



2002

Arizona v. California: Riding the Wave of Federal Riparianism

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Recommended Citation

Heather R. Brinton, *Arizona v. California: Riding the Wave of Federal Riparianism*, 13 Vill. Envtl. L.J. 59 (2002).

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ARIZONA v. CALIFORNIA:
RIDING THE WAVE OF FEDERAL RIPARIANISM

I. INTRODUCTION

Restless water, worrying the land, has left its marks. Supporting vegetation and wildlife, it has inevitably governed the distribution of human beings. It was deeply important to the aborigines, to explorers and to those who followed — the fur traders, settlers, miners, railroad-builders and stockmen. Water was a prime influence in establishing centers of population. Rival users battled for it, courts awarded rights to its use, legislatures apportioned it and almost always it has been in short supply.¹

Water has historically been a definitive factor in the growth and development of the arid western United States.² The significance of water management rings especially true today, in an era when the West is the fastest growing region in the country.³ Due to this rapid expansion, competition for the finite water resources of the West has increased with both public and private interests battling for water rights.⁴ Because westerners derive their water from

1. SARAH F. BATES ET AL., *SEARCHING OUT THE HEADWATERS* 14 (1993) (quoting SAMUEL G. HOUGHTON, *A TRACE OF DESERT WATERS: THE GREAT BASIN STORY*, (A.H. Clark 1976) (prefacing chapter with emphasis upon water as essential center of human communities).

2. See Roger Florio, Note, *Arizona v. California: Finality as a Water Management Tool*, 33 CATH. U. L. REV. 457, 457 (1984) (noting importance of water in western United States). For purposes of this Note, the “western” states are defined as Alaska, Hawaii, and the seventeen states west of the Missouri River: Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

3. See Pamela Case & Gregory Alward, *Patterns of Demographic, Economic and Value Change in the Western United States*, U.S. DEPARTMENT OF AGRICULTURE FOREST SERVICE: REPORT TO THE WESTERN WATER POLICY REVIEW ADVISORY COMMISSION 1, 7 (Aug. 1997) (establishing water as factor of growth in United States). Between 1972 and 1997, the population of the seventeen western states grew by about 32 percent as a whole, as compared to a growth rate of 19 percent for the rest of the Nation. See *id.* Similarly, *Newsweek* reported that the 2000 Census indicated that the following five western states had the most growth since 1990: Nevada (66.3%), Arizona (40.0%), Colorado (30.6%), Utah (29.6%), and Idaho (28.5%). Sam Register & Kate Stroup, *281,421,906 People—And Counting*, NEWSWEEK, Jan. 8, 2001, at 13.

4. See Florio, *supra* note 2, at 457 n.3 (explaining competition for water rights). For a comprehensive discussion of water use in the western United States,

water rights with the priority rights of the state distribution systems.¹¹ In so doing, the federal courts, generally the Supreme Court, actively partake in the promulgation of new western water policies.¹² Unfortunately, the result is often a form of eastern water law, the law of riparian rights.¹³ Although riparianism may be quite amenable in certain areas of the country, its basic tenets are impracticable and inappropriate to the unique demographic and economic situation of the West.¹⁴

*Arizona v. California (Arizona III)*¹⁵ is the latest chapter in the epic saga of the allocation of water rights in the western states.¹⁶ In

sadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction." *Id.*

11. See Wes Williams, Jr., Note, *Changing Water Use for Federally Reserved Indian Water Rights: Wind River Indian Reservation*, 27 U.C. DAVIS L. REV. 501, 507 (1994) (noting reconciliation of two types of water rights arises because holders of state and federal water rights draw water from same sources). In such instances, the courts must respect the requirements and characteristics of both types of water rights. See *id.*

12. See *id.* at 507-08 (citing as example integration of Indian water rights with state water rights).

13. See WILLIAM GOLDFARB, WATER LAW 21 (1988) (defining law of riparian rights). Used as an adjective, the term "riparian" means "[o]f, relating to, or located on the bank of a river or stream [or occasionally another body of water, such as a lake]." BLACK'S LAW DICTIONARY 1328 (7th ed. 1999). Riparianism comprises the predominant water rights system that has developed east of the Mississippi River. See GOLDFARB, at 21. Directly opposite to the priority rights of the West, riparian rights are land based. See *id.* Thus, ownership of land bordering the watercourse determines allocation of water rights. See *id.* Riparianism's restriction of water diversion rights directly conflicts with most of the major interests, both public and private, in the water-scarce West. See *id.*

The doctrine of equitable apportionment, a form of federally-developed common law that allows for the "just apportionment of interstate waters" involves a separate body of case law and will not be addressed in this Note. For more information on equitable apportionment, see *Colorado v. New Mexico*, 459 U.S. 176, 190 (1982) (holding just apportionment of interstate waters is question of federal law that depends upon both consideration of pertinent laws of contending states and all other relevant facts, including "extent to which reasonable conservation measures by existing users can offset the reduction in supply due to diversion, and whether the benefits to the state seeking the diversion substantially outweigh the harm to existing uses in another state.").

14. See *Colorado*, 459 U.S. at 184 (explaining why riparian rights are not amenable to western states). Because the West has historically favored growth and expansion, western water policies have been founded on the principle that water should never be a limitation on growth. See Tarlock and Van de Wetering, *supra* note 8, at 172. Thus, riparianism was unfavorable to westerners due to the limits it imposes on water availability. See GOLDFARB, *supra* note 13, at 21. Hence, the law of prior appropriation evolved, allowing for adaptations such as transbasin diversions enabling urban areas to bring water from distant sources. See Tarlock and Van de Wetering, *supra* note 8, at 172.

15. 530 U.S. 392, 418 (2000) [hereinafter *Arizona III*].

16. See *id.* (rejecting States' appropriative rights by dismissing preclusion arguments).

this case of original jurisdiction, the Supreme Court addressed whether the concepts of judicial finality and certainty of water rights preclude changes in water rights apportionment.¹⁷ Breaking from established precedent, the Court ruled in favor of substantially altering existing water rights to the Colorado River.¹⁸ Through the vehicle of federally reserved water rights, the Court challenged both the legacy of the prior appropriation doctrine and the resource sovereignty of western states.¹⁹

This Note examines the federally influenced changes in water distribution and policy in the western states. Part II of this Note begins with a summary of the facts of *Arizona III*.²⁰ Part III chronicles the federal encroachment on western states' water rights and the coincident erosion of the doctrine of prior appropriation.²¹ Parts IV and V explain the Supreme Court's reasoning and suggest that the Court has changed its policy in a deliberate move away from private interests and toward a riparian, public notion of water distribution.²² Finally, Part VI discusses the disruptive presence of the federal government as a western water user and the potential negative effects the West will suffer if the Court persists in riding the compromising wave of federal riparianism.²³

17. See *id.* at 413-18, 424 (discussing whether preclusion bars United States' claim for water rights). The dissent, in *Arizona III*, pointedly noted that when a judgment is entered on the merits of a case, judicial principles call for finality as to the demand in controversy. See *id.* at 424. The dissent further observed that, from the inception of the *Arizona v. California* litigation, a major purpose of the Court was to maintain stability of well-established water rights. See *id.* (Rehnquist, J., dissenting).

18. See *id.* at 420 (limiting existing water rights to Colorado River). The expanded diversions from the Colorado River to both the Colorado River Indian and Fort Mojave Indian reservations are included in the appendix to the opinion of the Court. See *id.*

19. See *id.* at 424-25 (Rehnquist, J., dissenting). The dissent charged the majority with ignoring this language posited in an earlier stage of the *Arizona v. California* litigation: "[A]n increase in federal reserved water rights will require a . . . reduction in the amount of water available for water-needy state and private appropriators [This reduction] runs directly counter to the strong interest in finality in this case." *Id.* (citing *Arizona v. California*, 460 U.S. 605, 620-21 (1983) [hereinafter *Arizona II*]).

20. For a further discussion of the facts of *Arizona III*, see *infra* notes 24-47 and accompanying text.

21. For a further discussion of federal encroachment on western states' water rights, see *infra* notes 48-113 and accompanying text.

22. For a further discussion of the Supreme Court's reasoning in *Arizona III*, see *infra* notes 114-196 and accompanying text.

23. For a further discussion of the potential negative effects the West will suffer if the Court persists in its application of a riparian doctrine, see *infra* notes 197-209 and accompanying text.

II. FACTS

In 1952, the United States intervened on behalf of five Indian reservations in a dispute between Arizona and California over water rights to the Colorado River.²⁴ In the first round of litigation (*Arizona I*), the Supreme Court agreed, among other things, that the United States had reserved water rights for the five reservations.²⁵ Accordingly, the Court issued a decree in 1964 that established the various water rights of the states, the reservations, the federal government and other interested parties.²⁶ Due to ongoing disputes over the boundaries of several Indian reservations, the Supreme Court retained jurisdiction over the decree for later modifications or amendments.²⁷ It is the final determination of these boundary disputes and subsequent allocation of water rights that the Court addressed in the most recent round of *Arizona v. California* litigation.²⁸

24. See *Arizona v. California*, 373 U.S. 546, 595 n.97 (1963) [hereinafter *Arizona I*]. The five reservations on whose behalf the United States intervened were the Chemehuevi Indian Reservation, the Cocopah Indian Reservation, the Fort Yuma (Quechan) Indian Reservation, the Colorado River Indian Reservation and the Fort Mohave Indian Reservation. See *id.* Nevada also intervened in the dispute between Arizona and California, seeking determination of its water rights; Utah and New Mexico were joined as defendants. See *id.* at 551.

25. See *Arizona I*, 373 U.S. at 599-601 (discussing United States' water rights). The Court reasoned that when Congress first contractually created the Colorado River Indian reservation in 1873 and when the Executive Department created the other reservations, water rights essential to the life of the Indian people were at the time implied, or federally reserved, in the reservation contracts. See *id.* at 601. For a more thorough discussion of the decision in *Arizona I*, see *infra* notes 80-84 and accompanying text.

26. See *id.* at 340-57 (1964) (explaining purpose of 1964 decree). For an explanation of the federal government's method of allocating water rights between the parties, see *infra* notes 83-84 and accompanying text.

27. See *Arizona I*, 373 U.S. at 601 (noting need for Court to resolve boundary disputes at later time).

28. See *id.* The procedural history of *Arizona v. California* spans almost 40 years. See *Arizona III*, 503 U.S. at 397. The events most relevant to the latest chapter of this protracted dispute are as follows.

On December 20, 1978, the Secretary of the Interior issued a Secretarial Order confirming the Fort Yuma Indian Reservation's entitlement to the disputed boundary lands. *Id.* at 398. For a further discussion of the December 1978 Secretarial Order, see *infra* note 32. Later that year, all five Indian nations joined to seek a modification of the decree, claiming that: 1) the federal government underestimated the amount of "practicably irrigable acreage" on their reservations, and 2) the Fort Yuma, Fort Mojave and Colorado River reservations had reached final determinations in their respective boundary disputes. See *Arizona III*, 530 U.S. at 398. The Court instituted the concept of "practicably irrigable acreage" as a method for quantifying the rights which would then be apportioned. *Id.* This method of quantification does not have the beneficial use requirement that is vital to the western appropriation doctrine. See A. Dan Tarlock, *Putting Rivers Back in the Landscape: The Revival of Watershed Management in the United States*, 6 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 167, 174 (Winter/Spring 2000).

Both the Quechan Tribe (Tribe) of the Fort Yuma Reservation (Reservation) and the United States, on the Tribe's behalf, claimed that the Tribe is entitled to increased water rights.²⁹ The claims for increased rights rested on the contention that the Reservation held title to approximately 25,000 acres of disputed boundary lands not attributed to the Reservation in the original consent decree.³⁰ The

In 1979, the Supreme Court issued a supplemental decree setting out water rights for all five reservations and allowing for modification should the Fort Yuma and Colorado River reservations resolve their boundary disputes. See *Arizona III*, 530 U.S. at 398-99. The Supreme Court also appointed a Special Master to report on the issue of the purportedly settled boundary disputes. See *id.* at 399. A "Special Master" is "[a] master appointed to assist the court with a particular matter or case." BLACK'S LAW DICTIONARY 990 (7th ed. 1999). Here, the Special Master assigned was a Water Master the Court appointed to investigate the above-mentioned water rights issues. See, e.g., *Arizona I*, 373 U.S. at 551 (describing Special Master's duties regarding water rights investigation).

In 1983, the Supreme Court, rejecting the Special Master's recommendations and citing the interests of judicial finality and certainty of water rights, refused to modify the original decree. See *Arizona III*, 530 U.S. at 399. In *Arizona II*, the second round of *Arizona v. California* litigation, the Supreme Court held that the boundary dispute determinations were not, in fact, final determinations because the states, agencies and private water users had not had an opportunity to obtain judicial review of the Secretarial Order identifying those determinations. See *id.* The Court specifically noted that California state agencies initiated an action in the United States District Court for the Southern District of California, challenging these determinations in an action which would provide the currently lacking judicial review. See *id.* In another supplemental decree, issued in 1984, the Supreme Court again declared that water rights for all five reservations would be subject to appropriate adjustments if the reservations' boundaries were finally determined. See *id.*

Meanwhile, district court litigation proceeded, but the Ninth Circuit later dismissed the action on the ground that the United States had sovereign immunity. See *id.* Because the dismissal of the district court action prevented the "final determination" of reservation boundaries from occurring in that forum, the state parties moved to reopen the 1964 decree, asking the Supreme Court to determine whether the Fort Yuma Indian Reservation and two other reservations were entitled to claim additional boundary lands and, if so, additional water rights. See *id.* The Court granted the motion, agreeing to review the Secretarial Order. See *id.* Therefore, in the latest case, the Court focused primarily on both the dispute and water rights involving the Fort Yuma reservation. See *id.* at 397-401.

29. See *Arizona III*, 530 U.S. at 401 (discussing Tribe's claim to equal water rights). The specific dispute before the Court arose from an 1884 Executive Order signed by President Chester A. Arthur, designating approximately 72 square miles of land along the Colorado River in California to be given to the Quechan Tribe as the Fort Yuma Indian Reservation. See *id.* The Quechan Tribe, traditionally a farming Tribe, offered to cede rights to 25,000 acres of the Fort Yuma Reservation to the United States in exchange for allotments of irrigated land to individual farmers. See *id.* The related agreement was ratified in 1893. See *id.*

30. See *id.* (noting conflict with 1893 agreement's language). The Court noted that the language of the agreement could be interpreted to condition the cession of the United States' performance of certain obligations, including construction of an irrigation canal, allotment of irrigated lands to individual Indians, sale of certain lands to raise revenues for canal construction and opening of certain lands to the public domain. See *id.*

land in question was purportedly ceded to the United States under an 1893 Agreement with the Tribe.³¹ In 1936, Solicitor Margold of the Department of the Interior issued a Secretarial Order stating that the Quechan Tribe unquestionably ceded these lands to the United States under the terms of the 1893 Agreement.³² The federal government maintained the Margold Opinion for forty-two years.³³

In 1951, pursuant to the enactment of the Indian Claims Commission Act, the Quechan Tribe brought an action before the Indian Claims Act Commission challenging the 1893 agreement in an action entitled "Docket No. 320."³⁴ The Tribe challenged the 1893 Agreement on grounds that the agreement was void and, consequently, that the United States owed the Tribe damages for trespass, or, alternatively, that the agreement constituted an uncompensated taking of tribal lands.³⁵ In 1976, the Commission transferred the matter to the Court of Claims.³⁶

Meanwhile, the Tribe requested that the Department of the Interior reconsider its 1936 Margold Opinion.³⁷ Ultimately, in a 1978 Secretarial Order, Interior Solicitor Leo Krulitz reversed the

31. *See id.* at 397-401. The Tribe opposed the validity of the United State's claim to the disputed lands on the ground that the United States had not performed any of the conditions in the 1893 agreement. *See id.*

32. *See id.* (explaining how these lands were ceded to United States). A Secretarial Order issued by the Department of the Interior is "the mandate or determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings." BLACK'S LAW DICTIONARY 1123 (7th ed. 1999) (citing HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS 5 (1902)).

33. *See Arizona III*, 530 U.S. at 397-401. The Margold Opinion remained the position of the government until a 1978 Secretarial Order by Leo Krulitz reversed the Margold Opinion and recognized the Quechan Tribe's entitlement to the disputed lands. *See id.* at 404-05.

34. *See* 25 U.S.C. § 70 (1976) (establishing tribunal with power to decide tribes' claims against government); *see also Arizona III*, 530 U.S. at 403 (characterizing this action as "Docket No. 320" and describing Tribe's petition therein for Loss of Reservation).

35. *See Arizona III*, 530 U.S. at 403 (noting that during more than twenty-five years of litigating Docket No. 320, Tribe alternated between two grounds for relief).

36. *See id.* The Commission's "final determinations" were subject to review by the Court of Claims. *See id.* at 404 n.1.

37. *See id.* at 403-06. In 1977, Interior Solicitor Scott Austin reviewed the 1893 agreement and concluded that the 1893 agreement was valid. *See id.* Therefore, the cession of the disputed lands had been unconditional. *See id.* This opinion, however, provoked considerable controversy within the Department of the Interior and, after the election of President Carter, the Department revisited the issue and reversed Interior Solicitor Austin's decision. *See id.*

Margold Opinion and confirmed the Tribe's entitlement to most of the disputed lands.³⁸

In the second round of *Arizona v. California* litigation, the Supreme Court held that the 1978 Secretarial Order did not constitute a "final determination" of reservation boundaries.³⁹ A few months following this ruling, the United States and the Quechan Tribe entered into a settlement of Docket No. 320.⁴⁰ The Court of Claims approved the settlement and entered it as a final judgment.⁴¹

In 1989, the Supreme Court granted Arizona, California, and various state agencies' motion to reopen the 1964 decree in order to determine whether the Reservation was entitled to claim additional boundary lands and water rights.⁴² In the most recent round of litigation, the Supreme Court addressed whether claims by the Quechan Tribe and the United States, on behalf of the Tribe, were precluded by the Court's decision in *Arizona I*, the consent judgment of Docket No. 320, or both.⁴³ The Special Master appointed by the Court submitted a report, recommending the claims be precluded only by the consent judgment.⁴⁴

38. See *id.* at 404-06. The Secretarial Order expressly excepted those certain lands that the United States had acquired pursuant to an Act of Congress or had conveyed to third parties. See *id.*

39. See *Arizona II*, 460 U.S. at 1400 (holding reservation boundaries extended by Krulitz's Secretarial Order were not "finally determined" within meaning of 1964 decree).

40. See *Arizona III*, 530 U.S. at 405.

41. See *id.* In the settlement, the United States agreed to pay the Tribe \$15 million in full satisfaction of "all rights, claims, or demands which [the Tribe] has asserted." *Id.* (quoting Final Judgment, Docket No. 320 (Aug. 11, 1983)). The Tribe agreed that it would "be barred thereby from asserting any further rights, claims, or demands against the defendant and any future action on the claims encompassed on Docket 320." *Id.* (quoting Final Judgment, Docket No. 320 (Aug. 11, 1983)).

42. See *Arizona v. California*, 493 U.S. 886 (1989) (granting motion of state parties to reopen 1964 decree to determine disputed boundary claims of Fort Mojave, Colorado River and Fort Yuma Indian reservations).

43. See *Arizona III*, 530 U.S. at 406. The state parties first brought the preclusion issues before Special Master McGarr and repeated the same issues before the Supreme Court. See *id.*

44. See *id.* (discussing Special Master's report and recommendations). The Special Master's report contained three recommendations: 1) that the claims made by the Tribe and the United States for additional water rights not be precluded by the litigation in *Arizona I* because the 1978 Secretarial Order recognizing the Tribe's beneficial ownership of the lands was a circumstance not known in 1964 and thus warranted an exception to the application of *res judicata*; 2) that the claims for additional water rights were, in fact, precluded because the settlement included in the consent decree extinguished any future claim by the Tribe to title in the disputed lands; and 3) that the Court approve the parties' proposed settlements of water rights claims for the Fort Mojave and Colorado River Reservations.

The majority, however, only partially agreed with the Master's findings and held the claims were precluded neither by the prior decision, nor by the consent judgment.⁴⁵ The dissenters argued that the claims were, in fact, precluded by the prior court decision in *Arizona I*, stressing the importance of the certainty of water rights in the western United States.⁴⁶ In its holding, the Court also approved proposed settlements regarding the water rights of both the Fort Mojave and the Colorado River Indian reservations.⁴⁷

III. BACKGROUND

The doctrine of riparian rights, the prevalent system of water allocation in states east of the Mississippi River, historically preceded the doctrine of prior appropriation.⁴⁸ Because riparianism is a predominantly land-based system, riparian rights accrue incident to property ownership.⁴⁹ An owner of land that borders the watercourse possesses the right to make any reasonable use, or non-use, of the contiguous water.⁵⁰ These water rights exist entirely independent of use and are not limited to a definite quantity.⁵¹

See id. at 406-07. The state parties filed an exception to the first of the preclusion recommendations, while the Tribe and the United States filed an exception to the second preclusion recommendation. *See id.* None of the parties filed an exception to the third recommendation. *See id.*

45. *See id.* at 413-14, 418. In the Supreme Court's final holding, the United States' and the Tribe's exceptions were sustained, but the state parties' exception was overruled. *See id.*

46. *See id.* at 423 (disagreeing with majority's conclusion that claims were precluded). For a further discussion of the dissent's argument in *Arizona III*, *see infra* notes 136-69 and accompanying text.

47. *See Arizona III*, 530 U.S. at 419-20. The Special Master submitted a proposed supplemental decree that reallocated the disputed lands between the Fort Mojave and Colorado River reservations. *See id.* The parties were directed to submit to the Clerk of the Supreme Court any objections to the Special Master's proposed supplemental decree before August 22, 2000. *See id.* at 420.

48. *See Colorado v. New Mexico*, 459 U.S. 176, 179 n.4 (1982) (distinguishing prior appropriation doctrine from riparian doctrine as manner where water rights are acquired by diversion of water and its application for beneficial purpose).

49. *See Fisher, supra* note 5, at 1079.

50. *See id.* Riparian owners enjoy the following rights, subject to applicable governmental restrictions: (1) the right to have access to the watercourse; (2) the right to fish; (3) the right to wharf out to deeper water; (4) the right to alter or protect shoreline areas; (5) the right to recreate on all or part of the surface; and (6) the right to claim title to the beds of non-navigable watercourses. *See GOLD-FARB, supra* note 13, at 22 (noting these rights are subject to reasonable use of others).

51. *See Fisher, supra* note 5, at 1079. Riparian rights are not formally quantified. *See id.* Rather, they vary depending on stream flow and others' reasonable uses. *See Colorado*, 459 U.S. at 179 n.4 (discussing basic doctrines governing water use).

A. The Ebb and Flow of Prior Appropriation

Though contrasting the riparian doctrine found in the eastern United States, some form of the appropriation doctrine governs water law throughout the West.⁵² Under the appropriation system, often termed “first in time, first in right,” water rights are prioritized by the date on which they were created, with the earliest right receiving the highest priority.⁵³

The prior appropriation system originated among gold miners during the California gold rush.⁵⁴ The very rush that drew settlers west originated in the streams that carried the gold itself, supplied the domestic needs of the mining camps, and powered the hydraulic hoses that blew deposits out of the hillsides.⁵⁵ Here, the doctrine of riparianism proved an inadequate method of allocating water, primarily because the miners did not own any of the western lands.⁵⁶ Exemplifying true pioneer spirit, the gold miners simply

52. See Carla J. Bennett, *Quantification of Indian Water Rights: Foresight or Folly?*, 8 UCLA J. ENVTL. L. & POL'Y 267, 268 (1989). An example of language that states commonly employ in their statutory and contractual recognition of the doctrine of prior appropriation can be found in the Arkansas River Compact, approved by both Colorado and Kansas in 1949. Article VI-A(2) of the Arkansas River Compact provides:

Except as otherwise provided, nothing in this Compact shall be construed as supplanting the administration by Colorado of the rights of appropriators of waters of the Arkansas River in said state as decreed to said appropriators by the courts of Colorado, nor as interfering with the distribution among said appropriators by Colorado, nor as curtailing the diversion and use for irrigation and other beneficial purposes in Colorado of the waters of the Arkansas River.

Arkansas River Compact, Pub. L. 81-82, 63 Stat. 145 (1949).

53. See James N. Corbridge, Jr., *Historical Water Use and the Protection of Vested Rights: A Challenge for Colorado Water Law*, 69 U. COLO. L. REV. 503, 505 (1998). In times of water shortage, an earlier, more “senior,” appropriation receives its entire water entitlement before a later, more “junior,” right receives such entitlement. See *id.*

54. See Bates, *supra* note 1, at 3 (noting that in addition to development of appropriation system, California gold rush first made United States force in world's economy).

55. See *id.* Bates identifies the historical significance of water:

A generation later, water was the essential ingredient in fulfilling the Jeffersonian ideal of allowing farmers and ranchers to settle new lands, lands where crops grew only if the settlers put water on the fields by means of irrigation. Still later, elaborate plumbing systems transported water over great distances, often across natural divides, enabling growth of industry and development of housing subdivisions in booming metropolitan areas. Today, water feeds the rivers, lakes, and landscapes that attract millions of tourists and recreationalists to the region.

Id. at 3.

56. See GOLDFARB, *supra* note 13, at 32 (noting that riparian doctrine was not well-tailored to new territories in West). Several factors precluded the gold miners from applying riparian principles to their system of water distribution:

ignored eastern customs and adapted their own system of water distribution.⁵⁷ Eventually, the “first in time, first in right” custom that miners had adopted on public lands was extended to waters on private lands.⁵⁸

The initial distaste and perceived inflexibility of riparianism continued beyond the early gold miners, remaining prevalent to this day.⁵⁹ Because appropriation promotes irrigation economies, it currently stands as the favored doctrine in the western states.⁶⁰ In addition to presumed priority in time, three other major principles form the basis of the appropriation doctrine: (1) certainty of water rights; (2) quantification of water rights; and (3) actual beneficial use of water rights, otherwise known as the “use it or lose it” requirement.⁶¹

(1)[the residents of the West] did not own land, virtually all of which belonged to the United States government as a result of the Louisiana purchase and the Mexican cessions; (2) the United States had not yet begun the major programs, such as the Homestead Act and the federal mining laws, which would permit private land acquisition; and (3) the places in which the settlers needed to use the water were often located quite a distance away from the rivers.

Id. (citing J.L. SAX AND R.H. ABRAMS, *LEGAL CONTROL OF WATER RESOURCES* 154 (1986)).

57. *See id.* The miners simply entered federal lands and diverted the water that was needed, applying the same “first in time is first in right” principle to water as they did to minerals and land. *See id.*

58. *See Bates*, *supra* note 1, at 131-32. Bates also explains that after the mining era, when many areas of the West began to be used for agricultural development, the “first in time, first in right” custom was adopted by the developers and farmers. *See id.* Thus, prior appropriation was extended from federal lands to waters on private lands. *See id.* at 131.

59. *See generally* Tarlock, *supra* note 28, at 174. For example, in the late nineteenth and early twentieth century, when promulgating relevant statutes, the benefits of riparian rights were hotly debated in California. *See id.* Conflict often centered on the absence of quantification in the riparian doctrine. *See id.* Interests such as electric utilities, which need definite quantities of water, were concerned the doctrine would allow upstream users to impede water flow. *See id.*

60. *See Coffin v. Left Hand Ditch Company*, 6 Colo. 443, 446-47 (1882). The western belief in the necessity of the appropriation doctrine to an irrigation economy has been immortalized in the words of Colorado Supreme Court Justice Helms. In an 1882 decision that courts continue to cite to this day, Justice Helms wrote:

[V]ast expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our unproductive territory. Houses have been built, and permanent improvements made; the soil has been cultivated, and thousands of acres have been rendered immensely valuable, with the understanding that appropriations of water would be protected. Deny the doctrine of priority or superiority of right by priority of appropriation, and a great part of the value of all this property is at once destroyed.

Id. at 446.

61. *See Van de Wetering & Adler*, *supra* note 7, at 18. The authors contend, however, that three basic problems underlie the doctrine of prior appropriation:

1. *The Wave of Federal Riparianism*

Because holders of state and federal water rights historically have taken water from the same sources, the federal government has been forced to reconcile federal water interests with the western states' system of appropriation.⁶² In the past, the courts, rather than Congress, asserted federal proprietary rights to western waters.⁶³ In so doing, the judiciary created a system of implied rights through the vehicle of federally reserved water rights.⁶⁴ Purporting to accommodate the priority doctrine, these judge-made rights preempted state-established water rights through assignment of priority by looking to the date of national recognition of the federal lands, such as the creation of an Indian reservation, power site or National Park.⁶⁵

However, in the area of use there exists a significant clash between the priority doctrine and the doctrine of federally reserved water rights.⁶⁶ Comparable to riparian rights, federally reserved rights create water rights similar to property rights.⁶⁷ Both riparian and federally reserved rights vest even if unexercised and both lack the beneficial use requirement necessary to the doctrine of appro-

many western streams have been dewatered or modified beyond recognition; decisions about water management have excluded all but a few interested parties; and water rights holders have heretofore assumed that their rights were untouchable. *See id.*

62. *See Williams, supra* note 11, at 507. Williams offers as an example the case of Indian water rights. *See id.* at 508. In such cases, the Supreme Court set the date of an Indian reservation's creation as the priority date the state appropriation system should use. *See id.* Therefore, "since the federal government created most Indian reservations before settlers moved West, Indians possess prior rights over most non-Indian water users." *Id.*

63. *See generally* A. Dan Tarlock, *New Commons in Western Waters*, in *WATER AND THE AMERICAN WEST* 69 (David H. Getches, ed. 1988). The consequences of the shift in natural resource policy toward recognizing federal proprietary water rights were slow in materializing due to the fact federal interests in western waters are not asserted until long after state expectations of exclusive control harden. *See id.* at 77.

64. *See id.* (noting that such implied rights were first thought to be limited to Indian reservation lands, but subsequent opinions held implied rights to apply to both Indian and non-Indian public lands).

65. *See id.* (noting federal rights take precedence); *see also Williams, supra* note 11, at 507 (explaining priority dates of Indian reservations).

66. *See Fisher, supra* note 5, at 1092 (acknowledging appropriative rights terminate when appropriated water is no longer put to beneficial use). Appropriative rights thus ensure water does not go unused, while federally reserved rights exist independently of any use, "present or future, beneficial or otherwise." *Id.*

67. *See Tarlock, supra* note 28, at 174. Both property rights and riparian rights arise by virtue of land ownership; riparian rights arise by virtue of land ownership bordering stream or lakes. *See id.*

priation.⁶⁸ Federally reserved water rights subvert states' interest in controlling water supplies by subjecting state-created appropriative rights to variability and the use of others and by altering the "use it or lose it" requirement to one that now allows provisions for future use.⁶⁹

In the late 1800s and early 1900s, Congress approved the appropriative right with the passage of several supportive legislative acts.⁷⁰ Congress first passed the Desert Land Act of 1877, requiring the federal government to obtain water rights for federal lands in accordance with applicable state law.⁷¹ As a result, Congress both approved the doctrine of prior appropriation and delegated to the states the authority to determine the property rights in their own waters.⁷² In addition, the Reclamation Act of 1902 authorized the Secretary of the Interior to construct irrigation projects in the western states and to pay for them with the proceeds of public land sales.⁷³ Through its reclamation projects, the federal government

68. *See id.*

69. *See* GOLDFARB, *supra* note 13, at 21 (discussing federal subjugation of state rights).

70. *See* Hot Springs Reservation, 44 *Cong. ch.* 108, 19 Stat. 377 (1877) (requiring federal government to obtain water rights for federal lands); *see also* Irrigation Newlands Act and Reclamation Acts, 57 *Cong. ch.* 1093, 32 Stat. 388 (1902) (building irrigation works from proceeds from public-land sales).

71. *See* Fisher, *supra* note 5, at 1081 (noting that Desert Land Act applied only to public lands and not to reserved lands). The Desert Land Act of 1877 included the following provision:

that the right to the use of water . . . on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated . . . for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

Hot Springs Reservation, 44 *Cong. ch.* 108, 19 Stat. 377 (1877).

72. *See* ROBERT G. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS 77 (1983) (elaborating on importance of Congressional passage of Desert Land Act of 1877 and Reclamation Act of 1902).

73. Irrigation Newlands Act and Reclamation Acts, 57 *Cong. ch.* 1093, 32 Stat. 388 (1902); *see also* Dunbar, *supra* note 72, at 51. Frequently called the Newlands Act, the Reclamation Act of 1902 authorized the Secretary of the Interior to conduct irrigation projects in sixteen western states, using money from public land sales in their respective jurisdictions to fund each project. *See id.* In order to promote family farming and prevent monopolization, water was not supplied to tracts consisting of more than 160 acres and under one title. *See* GOLDFARB, *supra* note 13, at 77. The limit of 160 acres was eventually expanded to 320 acres for a husband and a wife. *See id.* Under the Reclamation Act of 1902, in addition to the acreage limitations, the Act also required the user to be a resident or occupant of the land. *See id.*

effectively initiated its continuously-expanding authority over the allocation and use of western water resources.⁷⁴

The Supreme Court first recognized federal proprietary rights in the 1908 case of *Winters v. United States*.⁷⁵ In *Winters*, the Fort Belknap Indian Reservation was unable to obtain sufficient water for its irrigation needs due to upstream off-reservation diversions by private parties including Winters.⁷⁶ Winters argued that his prior appropriation gave him a vested right to the use of the water and that his right was superior to all other claimants.⁷⁷ Despite Winters' assertion of his appropriation rights, the Court held that the creation of the Indian Reservation implied a simultaneous reservation of water rights.⁷⁸ Because a 1888 treaty had created the Fort Belknap Indian Reservation, the water rights for the reservation received a priority date of 1888, thereby subverting then-current appropriation claims.⁷⁹

After hints that the doctrine of federally reserved water rights might affect non-Indian federal lands, the Supreme Court explicitly extended the *Winters* doctrine to all federally reserved lands in *Ari-*

74. See GOLDFARB, *supra* note 13, at 77-78. The Reclamation Act has been amended several times, most significantly in 1982 and 1992. The 1982 amendments, namely the Reclamation Reform Act of 1982, loosened acreage limitations and eliminated certain subsidized rates for irrigation of lands in excess of the new acreage limitations. See 43 U.S.C. § 390ww (2000). The 1992 amendments, the Western Water Policy Review Act of 1992, directed the President to comprehensively review federal activities that affect the allocation and use of water resources in the western states. See The Western Water Policy Review Act of 1992, Pub. L. 102-575, 106 Stat. 4600 (1992). To undertake this review, the Western Water Policy Review Advisory Commission was formed. See *id.* For more information regarding the directives of the Western Water Policy Review Act, see generally D. Craig Bell, *Water in the West Today: A States' Perspective*, in WESTERN STATES WATER COUNCIL: REPORT TO THE WESTERN WATER POLICY REVIEW ADVISORY COMMISSION (July 1997) (summarizing basic points of Western Policy Review Act).

75. 207 U.S. 564 (1908).

76. See *id.* at 565 (noting five defendants were involved in diverting waters of Milk River from reservation).

77. See Florio, *supra* note 2, at 462. To settle the dispute, the Court looked to the 1888 treaty establishing the reservation and noted that, although the treaty did not address water rights, the governmental interest had been to aid the Indians in converting from a nomadic to pastoral state. See *id.* Observing that the reservation lands were arid and practically worthless without water, the Court held that the creation of the reservation implied a reserve of water sufficient to fulfill the government's purpose. See *id.*

78. See *Winters*, 207 U.S. at 576-77 (stating reservation formed to change Indians' "nomadic and uncivilized" habits, making them into "pastoral and civilized people.").

79. See *id.* at 577. The creation of federally reserved water rights subverted then-current appropriation claims by giving priority as of the date of the creation of the reservation, not by giving priority as of the date of application of beneficial use as required under the appropriation system. See generally Tarlock, *supra* note 28.

zona I.⁸⁰ The State of Arizona initiated the suit to determine the allocation of the waters of the Colorado River.⁸¹ The federal government had asserted reserved water rights claims on behalf of five Indian tribes and several wildlife refuges and national forests.⁸²

The Court declared that the federal government had implicitly reserved a sufficient quantity of water for both the Indian reservations and non-Indian federal lands.⁸³ In addition to extending the implied rights doctrine, the Court further eroded the western appropriation doctrine by allowing the quantification of the implied rights to include enough water to satisfy both present and future needs and by calculating the rights based on the amount of irrigable acreage within the respective reservations.⁸⁴

The next important Supreme Court water rights decision was handed down in *United States v. Dist. Court in and for the County of*

80. See *Arizona I*, 373 U.S. 546, 599-600 (1963). In *Fed. Power Comm'n v. Oregon*, the Federal Power Commission issued a license to a private power company to construct a dam across the Deschutes River in Oregon. See *Fed. Power Comm'n v. Oregon*, 349 U.S. 435 (1955). One terminus of the dam was to be on federal Indian land and the other was to be on federal non-Indian land. See *id.* at 437-39. The state of Oregon objected, declaring that the Federal Power Commission was subject to state authority because Congress had relinquished control of non-navigable waters in the Desert Land Act of 1877. See *id.* at 446-47. The state argued that the Desert Land Act required the federal government to obtain water rights for federal lands in accordance with state law and required the state to give its consent before the dam could be built. See *id.* The Court first distinguished between public and reserved lands and declared that the legislation in question applied only to public lands, not the reserved lands which were at issue. See *id.* at 446-48. The Court thus implied that federal reserved lands, both Indian and non-Indian, were not subject to state appropriation law. See Fisher, *supra* note 5, at 1082.

The *Fed. Power Comm'n* decision alarmed the western states. See DUNBAR, *supra* note 72, at 199 (1983). With more than 50 percent of the western water supply either originating from or flowing through forest reserves and national parks, federal assertion of preemptive water rights threaten vast dislocations in the economies of the western states. See *id.* at 199-200.

81. See *Arizona I*, 373 U.S. at 551. The parties involved included Arizona, California and seven of its public agencies, Nevada, New Mexico and Utah. See *id.* The United States also brought suit on behalf of the Chemehuevi, Cocopah, Yuma, Colorado River and Fort Mojave Indian Reservations. See *id.* at 595 n.97.

82. See *id.* at 601. In addition to the reservations, the government asserted reserved water rights claims on behalf of Lake Mead National Recreation Area, Havasu Lake National Wildlife Refuge, Imperial National Wildlife Refuge and Gila National Forest. See *id.*

83. See *id.* The Court expressly extended the implied rights doctrine to non-Indian federal lands. See *id.* "We agree . . . that the United States intended to reserve water sufficient for the future requirements of the Lake Mead Recreation Area, the Lake Havasu National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest." *Id.*

84. See *id.* at 600-01 (concluding that only "feasible and fair" measurement of present and future needs of reservation be determined by irrigable acreage).

Eagle.⁸⁵ In *Eagle County*, the Court determined the scope of the McCarran Water Rights Suits Act, a 1952 amendment to the Reclamation Act of 1902.⁸⁶ The *Eagle County* decision provided for a limited waiver of the United States' sovereign immunity in water rights adjudication, allowing the United States to be joined as a defendant in state water adjudications.⁸⁷ In *Eagle County*, the government contended that the waiver of sovereign immunity applied only to water rights acquired under state law and not to reserved water rights.⁸⁸ The Court held, however, that the waiver of sovereign immunity applied to federally reserved rights as well as nonreserved rights.⁸⁹ Thus, *Eagle County* indicated states would have a voice in the determination of federally reserved water rights in the future.⁹⁰

2. Riparianism Hits the High-Water Mark

Despite the Court's decision in *Eagle County*, the doctrine of federally reserved rights received its most expansive interpretation in *Cappaert v. United States*.⁹¹ In *Cappaert*, the dispute centered on Devil's Hole, an underground cavern reserved as a national monument in 1952 to preserve its historic and scientific value.⁹² In 1968,

85. 401 U.S. 520 (1971) (holding that McCarran Amendments limited waiver of United States' sovereign immunity in cases involving both federal reserved water rights and all nonreserved water rights).

86. *See id.*

87. *See Fisher, supra* note 5, at 1083. The McCarran Amendments provide, in relevant part:

Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

43 U.S.C. § 666(a) (1976).

88. *See United States v. District Court in and for the County of Eagle et al.*, 401 U.S. 520, 523-24 (1971) (analyzing statutory language of McCarran Amendments).

89. *See id.* at 524 (holding that McCarran Amendments are "all-inclusive," covering rights acquired "by purchase" or "by exchange" as well as rights United States has "otherwise acquired").

90. *See Fisher, supra* note 5, at 1083 (noting *Eagle County* made United States "amenable to suit in state water adjudications, a first step toward allowing states to decide federal reserved water rights.").

91. 426 U.S. 128 (1976). Before *Cappaert*, all previous cases were limited to surface water only. *See id.* at 142. "No cases of this Court have applied the doctrine of implied reservation of water rights to groundwater." *Id.* The Court held that expanding implied rights to groundwater is an appropriate interpretation of the implied reservation of water rights doctrine. *See id.* at 142-43.

92. *Id.* at 131. According to the Presidential Proclamation at the time it was reserved as a national monument, Devil's Hole was "a unique subsurface remnant of the prehistoric chain of lakes which in Pleistocene times formed the Death Val-

the Cappaerts began pumping groundwater from the same source that supplied water to Devil's Hole.⁹³ Subsequently, the fish population at Devil's Hole became severely endangered; the United States filed suit seeking an injunction to limit the Cappaerts' pumping activity.⁹⁴ The Court held that an implied reservation of water was indeed within the purpose of the reservation of the land as a national monument, thereby expanding federally reserved water rights to include access to ground water as well as surface water.⁹⁵ This expansion of water rights enabled the United States to reach past the geographical limits of surface water into the greater groundwater aquifer, spanning a much greater distance from the reserved lands.⁹⁶

B. The Tide Goes Out: Prior Appropriation Stays Afloat

The Supreme Court, in *United States v. New Mexico*,⁹⁷ curbed the broadening of federal reserved water rights when, in a 5-4 split, Justice Rehnquist attempted to renew the appropriation doctrine, effectively narrowing the scope of federal riparianism.⁹⁸ In *New*

ley Lake System. . . . [It also contains] 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." *Id.* at 132.

93. *See id.* at 133. The Cappaerts pumped water from the wells near Devil's Hole from March through October, and, the following summer, it was discovered that the water level of the pool in Devil's Hole had decreased. *See id.*

94. *See id.* at 135. The Court explained the reduction in fish population as follows:

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 or 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 Fish . . . 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.

Id. at 133-34.

95. *See id.* at 142-43. The Court stated that since the doctrine of implied water rights "is based on the necessity of water for the purpose of the federal reservation," the United States should be able to "protect its water from subsequent diversion, whether the diversion is of surface or groundwater." *See id.* at 143.

96. *See Cappaert*, 426 U.S. at 143. Here, the Court referred to testimony from a research hydrologist claiming that "substantial pumping [up to] 40 miles away '[o]ver a period of perhaps decades (would have) a small effect.'" *Id.* at 143 n.7.

97. 438 U.S. 696 (1978) (limiting amount of reserved water rights to minimal amount necessary to preserve water flow).

98. *See Tarlock*, *supra* note 28, at 77-78. Justice Rehnquist, a resident of Arizona for sixteen years, consistently supported a reduction of federal encroachment on western states' control of water resources. *See DUNBAR*, *supra* note 72, at 206-07; *see also United States v. New Mexico*, 438 U.S. 696 (1978). Citing certainty of water

Mexico, the state of New Mexico initiated a general adjudication of water rights regarding the Rio Membres River.⁹⁹ The United States joined the suit as a party, claiming reserved water rights to the Gila National Forest, the point of origin of the Rio Membres.¹⁰⁰ The government contended that it had reserved rights for several purposes.¹⁰¹ These purposes included aesthetics, recreation, wildlife preservation, stock watering and preservation of timber.¹⁰²

In his opinion, Justice Rehnquist limited the reserved water rights to the minimal amount necessary to preserve timber and maintain adequate water flow.¹⁰³ The Court found the other enumerated purposes superfluous and outside the original purpose of reserved land.¹⁰⁴ This restrictive interpretation of the reserved

rights as an absolute imperative, Chief Justice Rehnquist wrote the dissenting opinion in *Arizona III*, the principal case of this Note. Justice O'Connor, who was also on the majority in *Arizona II*, joined Chief Justice Rehnquist in his dissent.

99. See *New Mexico*, 438 U.S. at 697-98. The Court noted that the Mimbres Valley Irrigation Co. originally filed this suit as a private action to enjoin alleged illegal diversions from Rio Mimbres. See *id.* at 698. New Mexico then filed a complaint-in-intervention seeking a general adjudication of water rights in the Rio Mimbres and its tributaries. See *id.*

100. See *id.* (noting District Court held that United States reserved use of water when it set aside Gila National Forest).

101. See *id.* at 708.

102. *Id.* Justice Rehnquist quoted from precedent:

The objects for which the forest reservations should be made are the protection of the forest growth against destruction by fire and ax, and preservation of forest conditions upon which water conditions and water flow are dependent. The purpose, therefore, of this bill is to maintain favorable forest conditions, without excluding the use of these reservations for other purposes. They are not parks set aside for nonuse, but have been established for economic reasons.

Id. (citing 30 CONG. REC. 966 (1897) (Cong. McRae)). Justice Rehnquist thus confirmed that national forests were to be reserved only for the purposes of conserving water flows and furnishing a continuous supply of timber. See *New Mexico*, 438 U.S. at 708.

103. See *id.* at 716 (holding stockwatering rights are not included in minimal amount necessary to preserve timber and adequate water flow).

104. See *New Mexico*, 438 U.S. at 700. Dan Tarlock, Professor of Law at the Chicago-Kent College of Law, wrote the following summary of the Court's holding:

Justice Rehnquist . . . as the guardian of western states' resource sovereignty, established three formidable barriers to the implication of future non-Indian federal reserved water rights by announcing a strong frustration of federal purpose standard as the basis for recognition of such rights. First, the right must relate to the original purpose of the withdrawal or reservation. Second, the implication must be necessary to prevent the frustration of the original purpose of the reservation. Third, the Court introduced into the law of reserved rights a new and unwarranted distinction between primary and secondary purposes of reservations. A reserved right may be implied for primary purposes, but a court will draw the contrary inference when the purpose is found to be secondary.

water rights doctrine hinted that the Court was willing to recognize state and private concerns in the allocation of western waters.¹⁰⁵

The Court affirmed its renewed respect of the apportionment doctrine in 1983 in the second round of *Arizona v. California* litigation.¹⁰⁶ In *Arizona II*, the five Indian tribes the United States represented petitioned for an increase in water rights awarded in the 1964 consent decree of *Arizona I*.¹⁰⁷ The tribes requested modification of the decree, claiming that the 1978 Secretarial Order settled boundary disputes over lands that now should be apportioned water, and that a portion of irrigable lands was "omitted" from the calculations used to determine the water rights originally set forth in the decree.¹⁰⁸ Citing a strong interest in judicial finality, the *Arizona II* majority invoked principles of *res judicata* to bar the tribes from reopening the 1964 decree.¹⁰⁹

New Mexico has been hailed as a sensitive accommodation of federal and state water law. It does a great deal to remove the specter of federal riparianism.

Tarlock, *supra* note 28, at 178.

105. See Florio, *supra* note 2, at 464. In his analysis, Justice Rehnquist noted the following:

The quantification of reserved water rights for the national forests is of critical importance to the West, where . . . water is scarce and where more than 50% of the available water either originates in or flows through national forests. When, as in the case of Rio Mimbres, a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators. This reality has not escaped the attention of Congress and must be weighed in determining, what, if any, water Congress reserved for use in national forests.

New Mexico, 438 U.S. at 705.

106. See *Arizona II*, 460 U.S. 605, 606 (1983). The majority in *Arizona II* consisted of then Chief Justice Burger and Justices White, Powell, O'Connor and Rehnquist. See *id.*

107. See *id.* at 610. Water rights in the 1964 consent decree were awarded on the basis of practicably irrigable acreage of the lands that were, at the time, accorded to the reservation. See *id.* In 1978, when the Department of the Interior issued the Krulitz opinion granting entitlement of the disputed lands to the reservation, there was no accompanying expansion of water rights as in *Arizona III*. See *Arizona III*, 530 U.S. 392, 404 (2000).

108. See *Arizona II*, 460 U.S. at 614 (noting Tribes did not seek to bring new claims or issues to case, but sought only to participate in adjudication of their water rights).

109. See *id.* at 620-27. The technical rules of *res judicata* did not apply to *Arizona II* because it was a continuation of the *Arizona I* litigation and not a separate action. See *id.* at 618. The Court, however, found that the principles of finality upon which the rules of *res judicata* are founded should govern their decision. See *id.* In its opinion, the Court stressed:

Recalculating the amount of practicably irrigable acreage runs directly counter to the strong interest in finality in this case. A major purpose of this litigation, from its inception to the present day, has been to provide the necessary assurance to states of the Southwest and the various private

In its 1983 decision in *Nevada v. United States*,¹¹⁰ the Court again held that federally reserved rights, once quantified and finalized, cannot be expanded later.¹¹¹ The dispute in *Nevada* involved the United States' petition to obtain additional water rights from those quantified in a 1944 consent decree.¹¹² Speaking for a unanimous court, Justice Rehnquist invoked *res judicata* to bar the reopening of the 1944 decree.¹¹³

IV. NARRATIVE ANALYSIS

A. The Majority Opinion

Writing for the majority, Justice Ginsburg first summarized the parties' positions with regard to the argument that their current claims are precluded by the *Arizona I* decision.¹¹⁴ The state parties

interests, of the amount of water they can anticipate to receive from the Colorado River System.

Id. at 620-21.

110. 463 U.S. 110, 143-44 (1983)

111. *See id.* (calling expansion of rights "manifestly unjust" and concluding that expansion of water rights "would make it impossible ever finally to quantify a reserved water right.")

112. *See id.* at 112-13. In *Nevada*, the United States filed the action on behalf of the Pyramid Lake Indian Reservation, seeking additional rights to the Truckee River. *See id.* at 110.

113. *See id.* at 143. In support of its decision to employ the principles of *res judicata*, the Court cited to cases concerning real property, land and water:

Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. . . . [W]here courts vacillate and overrule their own decisions . . . affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.

Nevada v. United States, 463 U.S. at 129 n.10 (citing *Minnesota Mining Co. v. Nat'l Mining Co.*, 3 Wall. 332 (1866)).

Justice Brennan, in his concurring opinion, wrote:

In the final analysis, our decision today is that thousands of small farmers in northwestern Nevada can rely on specific promises made to their forebears two and three generations ago, and solemnized in a judicial decree, despite strong claims on the part of the Pyramid Lake Paiutes. The availability of water determines the character of life and culture in this region. Here, as elsewhere in the West, it is insufficient to satisfy all claims. In the face of such fundamental natural limitations, the rule of law cannot avert large measures of loss, destruction, and profound disappointment, no matter how scrupulously evenhanded are the law's doctrines and administration.

Id. at 145-46.

114. *See Arizona III*, 530 U.S. 392, 406-07 (2000). For a further discussion of the *Arizona II* finality rationale, *see supra* note 109 and accompanying text.

argued the water rights claims associated with the disputed boundary lands of the reservation were precluded by the finality rationale employed by the Court in *Arizona II* in dismissing the “omitted lands” claim.¹¹⁵ The state parties also asserted that the United States could have raised a boundary lands claim for the Fort Yuma Reservation in *Arizona I* based on facts known at the time, as it had done for the Fort Mojave and Colorado River Reservations; however, the United States had deliberately decided not to pursue this argument, much like it once did with respect to the omitted lands.¹¹⁶

In response, the United States and the Tribe contended that the omitted lands in *Arizona II* were not equivalent to the disputed boundary lands of the Fort Yuma Reservation.¹¹⁷ The United States and the Tribe argued that since the Court in *Arizona I* rejected the Special Master’s resolution of the Fort Mojave and Colorado River Reservation boundary disputes, a resolution of the Fort Yuma Reservation’s boundary dispute would have been equally rejected.¹¹⁸ The United States and the Tribe, therefore, maintained that the issue could not have been decided in *Arizona I* and consequently, preclusion principles were inapplicable.¹¹⁹

Once the Court summarized the parties’ positions, however, the discussion proceeded no further.¹²⁰ Rather, the Court declared the preclusion defense to be inadmissible at such a late date, and,

115. *See id.* In *Arizona II*, the Court rejected the United States’ claim for water rights for the “omitted lands,” stressing that certainty of water rights is particularly important in the western United States and noting the strong interest in case finality. *See id.* Observing that the 1964 decree determined “the extent of irrigable acreage within the uncontested boundaries of the reservations,” the Court refused to consider issues “fully and fairly litigated 20 years ago.” *Arizona II*, 460 U.S. 605, 621 (1983).

116. *See Arizona III*, 530 U.S. at 408 (rejecting state parties’ preclusion argument).

117. *See id.* at 408-09. In the alternative, the United States and the Tribe argued that the state parties forfeited their preclusion defense. *See id.* The Court agreed that the preclusion defense was inadmissible at such a late date. *See id.*

118. *See Arizona III*, 530 U.S. at 408 n.2. In *Arizona I*, the Court held that consideration of the Fort Mojave and Colorado River reservations was premature. *See id.* The state parties in *Arizona III* contended that consideration of the Fort Yuma reservation boundaries would have been equally premature. *See id.*

119. *See id.* at 408-09. The United States and the Tribes further stressed that present claims turned on the validity of the 1983 Agreement, initially granting the reservation and the 1978 Secretarial Order, granting the Tribe title to disputed lands. *See id.* Both the 1983 Agreement and the Secretarial Order were questions of law and thus not addressed in prior proceedings. *See id.* at 409 n.2.

120. *See id.* at 408-09.

as a result, the Court did not address the merits of this “omitted lands” analogy.¹²¹

In an effort to explain the inadmissibility of the preclusion defense, the Court posited a timeliness argument.¹²² The Court acknowledged that while preclusion rules are not strictly applicable in the context of a single ongoing original action, the basic principles of preclusion should still apply.¹²³ Those principles hold *res judicata* as an affirmative defense ordinarily lost if not timely raised.¹²⁴ The Court then noted that the state parties did not raise the defense in 1978 in response to the United States’ motion for a supplemental decree granting additional water rights to the Fort Yuma Reservation, nor did they raise the defense in the 1982 litigation of *Arizona II*.¹²⁵ In fact, the states did not raise the *res judicata* plea until 1989, when initiating the current round of proceedings.¹²⁶

For further support, the majority looked to the Court’s 1979 and 1984 supplemental decrees.¹²⁷ The majority maintained that the decrees anticipated the disputed boundary issues for all five reservations would be “finally determined” in some forum.¹²⁸ This “final determination” was meant to be on the merits rather than by

121. *See id.* The Court noted that the Special Master did, in fact, reach the merits of the preclusion defense. *See id.* at 406-07. The Special Master noted that, at the time of *Arizona I*, the United States was bound by the 1936 Margold Opinion. *See id.* The 1978 Secretarial Order, however, reversed the Margold Opinion and confirmed the Quechan Tribe’s entitlement to the disputed lands. *See id.* at 404. The Special Master thus declared the 1978 Secretarial Order to be “a later and then unknown circumstance” and, as such, qualified as an exception to *res judicata*. *See id.* at 408. For a further discussion of the 1978 Secretarial Order, *see supra* notes 37-38 and accompanying text.

The majority, however, rejected the Special Master’s recommendation. *See Arizona III*, 530 U.S. at 408. The majority argued that the Order did not change the underlying facts in dispute, but “simply embodied one party’s changed view of the import of unchanged facts.” *Id.* at 408.

122. *See id.* at 410.

123. *See Arizona III*, 530 U.S. at 410 (citing *Arizona II*, 406 U.S. at 619) (stating technical rules not applicable).

124. *See id.* (citing FED. R. CIV. P. 8(c)).

125. *See id.* (noting that no preclusion argument was made with respect to boundary lands until after 1983, the year in which the Court decided both *Arizona II* and *Nevada v. United States*).

126. *See id.* (condemning notion that party may wake up because “light finally dawned” years after first opportunity to raise defense).

127. For a further discussion of the 1979 and 1984 supplemental decrees, *see supra* note 28 and accompanying text.

128. *See Arizona III*, 530 U.S. at 411. The majority specifically characterized the 1984 Supplemental Decree as designating water rights for all five reservations “shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.” *Id.* (citing *Arizona v. California*, 466 U.S. 144, 145 (1984)).

preclusion.¹²⁹ The Court ultimately held the *Arizona I* decision did not preclude the United States' and Tribe's claims to increased water rights for the disputed boundary lands of the Reservation because the state parties failed to raise the preclusion argument earlier in the litigation.¹³⁰

Turning next to the issue of whether the claims were barred by the consent judgment in Docket No. 320, the Court stressed that the consent judgment proceeded on alternative and mutually exclusive theories of recovery.¹³¹ Here, the consent judgment encompassed both claims, with no election of the one over the other.¹³² Thus, since the settlement was ambiguous as to the precise theory of recovery, there was an inadequate foundation for issue preclusion.¹³³

Finally, the Court approved the parties' proposed settlements of the disputes regarding additional water rights for the Fort Mojave and Colorado River Reservations.¹³⁴ A supplemental con-

129. *See id.* (noting preclusion would not determine status of these issues). The Court also briefly addressed the state parties' argument that even if they earlier failed to raise the preclusion defense, the Court should have raised it *sua sponte*. *See id.* at 412. The Court rejected this argument, declaring it null due to the fact that the Court had not previously decided the issue presented. *See id.*

130. *See id.* at 412. Responding to the state parties' argument that the Court should have raised preclusion *sua sponte*, the Court adamantly stated:

[T]his Court plainly has not 'previously decided the issue presented.' Therefore we do not face the prospect of redoing a matter once decided. Where no judicial resources have been spent on the resolution of a question, trial courts must be cautious about raising a preclusion bar *sua sponte*, thereby eroding the principle of party presentation so basic to our system of adjudication.

Id. (quoting *United States v. Sioux Nation*, 448 U.S. 371, 432 (1980)).

131. *See id.* at 417. The consent judgment proceeded upon the following theories of recovery: 1) that the Tribe should win damages for a taking, indicating that title was in the United States, or 2) that the Tribe should obtain damages for trespass, indicating that title remained in the Tribe. *See id.*

132. *See id.* (noting Tribe made no election of one theory over other, nor was such election required for approval of consent judgment).

133. *See Arizona III*, 530 U.S. at 410. In the course of its argument, the majority conceded that the settlement was intended to have claim-preclusive effect. *See id.* at 414. The Court, however, noted that settlements ordinarily lack issue-preclusive effect. *See id.* (citing 18 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 4443 (1981)). Thus, because the issue of ownership of the disputed boundary lands was not actually litigated in this case, there was no valid and final judgment. *See id.*

134. *See id.* at 418. The claim respecting the Fort Mojave reservation arose out of a dispute concerning the accuracy of the so-called Hay and Wood Reserve portion of the reservation. *See id.* The Fort Mojave reservation agreed to an accord that:

1) specifies the location of the disputed boundary; 2) preserves the claims of the parties regarding title to and jurisdiction over the bed of the last natural course of the Colorado River within the agreed-upon boundary;

sent decree regarding the settlements was reproduced in the Appendix to the Opinion, and the remaining issues of *Arizona III* were remanded to the Special Master for determination on the merits.¹³⁵

B. The Dissenting Opinion

In this 6-3 decision, Chief Justice Rehnquist, joined by Justices O'Connor and Thomas, filed an opinion concurring in part and dissenting in part.¹³⁶ The dissenters criticized the majority's refusal to reach the merits of the state parties' *res judicata* defense.¹³⁷ The dissent disagreed with the majority's lengthy discussion of both the timeliness argument and the consent judgment in Docket No. 320.¹³⁸ Instead, the dissent indicated that the preclusion by the *Arizona I* decision was the seminal issue of the current case.¹³⁹ Thus, the dissent first disputed the holding that the preclusion issue was

3) awards the Tribe the lesser of an additional 3,022 acre-feet of water or enough water to supply the needs of 468 acres; 4) precludes the United States and the Tribe from claiming additional water rights from the Colorado River within the Hay and Wood Reserve; and 5) disclaims any intent to affect any private claims to title to or jurisdiction over any lands.

Id. at 414.

The dispute respecting the Colorado River Indian reservation arose from a dispute over whether the reservation boundary is the ever-changing west bank of the Colorado River or a fixed line representing a past location of the River. *See id.* at 418-19. The Colorado River Indian reservation agreed to an accord that:

1) awards the Tribes the lesser of an additional 2,100 acre-feet of water or enough water to irrigate 315 acres; 2) precludes the United States or the Tribe from seeking additional reserved water rights from the Colorado River for lands in California; 3) embodies the parties' intent not to adjudicate in these proceedings the correct location of the disputed boundary; 4) preserves the competing claims of the parties to title to or jurisdiction over the bed of the Colorado River within the reservation; and 5) provides that the agreement will become effective only if the Master and the Court approve the settlement.

Id. at 419.

The Special Master recommended that both the Fort Mojave and Colorado River Indian accords be accepted and the Supreme Court approved both settlements. *See id.*

135. *See id.* at 418-20. The remaining issues included "the outstanding water rights claims associated with the disputed boundary lands of the Fort Yuma reservation." *Id.* at 419-20.

136. *See id.* at 422. Chief Justice Rehnquist and Justices O'Connor and Thomas agreed with the majority on the following two points: (1) that the Special Master erred in finding the 1978 Secretarial Order a "new fact," and (2) that the parties' settlements regarding the disputed lands on the Fort Mojave and Colorado River Reservations should be approved. *See id.* at 422-27.

137. *See id.* at 422-23 (disagreeing with majority's refusal to reach merits of state parties' defense).

138. *See Arizona III*, 530 U.S. at 427 (contending that issue of preclusion was properly before Supreme Court).

139. *See id.* (stating belief that state parties' *res judicata* defense was properly before Supreme Court).

not timely raised, and then, on its own accord, moved to analyze the issue of preclusion on the merits.¹⁴⁰ The dissent did not address the majority's holding that the claims were not precluded by the consent judgment in Docket No. 320.¹⁴¹

The dissent began by strongly arguing against the majority's conclusion that the preclusion defense was untimely.¹⁴² In support of its position, the dissent cited Federal Rule of Civil Procedure 8(c), providing *res judicata* shall be pleaded as an affirmative defense.¹⁴³ In this case, the only "pleadings" were filed in the 1950's, at which time no *res judicata* claim could have been made.¹⁴⁴

The dissent's next argument against the majority's time bar rested on the absence of objection once the defense was raised by motion in 1989.¹⁴⁵ In response to this motion, neither the Tribe nor the United States contended that, since the preclusion issue was not timely raised, the Court was unable to make a decision.¹⁴⁶ The dissent pointedly noted that the Supreme Court had granted the motion and the Special Master had considered the claim on the merits.¹⁴⁷

The dissent also addressed the majority's interpretation that the 1979 and 1984 supplemental decrees "anticipated" the bound-

140. See *id.* at 422-25 (addressing preclusion issue on merits and arguing it was timely raised and thus precluded further proceedings).

141. See *id.* (implying no need to address Docket No. 320 due to preclusive effect of *Arizona I* decision).

142. See *id.* at 422-23 (arguing that state parties did not lose *res judicata* defense by failing to assert it in earlier proceedings).

143. See *Arizona III*, 530 U.S. at 422. Federal Rule of Civil Procedure 8 (c) provides, in relevant part:

Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

FED.R.CIV.P. 8(c).

144. See *Arizona III*, 530 U.S. at 422. Since the initial pleadings of *Arizona I*, no further pleadings, but only various motions to the Court, were filed with the Court. See *id.*

145. See *id.* at 423 (noting that State did expressly raise *res judicata* defense in 1989 motion to which neither Tribe nor United States objected).

146. See *id.* (stressing that neither Tribe nor United States contended, in response to state parties' motion, that Court could not decide *res judicata* defense because not timely raised).

147. See *id.* (stating under such circumstances, state parties did not lose defense by failing to assert it earlier and that Master McGarr considered claim on merits).

ary dispute would be finally resolved in some forum.¹⁴⁸ Chief Justice Rehnquist and the joining dissenters disagreed with this conclusion, charging the majority with reading too much into the “simple language” of the consent decree and ignoring language in the *Arizona II* opinion.¹⁴⁹ The dissent asserted that the decrees are best interpreted as merely providing that the reservation’s water rights can be adjusted if the boundary changes; the decrees did not decide whether the boundary in the 1964 decree could be properly relied upon.¹⁵⁰ Furthermore, the decrees did not indicate that the boundary necessarily would be “finally determined” at some future point.¹⁵¹

To support its interpretation, the dissent cited language from the *Arizona II* opinion discussing the pending District Court action: “There will be time enough . . . to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court.”¹⁵² This language is evidence that the decree did not “anticipate” that the dispute would be “finally resolved.”¹⁵³ Instead, the decree explicitly left open the question of whether the dispute could be litigated in the Supreme Court.¹⁵⁴ The dissent concluded its argument by stating that the language of *Arizona II* indicated the Court’s recognition that the boundary issue potentially may not be judicially resolved, and, therefore, the question whether there was some defense precluding the Court’s review was left unresolved.¹⁵⁵ The context of that defense was not an issue before the Court.¹⁵⁶

Having thoroughly disputed the majority’s argument of timeliness, the dissent next addressed the preclusion issue on its mer-

148. See *id.* at 423-24 (contesting majority’s interpretation of language in 1979 and 1984 supplemental decrees).

149. See *Arizona III*, 530 U.S. at 423-24. The dissent cited express language of the supplemental decree stating that water rights for the five reservations “shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.” *Id.*

150. See *id.* at 423-24 (noting decree was subject to future challenges).

151. For further discussion of whether the decrees were “finally determined,” see *infra* notes 152-56 and accompanying text.

152. *Arizona III*, 530 U.S. at 424 (quoting *Arizona II*, 460 U.S. at 638 and asserting that its reasoning was supported by express language of *Arizona II*).

153. See *id.* (identifying majority’s error through close reading of Court’s earlier language).

154. See *id.* (concluding Court’s determination inconsistent with decree’s language and prior precedent).

155. *Id.* (recognizing “possibility that the boundary issue would not be judicially resolved at all, and [thus it] left open the question of whether there was some defense precluding this Court’s review.”).

156. See *id.* (noting that majority overlooked preclusion defense).

its.¹⁵⁷ Relying on *Nevada v. United States*, the dissent asserted that under the doctrine of *res judicata*, when a final judgment has been entered on the merits of the case, it is final as to the demand in controversy “not only as to every other matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.”¹⁵⁸

The dissent noted the Court applied this general principle in *Arizona II*, even though the 1964 decree expressly provided for modification in appropriate circumstances.¹⁵⁹ The dissent also recalled that in *Arizona II* “[a] major purpose of [the] litigation . . . has been to provide the necessary assurance to States of the Southwest and to various private interests, of the amount of water they can anticipate to receive from the Colorado River system.”¹⁶⁰ In *Arizona II*, the Court concluded that allowing reallocation of water rights would directly counter the strong interests of finality in the case and thus held the 1964 calculation of rights as final.¹⁶¹

The dissent charged that the reasoning in *Arizona II* was equally applicable to the present case.¹⁶² Although the exact claim for additional water for the Fort Yuma Reservation was not actually litigated in *Arizona I*, the United States could have raised the claim but failed to do so.¹⁶³ The dissent further indicated that, at the time of *Arizona I*, the United States possessed all of the facts related to the disputed boundary lands and, therefore, could have litigated

157. See *Arizona III*, 530 U.S. at 424 (discussing whether *res judicata* barred United States’ claim).

158. *Id.* at 424-25 (citing *Nevada v. United States*, 463 U.S. 110, 129-30 (1983)) (stressing that due to *Arizona I* issuance of final order and fact that Fort Yuma’s claims could have been raised in prior *Arizona I* litigation, *Arizona I* precluded current claim for additional water rights).

159. See *id.* at 425 (emphasizing that Court in *Arizona II* applied principles of *res judicata* to 1964 decree).

160. *Id.* at 425 (noting *Arizona II* Court’s recognition of importance of water rights in western states).

161. See *id.* The Court, in *Arizona II*, also noted that treating the 1964 calculation as final “comported with the clearly expressed intention of the parties and was consistent with our previous treatment of original actions, allowing modifications after a change in the relevant circumstances.” *Id.*

162. See *Arizona III*, 530 U.S. at 425 (stating that western states’ strong interest in finality, as enunciated in *Arizona II*, equally applied in *Arizona III*).

163. *Id.* at 425. The dissent also cited to specific language in the *Arizona I* proceedings where the Special Master explicitly warned about the preclusive effect of failing to assert all claims. See *id.* “In an action or a decree quieting title, you cut out all claims not asserted . . . I just want you to be aware of the fact that the mere fact that it has not been asserted does not mean that you may not lose it.” *Id.* at 426 (quoting Exception by State Parties to Report of Special Master and Supporting Brief 8-9).

the larger claim at that time.¹⁶⁴ Thus, under the general principles of *res judicata* and with the strong interest in finality of the case, the United States and the Tribe were, according to the dissent, clearly barred from asserting the claim for additional water rights.¹⁶⁵

The dissent next addressed the United States' contention that the boundary dispute could not have been decided because the Court had rejected the resolutions of Fort Mojave's and Colorado River Reservation's boundary disputes.¹⁶⁶ The dissent maintained that because the Fort Yuma Reservation dispute was solely between the United States and the Quechan Tribe, the United States could have raised the claim in *Arizona I* and the Court could have decided it at that time.¹⁶⁷ In support of this contention, the dissent cited California's objection in *Arizona I* that the necessary parties were not participating in the proceedings.¹⁶⁸ Ultimately, for the same reasons of judicial finality and certainty of water rights the Court previously asserted in *Arizona II*, the dissent declared that the consent decree issued in *Arizona I* precluded the claim for additional water rights.¹⁶⁹

V. CRITICAL ANALYSIS

Sidestepping the merits of the preclusion defense, the majority ultimately held that the defense was barred because it was not timely raised.¹⁷⁰ With regard to the preclusion issue, the dissent appropriately cited Federal Rule of Civil Procedure 8(c) which provides that *res judicata* shall be pleaded as an affirmative defense.¹⁷¹ As the dissent pointed out, the only "pleadings" in this protracted

164. *See id.* at 425-26. The dissent specifically cited to language stated by the counsel for the United States in the proceedings before the Special Master. *See id.* "The testimony . . . as reflected by these maps and by the other testimony will define the maximum claim which the United States is asserting in this case." *Id.*

165. *See id.* at 426 (concluding dissent's argument regarding preclusion issue).

166. *See id.*; *see also Arizona I*, 373 U.S. 546, 601 (1963) (holding it unnecessary to resolve disputed boundaries of Fort Mojave and Colorado River Indian Reservations).

167. *See Arizona III*, 530 U.S. at 426 (restating why preclusion principles should apply in *Arizona III*).

168. *See id.* Specifically, California argued that it lacked the authority to represent private individuals claiming title to the disputed lands and asserted that, in the interest of justice, the issue was not properly before the Court. *See id.*

169. *See id.* at 425 (emphasizing that conclusion allowing recalculation of amount of practicably irrigable acreage "runs directly counter to the strong interest in finality in this case.").

170. *See id.* at 412 (refusing to address preclusion issue *sua sponte*).

171. *See id.* at 422. For a complete discussion of FEDERAL RULES OF CIVIL PROCEDURE 8(c), *see supra* note 143.

case were filed in the 1950's, at which time no defense of *res judicata* could have been made.¹⁷² Additionally, because preclusion rules are not strictly applicable in the context of a single ongoing original action, it seems a particularly extreme measure for the Court to have allowed what it terms a "general principle" to prevent it from reaching the merits of a valid issue.¹⁷³

Furthermore, by not reaching the merits of the preclusion defense, the majority avoided an issue that earlier stages of the litigation directly addressed.¹⁷⁴ In *Arizona II*, the Supreme Court refused to reopen the 1964 consent decree for the "omitted lands," observing that the decree determined "the extent of irrigable acreage within the uncontested boundaries of the reservations."¹⁷⁵ The Court thus held that the Tribes were bound by the United States' representation of them in *Arizona I*.¹⁷⁶

As the dissent aptly charged, the "omitted lands" reasoning in *Arizona II* is equally applicable to the disputed boundary lands of *Arizona III*.¹⁷⁷ As it had with regard to the omitted lands, the United States possessed all of the facts related to the disputed boundary lands at the time of the formation of the consent decree.¹⁷⁸ The United States, therefore, could have litigated the larger claim of water rights for the disputed lands at that time, yet failed to do so.¹⁷⁹ When faced with an almost identical set of facts, the Court in *Arizona II* resisted "reopen[ing] an adjudication . . . to reconsider whether initial factual determinations were correctly

172. See *Arizona III*, 530 U.S. at 422. The Court noted that motions filed in 1977 and 1979 were "not in any sense comprehensive pleadings, purporting to set forth all of the claims and defenses of the parties." *Id.*

173. See *id.* at 425 (advocating majority's application of "general principles" of preclusion).

174. See *id.* (Rehnquist, J., dissenting) (citing *Arizona II*, 460 U.S. 605 (1983)) (stating refusal to reopen 1964 consent decree due to preclusive effect of *Arizona I* litigation).

175. *Arizona II*, 460 U.S. at 621 n.12 (noting doctrine of *res judicata* does not mandate all aspects of case to be final before finality attaches).

176. See *id.* at 626-27. The Court agreed with the states that the uncertainties not resolved by the 1964 consent decree were "not of a nature and magnitude to deter the states from relying upon our 1964 decree with respect to the litigated issue of irrigable acreage on the reservations." *Id.* at 621 n.12.

177. See *Arizona III*, 530 U.S. at 425 (stating that western states' strong interest in finality equally applied in *Arizona III*).

178. See *id.* (noting that United States' claim to water for reservation was based on claim for larger amount of irrigable acreage because of claimed extension of boundaries of reservation and not due to miscalculation as to irrigability of acreage already claimed).

179. See *id.* (stressing that extension of boundaries of reservation could have been included and decided upon in *Arizona I* litigation).

made.”¹⁸⁰ However, in spite of its earlier language, the *Arizona III* Court proceeded to reopen the decree.¹⁸¹

In further support of its decision to reopen the consent decree, the Court looked to the 1979 and 1984 supplemental decrees.¹⁸² The Court specifically cited the language in the supplemental decrees which specified that water rights for all five reservations “shall be subject to appropriate adjustments . . . in the event that the boundaries of the respective reservations are finally determined.”¹⁸³ While the Court’s interpretation of this express language seems obvious on its face, the Court undermined this interpretation later in the opinion by ignoring comparable express language in Docket No. 320.¹⁸⁴ The *Arizona II* opinion further complicates the matter.¹⁸⁵ Although the 1964 consent decree expressly provided for modification in appropriate circumstances, in *Arizona II*, the Court overruled this language, citing its refusal to reconsider “issues that were fully and fairly litigated 20 years ago.”¹⁸⁶ With such inconsistencies, the Court thus provided no definitive answer for when it will abide by the express language of its decrees and when it will ignore such language.¹⁸⁷

In addition to the abovementioned inconsistencies, the most significant discrepancy in the *Arizona III* decision is the Court’s refusal to recognize the strong interest in finality involved in this litigation.¹⁸⁸ The Court has historically reaffirmed that once

180. *Arizona II*, 460 U.S. at 623-24 (citing precedent which only allowed subsequent modifications in reaction to changed circumstances).

181. *Arizona III*, 530 U.S. at 420 (noting supplemental decree was allowed and provided as appendix to Court’s opinion).

182. *See id.* at 411 (claiming that 1979 and 1984 supplemental decrees anticipated disputed boundary issues for all five reservations, and would be “finally determined in some forum, not by preclusion but on the merits.”).

183. *Id.* at 411-12 (noting that states’ understanding was that boundary disputes should be resolved on merits).

184. *See id.* at 417. Docket No. 320 was decided in the context of the Indian Claims Commission Act, which reads in relevant part: “A final determination against a claimant made and reported in accordance with this chapter shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.” 25 U.S.C. § 70(u) (1976).

185. *See Arizona II*, 460 U.S. at 621-25 (stating “[t]his Court does not reopen an adjudication in an original action to reconsider whether initial factual determinations were correctly made.”).

186. *Id.* at 621-22 (suggesting that express language in 1964 consent decree was merely “safety net” added to retain jurisdiction and to ensure that Court had not, by virtue of *res judicata*, precluded itself from adjusting decree if unforeseeable changes in circumstances).

187. *See id.* (determining it unnecessary to resolve extent States detrimentally relied on decree).

188. *See Arizona III*, 530 U.S. at 425 (citing *Arizona II*, 460 U.S. at 620).

questions affecting titles to land have been decided, they should never be considered open to further scrutiny.¹⁸⁹ In fact, the Court expressly reinforced the need for certainty in the language of both *Arizona II* and *Nevada v. United States*.¹⁹⁰ Yet, in spite of long-established principles of judicial finality in cases involving the allocation of water rights, the *Arizona III* Court reopened the 1964 consent decree and reallocated water rights.¹⁹¹

The decision in *Arizona III*, when considered in the context of judicial precedent, reveals the Court to be vacillating between two

In *Arizona II* the Court stated:

Recalculating the amount of practicably irrigable acreage runs directly counter to the strong interest in finality in this case. A major purpose of this litigation, from its inception to the present day, has been to provide the necessary assurance to States of the Southwest and to various private interests, of the amount of water they can anticipate to receive from the Colorado River system If there is no surplus of water in the Colorado River, an increase in federal reserved water rights will require a "gallon-for-gallon reduction in the amount of water available for the water-needy state and private appropriators."

Arizona II, 460 U.S. at 620-21.

189. See *Arizona II*, 460 U.S. at 620 (citing *Minnesota Mining Co. v. Nat'l Mining Co.*, 70 U.S. 332, 334 (1866) (holding "where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open."); see also *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924) (holding that decision, affecting many tracts of land, made more than twenty years before, after which land values had increased and there had been many proprietary transfers, would be followed as rule of property)).

190. See *Arizona II*, 460 U.S. at 620; see also *Nevada v. United States*, 463 U.S. 110, 129 (1983). In *Arizona II*, the Court stressed the following:

Certainty of rights is particularly important with respect to water rights in the Western United States. The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country The doctrine of prior appropriation, the prevailing law in the Western States, is itself largely a product of the compelling need for certainty in the holding and use of water rights.

Arizona II, 460 U.S. at 620 (citation omitted). Likewise, the Court in *Nevada v. United States* noted:

Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change [W]here courts vacillate and overrule their own decisions . . . affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.

Nevada, 463 U.S. at 129 n.10 (quoting *Minnesota Mining Co.*, 70 U.S. at 334).

191. See *Arizona III*, 530 U.S. at 416-18 (explaining "[n]ot only was the issue of ownership of the disputed boundary lands not actually litigated and decided in Docket No. 320, but, most notably, the Tribe proceeded on alternative and mutually exclusive theories of recovery.").

approaches.¹⁹² The first approach implements the Court's deference to the western states' prior appropriation doctrine.¹⁹³ The second approach allows the Court to impose a federal riparian doctrine.¹⁹⁴ Using a timeliness argument, the Court sidesteps its own language in *Arizona II* and ultimately proceeds to reallocate the western water rights at issue.¹⁹⁵ In so doing, the Court fails to provide a coherent doctrine by which the future of western water rights can be determined.¹⁹⁶

VI. IMPACT

The period when the West could satisfy much of the country's rapacious appetite for natural resources is drawing to a close Over the long run, certainly by the time our children's children are grown, our culture must come to grips with the inherent inconsistency of sustained growth on a finite planet.¹⁹⁷

The inherent inconsistency in federal adjudication of western water rights reveals itself in *Arizona v. California*.¹⁹⁸ This protracted litigation chronicles the unreliability that results from a case-by-case determination of western water apportionment. In an era when water resource management has reached a critical stage, the Supreme Court's decision underscores the impermanence of previously allocated water rights.¹⁹⁹ Unfortunately, the absence of definite, quantifiable diversion rights inhibits investment and precludes drought planning and management.²⁰⁰ Thus, an increased uncertainty of water supply will discourage investors and impede

192. *See id.*

193. *See id.*

194. *See id.*

195. *See id.*

196. *See Arizona III*, 530 U.S. at 416-18. For a discussion of the holding and rationale of *Arizona II*, see *supra* note 109 and accompanying text.

197. Bates, *supra* note 1, at 180 (quoting Stewart L. Udall, *Pausing at the Pass: Reflections of a Native Son*, in *BEYOND THE MYTHIC WEST* (Stewart L. Udall et al., 1990)).

198. For a further discussion of the inconsistencies in federal adjudication of western water rights, see *supra* notes 75-113 and accompanying text.

199. For a further discussion of the impermanence of previously allocated water rights, see *supra* notes 188-191 and accompanying text.

200. *See GOLDFARB, supra* note 13, at 25 (suggesting that case-by-case judicial analysis provides inconsistent and impermanent results, changing not only users, but also patterns of use and characteristics of watercourse). Investors are therefore reluctant to rely on such an ad hoc system of enforcement. *See id.*

development in an area currently experiencing a population surge.²⁰¹

In the arid West, water is power, intrinsic to the infrastructure and economy of an ever-expanding region.²⁰² Its distribution arouses passions former Arizona Senator Barry Goldwater once described as the “three things a western man cares about: water, land, and women. In that order.”²⁰³ The holding in this most recent chapter of *Arizona v. California* should strike fear into the heart of Senator Goldwater’s western man. Through the vehicle of federally reserved water rights, the Supreme Court flatly rejected the principles of prior appropriation, and offered instead a derisory form of federal riparianism.²⁰⁴ In refusing to recognize the interests of certainty and finality, the Supreme Court jeopardizes the western man’s assertions to water rights and alters what was once stable, placing it into the realm of what Justice White termed “the uncertain and the unknowable.”²⁰⁵

On the brighter side, however, westerners will now deliberately avoid this judicial quagmire.²⁰⁶ The Supreme Court’s apparently inconsistent holdings will provide a stimulus for conflicting parties to engage in alternative dispute resolution.²⁰⁷ Deterred by the unpredictability of the courts and driven by necessity, westerners have already begun to develop new solutions to the problems embedded in water rights allocation.²⁰⁸ Through cooperation and collabora-

201. *See id.* For statistics regarding the western population surge, *see supra* note 3.

202. WENDY NELSON ESPELAND, *THE STRUGGLE FOR WATER* 4 (1998) (stressing that water is basis for all western development and that all profit depends on water supply).

203. *Id.* at 4-5 (stating “For years, the most coveted assignments for western legislators involved water and public works: the Interior and Insular Affairs Committees, Subcommittees on Irrigation and Reclamation and Public Works, and the biggest prize, the powerful Appropriations Committees.”).

204. For a further discussion of federal riparianism, *see supra* notes 62-96 and accompanying text.

205. *See Arizona II*, 460 U.S. at 623 (asserting Court chose “the practically irrigable acreage standard as a measure which would allow a fixed present determination of future needs for water.”).

206. *See* Mark H. Hunter, *Water War Dries Up Pact, Protects San Luis Farmer, Rancher Rights*, DENVER POST, Mar. 16, 2000, at B1. Ralph Curtis, manager of the Rio Grande Water Conservation District, spoke of the uncertainty created by the Forest Service’s claim for federal reserved water rights, revealing a common western belief. *See id.* Curtis stated, “[Settlement out of court] was a better way to do it. This is good news. We got a settlement without going to court.” *Id.*

207. *See id.*

208. *See id.* Two current examples of alternative resolutions to conflicts over western water rights include settlement outside of court and the establishment of an interstate water bank. *See id.*

tion, westerners will further develop new water policies, combining tradition and reform.²⁰⁹ By reclaiming authority to water management, the westerner will finally be able to maintain the stability and predictability of the appropriative right.

Heather R. Brinton

One long-running water war in Colorado's San Luis Valley finally ended through settlement. *See id.* The agreement, involving water rights in two of Colorado's national forests, was the collaborative effort of federal, state and local officials. *See id.* Statements by the Colorado Attorney General assure that the agreement will protect farmer and rancher rights to the Rio Grande's watershed and save taxpayers millions of dollars by avoiding court battles over the 303 streams in the Gunnison and Rio Grande national forests. *See id.* The Attorney General further stated:

This settlement is the first of its kind in the nation. It provides previously unachieved protection of the watersheds . . . which will help preserve fish and wildlife, riparian ecosystems and public outdoor recreation while also protecting existing water rights in the (San Luis) Valley from the uncertainty created by the Forest Service's claim for federal reserved water rights.

Id.

Westerners are also turning to more short-term flexible arrangements to handle water demand. *See* Van de Wetering and Adler, *supra* note 7, at 33. In the lower Colorado River basin, states and Indian tribes are discussing the establishment of an interstate water bank. *See id.* Water banks allow for the temporary transfer of water rights, "rentals," by current owners who may experience periods of surplus. *See id.* For example, in a particularly rainy year, a farmer may make his surplus water rights—water not necessary for irrigation due to the favorable weather—available to a third party for a one year rental. *See id.* Potential third parties range from hydroelectric power generators to various environmental groups. *See id.*

209. For a further discussion of new water policies, *see supra* notes 207-08 and accompanying text.