending upon the supply of water, the demands which differ from day to day, and a multitude of other factors.

Equally at odds with the concept of Winters Doctrine Rights of the United States is the limitation upon the exercise of rights riparian in character that: “‘Land which is not within the watershed of the river is not riparian thereto, and is not entitled, as riparian land, to the use or benefit of the water from the river, although it may be part of an entire tract which does extend to the river . . . .” There is, of course, no legal basis for any limitation of Winters Doctrine Rights to the watershed in which the government land is situated. Moreover, the laws of the states could not thus restrict the power of Congress over the properties of the nation.

Seneca Consolidated Gold Mines Co. v. Great Western Power Co. of California, 209 Cal. 206, 287 Pac. 93, 98 (1930).
HUTCHINS, op. cit. supra note 64, at 218.
Id. at 202.
B. WINTERS DOCTRINE RIGHTS TO THE USE OF WATER ARE NOT PREAMBUCTIVE IN CHARACTER

There is no basis for asserting that Winters Doctrine Rights were acquired by the United States through adverse possession. Rather, these rights were conveyed outright to the national government by the cessions alluded to above. There are neither facts to sustain, nor any reason for, an assertion that the federal government has exercised the Winters Doctrine Rights in an open, notorious, hostile manner for a period which would give rise to a claimed right by prescription. Elemental though that statement may be, it demonstrates the disparity between ceded rights—Winters Doctrine Rights—and others.

C. WINTERS DOCTRINE RIGHTS OF THE NATIONAL GOVERNMENT DIFFER FROM APPROPRIATIVE RIGHTS TO THE USE OF WATER

The preceding review sets forth the historic development of the doctrine of prior appropriation. That doctrine is the outgrowth of the local laws governing the respective rights of private claimants upon the "public land." As stated above "the rights of [appropriations upon public lands] . . . do not, therefore, rest upon the laws of Wyoming, but upon the laws of congress."

"The legislative enactment of [the state] . . . was only a condition which brought the law of congress into force." 1

1. WINTERS DOCTRINE RIGHTS WERE CEDED, NOT APPROPRIATED

Title to the "reserved rights" passed to the United States by cession. This means of acquiring title differs radically from the requirements for obtaining title to appropriative rights. As pointed out by the Court in Arizona v. California:

To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the State where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations. 2

The Supreme Court then concluded with this all-important statement as to the primary element giving rise to an appropriative right: "[T]he perfected vested right to appropriate water flowing within the State cannot be acquired without the performance of physical acts through which the water is and will in fact be diverted to beneficial use." 3


In a state case the Utah Supreme Court enunciated exactly the same principles:

Under our laws, rights in and to the use of public waters, or of a natural stream or source, may be acquired only by appropriation and by an actual diversion of waters from the natural channel or stream and a beneficial use made of them. . . . It is an indisputable requisite that there must be an actual diversion of the water from its natural channel into the appropriator's ditch, canal, reservoir or other structure.74

These requisites of the investiture of title to an appropriative right have been listed by the Utah court: “The three principle elements to constitute a valid appropriation . . . are: (1) an intent to apply it to some beneficial use; (2) a diversion from the natural channel . . . (3) an application of it within a reasonable time to some useful industry.”75 Manifestly the “rights reserved” by the United States as recognized under the Winters Doctrine were ceded to it and need not be—indeed could not be—appropriated in conformity with the preceding requirements of state law.

2. Winters Doctrine Rights Cannot Be Measured in the Manner Applicable to Appropriative Rights

Winters Doctrine Rights in the words of the Supreme Court, are reserved for uses “which would be necessarily continued through years”76 and “to satisfy the future as well as the present needs.”77 Variances between the Winters Doctrine Rights and appropriative rights are thus clearly defined. A “future use” is entirely foreign to the doctrine of appropriation of right. In connection with the appropriation concept in western water law it has been declared by the Utah Supreme Court that “beneficial use is the basis, the measure and the limit of all rights to the use of water in this state.”78 (Emphasis supplied.) That statement is a reflection of the statutory law of Utah which declares that “the appropriation must be for some useful and beneficial purpose. . . .”79 In keeping with these tenets the Utah court in the McNaughton decision stated: “No one can acquire the right to use more water than is necessary, with reasonable efficiency, to satisfy his beneficial requirements . . . and it must be used with due diligence.”80

It is, however, recognized by the courts that the Indians' rights are not thus limited for “we deal here with the conduct of the Government as trustee for the Indians. It is not for us to say to the legislative branch

81Winters v. United States, supra note 63, at 577.
84Utah Code Ann. § 73-3-1 (1953).
85McNaughton v. Eaton, supra note 78, at 572.
of the Government . . . ” when those rights are to be exercised. This principle also prevails in regard to other Winters Doctrine Rights.

3. Winters Doctrine Rights Have Date of Acquisition, Not “Priority Date” as Term Is Used for Appropriate Rights

The date when the Winters Doctrine Rights were ceded to the United States is the date of their acquisition. There is no basis in law for claiming a “priority date” for them as is asserted in connection with an appropriation right privately acquired pursuant to state law. The national government, far from being an appropriator of rights to the use of water, was the source of the title to those rights. Brief reference to the inceptive dates of titles to appropriative rights further demonstrates the basic differences between those rights and Winters Doctrine Rights.

In its 1936 Arizona v. California decision the Supreme Court succinctly presented the priority date concept:

The appropriator first in time is prior in right over others upon the same stream, and the right, when perfected by use, is deemed effective from the time the purpose to make the appropriation is definitely formed and actual work upon the project is begun, or from the time statutory requirements of notice of the proposed appropriation are complied with, provided the work is carried to completion and the water is applied to a beneficial use with reasonable diligence. (Emphasis supplied.)

This statement clearly distinguished the appropriation right from the Winters Doctrine Right ceded to the national government. The United States is the owner of Winters Doctrine Rights and capable of reserving them without formulating an intention to divert the water and use it with reasonable diligence in contemplation of the state law. The Supreme Court referred to the “perfected” appropriative right becoming vested when all requirements of intent and overt acts have been completed. However, the Winters Doctrine Rights were declared by the Court to be “present perfected rights” by the single act of withdrawing unappropriated rights from the operation of the Desert Land Act of 1877 and related acts. Further review is unnecessary to demonstrate the drastic and far-reaching difference between Winters Doctrine Rights and those appropriated pursuant to state law.

D. Winters Doctrine Rights Not Subject to State Control — Constitutional Impossibility

State laws were enacted for the purpose of providing means by which rights to the use of water may be acquired by the citizens of the United States v. Ahtanum Irrigation Dist., 236 F.2d 321, 328 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1956).

See text supra at 154-155.

298 U.S. 558 (1936).

Id. at 566.

states. These laws also provide for the administration of those privately acquired rights. However, state enactments are not designed or intended to regulate and control the functions of the national government in the administration of its Winters Doctrine Rights or of those of the Indians.

Evidence of the conflict which would arise between the official of the United States empowered to administer Winters Doctrine Rights and the state official who controls the use of water by private citizens is demonstrated by a state statute which declares that “no permanent change shall be made except on the approval of an application therefore by the state engineer. . . .” The federal official employed to administer Winters Doctrine Rights must be free from state restraint of that character.

It is most important that there be unrestricted authority to change the uses made of Winters Doctrine Rights. In this connection the Supreme Court of the United States declared in regard to Winters Doctrine Rights within the Yosemite National Park and the Stanislaus National Forest:

Article 4, § 3, Cl. 2 of the Constitution provides that ‘The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States.’ The power over the public land thus entrusted to Congress is without limitations. ‘And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.” Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy. And the policy to govern the disposal of rights to develop hydroelectric power in such public lands may, if Congress chooses, be one designed to avoid monopoly. . . .

Moreover, the congressional power over the public lands and “reserved rights to the use of water” is not subject “to veto” by the states.

There is no need on the part of the United States, when it is invested with title to Winters Doctrine Rights to initiate rights to the use of water pursuant to state law. As noted state law requires that water must be diverted and applied to a beneficial use by the appropriator before a right may be acquired, but the United States does not use the water and it could not, under state law, acquire rights to it.

The inability of the United States to comply with state law is pointed up by this declaration of the Utah Supreme Court: “[T]he appropriation must be one that inures to the exclusive benefit of the appropriator.
and subject to his complete dominion and control." 92 (Emphasis supplied.) It is also manifest that where permittees or licensees enjoy in common the Winters Doctrine Rights of the United States, as is often the case when the water on reserved lands is used by private livestock owners who graze the lands, the element of "exclusive" use referred to in the preceding quotation is lacking. However, under the Winters Doctrine the United States is not required to show exclusive use. There is no need to constitute those who use the waters as agents acting on behalf of the United States to effectuate an appropriation.

Another example of the disparity between the basic principles which underlie Winters Doctrine Rights and privately owned appropriation rights is presented by the statement in Arizona v. California "that the United States intended to reserve water sufficient for the future requirements of the . . . Havasu Lake National Wildlife Refuge, [and] the Imperial Wildlife Refuge. . . . 93 (Emphasis supplied.)

This position of the Court, recognizing that Winters Doctrine Rights may be used in development of wildlife refuges, is in direct conflict with the result reached by the Supreme Court of Utah in a case in which, under the appropriation theory, an attempt was made to secure water for similar purposes:

To our minds it is utterly inconceivable that a valid appropriation of water can be made under the laws of this state, [for wild waterfowl] when the beneficial use of which, after the appropriation is made, will belong equally to every human being who seeks to enjoy it. . . . If the beneficial use for which the appropriation is made cannot, in the nature of thing, belong to the appropriator, of what validity is the appropriation? The very purpose and meaning of an appropriation is to take that which was before public property and reduce it to private ownership. The whole procedure under our statute, relating to an appropriation of water, is a series of steps to that end.

. . .

It certainly must be conceded that the purpose of the law is to endow the appropriator of the water with all the insignia of private ownership. The certificate is his deed; his evidence of title, good, at least against the state, for all it purports to be and good against every one else who cannot show a superior right. 94

The Duck Club case emphasizes the fundamental differences between the publicly administered Winters Doctrine Rights and those which are acquired by private individuals for their exclusive use under state law. Sound principles of constitutional law give rise to these differences. The

92Lake Shore Duck Club v. Lake View Duck Club, 50 Utah 76, 166 Pac. 309, 311 (1917).
93Supra note 85, at 601.
94Lake Shore Duck Club v. Lake View Duck Club, supra note 92, at 310-11.
Supreme Court has declared that if state laws governed the properties of the United States the result would be "place the public domain of the United States completely at the mercy of state legislation." The 1930 Arizona v. California decision involved an attempt to impose state water law controls on the Department of the Interior. In that case the Court declared: "The United States may perform its functions without conforming to the police regulations of a state."

THE SIGNIFICANT DATE OF WINTERS DOCTRINE RIGHTS:
DATE OF CESSION TO THE UNITED STATES
NOT DATE OF RESERVATION

A. Cession Date of Winters Doctrine Rights Is the Date of Acquisition of Those Rights

Thompson, in his treatise on Real Property states that "in this country we are to look to the federal government and its grants for the source of all title to lands..." This statement embraces rights to the use of water in the Western United States. Consequently, it cannot be asserted that title to Winters Doctrine Rights became vested in the United States on other than the date that the lands upon which they are asserted were ceded to the United States. July 4, 1848, is the date when Mexico by the Treaty of Guadalupe Hidalgo ceded the rights which were very largely involved in Arizona v. California.

B. Date of Opening Surplus Waters to Acquisition on "Public Lands" Has No Bearing on Date of Acquisition of Winters Doctrine Rights

As pointed out in Jennison v. Kirk, eighteen years were to elapse between 1848, when the rights involved in Arizona v. California were acquired by the United States and the year 1866, when congressional sanction was given to private rights on the public domain claimed pursuant to local laws and customs. Eleven years more were to elapse before the Desert Land Act of 1877, when surplus waters on the "public lands" were made available for acquisition. Those dates are without significance in regard to the Winters Doctrine Rights. They simply establish the time when rights to the use of water on "public lands" could have been acquired pursuant to state laws. Rights which were so acquired prior to withdrawal of a reservation are, of course, recognized.

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Footnotes:

95 Thompson, Real Property § 2710 (1957).
97 Camfield v. United States, supra note 59, at 526.
C. TITLE TO WINTERS DOCTRINE RIGHTS IN NO WAY RELATED TO DATE OF "RESERVATION"; THEY WERE SIMPLY NO LONGER OPEN TO PRIVATE ACQUISITION

Neither title to nor the date of acquisition of the Winters Doctrine Rights of the United States was in any way altered by the fact that they were reserved by the United States upon creation of the reservation, and thus no longer subject to private acquisition under the Desert Land Act of 1877. After the particular reservation was created the rights were reserved for the Indians or for the benefit of the nation as a whole. It is clear that withdrawal of the Winters Doctrine Rights cannot be viewed as the inceptive date of title to them by the United States. Equally important is this fact: Title to rights to the use of water acquired pursuant to the laws of 1866, 1870, and 1877 prior to the withdrawal of "reserved lands" could not be disturbed by that act of withdrawal by the United States. From Arizona v. California this statement is taken: "Winters has been followed by this Court as recently as 1939 in United States v. Powers. . . ." Supra note 85, at 600. We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created.102 Key to that ruling is the term "effective." What was "effective"? It was the withdrawal of rights to the use of water acquired by the United States in the year 1848, from the application of the Desert Land Act of 1877 which had made them available for private acquisition. Continuing this same subject the Supreme Court has stated: "This means . . . that these water rights, having vested before the Act became effective on June 25, 1929, are 'present perfected rights' and as such are entitled to priority under the [Boulder Canyon Project] Act."104 (Emphasis supplied.)

The nature of these "present perfected rights" is of great importance.105 These rights are "to satisfy the future as well as the present needs of the Indian Reservations." These needs are to be measured by the quantity of water necessary "to irrigate all practicably irrigable acreage on the reservations."106

The "priority" of the Winters Doctrine Rights thus does not partake of the "priority date" recognized under the doctrine of prior appropriation. The inceptive date of title for an appropriative right, as stated in the 1936 Arizona v. California decision is established as follows:

102 Supra note 85, at 600.
104 Ibid.
105 The Boulder Canyon Project Act provides for the approval of the Colorado River Compact, 45 Stat. 1064 (1920), added by, 49 Stat. 863, (1935), 43 U.S.C. 617 (1958). Contained in that Compact are these provisions:

Article VII. Nothing in this Compact shall be construed as affecting the obligations of the United States of America to Indian Tribes.

Section VIII. Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this Compact. . . .

106 Arizona v. California, supra note 85, at 600.
The appropriator first in time is prior in right over others upon the same stream, and the right, when perfected by use, is deemed effective from the time the purpose to make the appropriation is definitely formed and actual work upon the project is begun . . . provided the work is carried to completion and the water is applied to a beneficial use with reasonable diligence.107 (Emphasis supplied.)

The “reserved rights” of the Indians—their Winters Doctrine Rights—were not perfected by use. They were acquired by cession. Their withdrawal was “effective” from the date of reservation. The vast disparity is thus demonstrated between the meaning of the term “priority” under the Boulder Canyon Project Act in regard to Winters Doctrine Rights and the term “priority date” as used in connection with the rights acquired from the national government through compliance with state law.

Preservation of the unbroken chain of title to the Winters Doctrine Rights acquired by the United States from the Indians, France, Mexico and Great Britain, is not less vital to the national government and the Indians than is preservation of a comparable title to the land of which they are a part. It was in connection with that unbroken chain of title to Winters Doctrine Rights that the Supreme Court in the Winters case recognized the power of the United States to reserve the waters and exempt them from appropriation under state law. That power, as the Special Master observed in Arizona v. California, “stems from the United States’ property rights in the water.”108 It was the unbroken chain of title to which the Court referred in Arizona v. California when it stated:

We . . . agree that the United States did reserve water rights for the Indians effective as of the time the Indian Reservations were created.

The water was intended to satisfy the future as well as the present needs of the Indian Reservations. . . .

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.109

It is equally clear that, absent ownership of title to the unappropriated rights on the “effective” date of the reservation, the Court could not have stated: “We have no doubt about the power of the United States under these [the property and commerce] clauses [of the Constitution] to reserve water rights for its reservations and its property.”110
Even in the exercise of constitutional authority an owner can not reserve that which he does not own. No mere technicality is here involved, for one of the most valuable aspects of a right to the use of water is the date when title to it was first vested. That proposition is equally applicable to Winters Doctrine Rights, appropriative rights or riparian rights in the hybrid states like California.

Property rights in water consist not alone in the amount of the appropriations, but also, in the priority of the appropriation. It often happens that the chief value of an appropriation consists in its priority over other appropriations from the same natural stream. Hence, to deprive a person of his priority is to deprive him of a most valuable property right. ...  

Although a priority date is a misnomer in regard to the Winters Doctrine Rights, nevertheless the right to date their title back to 1848 is invaluable. If abandoning a state statutory priority would amount to the loss “of a most valuable property right,” then it follows a fortiori that the failure to claim the date of acquisition of the Winter Doctrine Rights is a far greater loss. The Winters Doctrine Rights are of indefinitely greater value than the more limited appropriative rights.

Winters Doctrine Rights to the use of water for Indian reservations are not limited to purposes of irrigation. Similarly rights to the use of water on the national forests and grazing districts are not limited to stock watering purposes as they are now used to a very marked degree. Rather, when the need arises, they should be available—always subject to the will of Congress—for the authorized purposes of the United States.  

A factor of importance is the measure of the Winters Doctrine Rights. On sound principle, borne out by the Ahtanum decision and Arizona v. California, beneficial use has nothing to do with their investiture and their continued existence. Relative to the measure of the Indian rights in Arizona v. California the Court had this to say: “We have concluded ... that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable.” It likewise stated that the United States intended to reserve water sufficient for the future requirements of the national forests and other reservations which were involved. The quantities of Winters Doctrine waters adjudicated to the United States in Arizona v. California is referred to in the “Decree entered March 9, 1964.”

The criteria used in Arizona v. California in measuring the Winters Doctrine Rights are not precedents for measuring other rights of a similar

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113 Supra note 85, at 601.
nature. Those criteria, it must be remembered, were adopted to meet the exigencies which existed—the Colorado River Compact and the apportionment made to the States under the circumstances which prevailed. They would not be applicable to a different factual situation and, do not constitute precedents beyond the purview of that case.

PROTECTION OF THE WINTERS DOCTRINE RIGHTS OF MONTANA INDIANS

Montana’s Crow Indians and other similarly situated reservation Indians have a direct and vital interest in the manner in which the Winters Doctrine is applied in connection with their rights. Title to such rights has been recognized by the Supreme Court to reside in the Crows.\(^{115}\) The Crows, the Fort Belknap and other Indians held title to their Winters Doctrine Rights antecedent to their treaties. Moreover, the source of their titles is not the national government. For as Judge Pope pointed out in regard to the treaty rights of the Yakimas: “The treaty was not a grant of rights [from the United States] to the Indians, but a grant of right from them [to the United States and]—a reservation [by the Indians] of those rights not granted.”\(^{116}\) Consequently title to the Winters Doctrine Rights has been held by them since time immemorial and any effort to “date” them with a priority, in the sense that term is used under the doctrine of prior appropriation, would constitute a clear-cut invasion of the rights of the Indians. Moreover, as stated, the Winters Doctrine Rights may be exercised for any beneficial purpose and failure to exercise them does not result in their loss.

CONCLUSION

Winters Doctrine Rights to the use of water are of immense value to the Indians and to the United States as a whole. They are unique, being free of the limitations and restraints inherent in the appropriative and riparian rights acquired by compliance with state law.

Title to the Winters Doctrine Rights resides in the Indians or was ceded to the United States by treaties with the Indians, France, Great Britain and Mexico. Date of acquisition of those rights is the time of the cession. They were conveyed by those treaties as part and parcel of the land.

There is an unbroken chain of title to the Winters Doctrine Rights in the United States dating back to the treaties ceding those rights to it. Severance of that chain of title by claiming a date subsequent to the treaties would constitute an abandonment of invaluable rights. Moreover, any severance of that chain of title casts doubt on the source of title, the character, nature and measure of the Winters Doctrine Rights.

\(^{115}\)United States v. Powers, 305 U.S. 527 (1938).

\(^{116}\)United States v. Ahtanum Irrigation Dist., supra note 81, at 326.
Only the unappropriated rights to the use of water on public lands are open to acquisition. However, these rights and the lands of which they are a part, when withdrawn from the status of being available for acquisition, are reserved for the Indians, national forests and other national reservations. These withdrawals of the Winters Doctrine Rights had no effect upon the source of title, the date of their acquisition or their nature or character.

Winters Doctrine Rights were not acquired by use nor are they lost by non-use. They may be exercised to satisfy the future as well as present needs. Moreover, Congress has unlimited power as to the purpose for which they may be exercised. The measure of the rights when adjudicated should be governed by the circumstances which prevail in the litigation.

Finally, any rights to the use of water vested prior to the time that the Winters Doctrine Rights were withdrawn must, of course, be recognized and must be protected against invasion by the national government in the same manner as any other private property rights.