In the

Supreme Court of the United States

Nevada Ex Rel Roland D. Westergard, State Engineer

Petitioner

v.

United States Et Al; and Francis Leo Cappaert Et Al.,

Petitioners

v.

United States Et Al

No. 74-1304

No. 74-1107

Washington, D. C.
January 12, 1976

Pages 1 thru 76

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IN THE SUPREME COURT OF THE UNITED STATES

NEVADA EX REL ROLAND D. WESTERGARD, STATE ENGINEER, Petitioner	:	
v.	:	No. 74-1304
UNITED STATES ET AL.; and FRANCIS LEO CAPPAERT ET AL., Petitioners	:	
v.	:	No. 74-1107
UNITED STATES ET AL	:	

Washington, D. C.

Monday January 12, 1976

The above-entitled matter came on for argument at 1:50 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

[Continued]

APPEARANCES:

SAMUEL S. LIONEL, ESQ., 800 First National Bank Building, 302 East Carson Avenue, Las Vegas, Nevada 89101

GEORGE V. ALLISON, ESQ., Special Attorney General of Nevada, 402 North Division Street, Carson City, Nevada 89701

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-1304, Westergard against the United States, consolidated with Cappaert against the United States.

Mr. Lionel, you may proceed when you are ready.

ORAL ARGUMENT OF SAMUEL S. LIONEL, ESQ.

ON BEHALF OF CAPPAERT ET AL

MR. LIONEL: Mr. Chief Justice and may it please the Court:

This case presents dramatic features of both fact and law but it can be decided on a narrow basis.

Factually, this case presents a contest between two endangered species.

On the one hand, the individual farm operator of the United States, whose numbers declined no less than 40 percent between the years 1959 and 1969, and on the other hand, a species of fish known as Cyprinodon diabolis.

Cyprinodon is also known as pupfish and it inhabits the Death Valley area of Nevada and California.

There are many species of pupfish, five of which, in 1970, were declared to be endangered.

Cyprinodon diabolis has a life span of approximately one year and at maturity it is almost one inch in length. Its numbers have been stabilized for

several years now at several hundred.

Legally, this case presents a contest between two disparate rules of law, both formulated by this Court.

The first, which was in effect between the years 1935 and 1955, laid down that the Congress, by the Desert Land Acts, no later than 1877, severed the land and the water in the western arid states and then territories and ceded all jurisdiction over non-navigable water in the public domains to those states and territories.

The other, which was first espoused in 1955 by this Court and later extended and expanded, laid down that when the United States reserved land in the public domain, it could also reserve water if there was intent to reserve water and such intent could be implied.

QUESTION: The first rule of law to which you referred, i.e., that reserving the land, the United States back as in the 19th century, 1877, ceded jurisdiction over non-navigable waters to the states. That means jurisdiction to determine the rights and the waters under state laws. Is that it?

MR. LIONEL: That is correct.

QUESTION: It didn't cede the waters to the states.

MR. LIONEL: It did not. It said it belonged to the public and to be given as provided by the states and under the laws of the several states.

QUESTION: And what public? Are you saying that it also ceded or conveyed or gave up to the federal property?

MR. LIONEL: Well, in the California Power case this Court said that Congress by those acts had severed the land from the water and that the water then would belong to the public to be given out as provided by the several states.

QUESTION: And to what public? The federal public or the population of the state?

MR. LIONEL: No. In other words, that the states had jurisdiction and control over that water and it would be up to the states involved to determine water rights to that water and as pursuant to the laws of those several states.

QUESTION: And prior to 1877, the Federal Government, under your submission or prior, at least to sometime in the 19th century, the Federal Government in the territories had jurisdiction over the land and the water to apply its federal law to the ownership of the land and water and it also, do you concede, had ownership of both the land and the water.

MR. LIONEL: I concede that at some point the Federal Government had ownership of both the land and the water but the California Power case, that doctrine enunciated there said by 1877 at the latest there was a severance of

water and land and jurisdiction ceded to the states. There were a series of desert land acts.

QUESTION: Well, jurisdiction to determine who did own the water. Is that it?

MR. LIONEL: No. Jurisdiction to determine who was entitled to the water.

QUESTION: Well, that's -- who had the water rights?

MR. LIONEL: The rights, beneficial use of that water.

QUESTION: Right. Jurisdiction to determine that, but -- I see -- but no rights in and of themselves except the right to decide. Is that it?

MR. LIONEL: It said it belonged to the public. And to be given out, pursuant to the laws of the several states.

QUESTION: Including the power or the right to pass on claims of the United States.

MR. LIONEL: That's true.

QUESTION: The right to water.

MR. LIONEL: Precisely.

QUESTION: And it repudiated the riparian concept in the west unless it were to be adopted by an individual state.

MR. LIONEL: In substance, yes, but it said that

the states were still free to use whatever the state felt should be used by that state for the water and --

QUESTION: And the fact of the matter is, that the arid western states do not apply the riparian rule. They apply the prior appropriation rule.

MR. LIONEL: Now, in the view of the Cappaerts, the owners of a large farm in Nevada, neither question need be determined but this case can be decided on a more narrow basis by giving consideration to the reservation of public lands here involved and the effect of giving that reservation below and I will show that there are five cumulative reasons why the judgment below does not properly flow from that reservation.

Briefly, in January, 1952 -- and that date is significant and I will refer to it later in several connections, in January, 1952, the President reserved a 40-acre tract of land in order to preserve a pool of water known as the Devil's Hole in Nevada.

The proclamation described that pool as being a remarkable underground one and of outstanding scientific importance and interest. There was nothing in that proclamation about water and yet, on the strength of that proclamation, the Cappaerts have been enjoined from pumping water on 21 square miles, which is effectively their entire farm and as a matter of economics will utterly destroy their

business enterprise. Now, how would such results --

QUESTION: This proclamation did refer to a pool, didn't it?

MR. LIONEL: Yes, sir.

QUESTION: So there is something said about water.

MR. LIONEL: Well, yes, but it refers to it as being a remarkable underground pool. It doesn't say anything about water in there. The word "water" never occurs.

How is this result justified below?

The court said both parts here, "Pumping from this 21 square miles of your farm will endanger these pupfish which by reason of later legislation, legislation many years after the withdrawal have been deemed to be endangered and therefore entitled to special protection.

As I said before, I will show five cumulative reasons why this result, this conclusion, is unjustified and wrong.

First, the terms of the proclamation do not support the effect given to it below. That proclamation's text appears on pages C-1 to C-3 in the Cappaert's petition for certiorari. That is a small, very blue book.

The proclamation reserves 40 acres containing this pool.

It explains why the pool, known as Devil's Hole,

is of remarkable scientific importance and interest. It doesn't say that about the pupfish.

The proclamation states that the pool should be afforded special protection. It doesn't say that about the pupfish.

The pupfish are referred to only in the fourth of five preambles and then only as further confirming geologic evidence of the importance of the pool.

Now, I stress --

QUESTION: Mr. Lionel --

MR. LIONEL: Yes, sir.

QUESTION: If your clients pump water, that will diminish the pool. Everybody agrees on that, don't they?

MR. LIONEL: The level of the water in the pool, yes, sir.

QUESTION: And that broad language in there about this great pool, it would be eventually destroyed, wouldn't it?

MR. LIONEL: Well, the pool is of great depth. No one knows the depth. They know it runs more than 200 feet.

QUESTION: Well, it would interfere with it.

MR. LIONEL: Interfere?

QUESTION: With the pool.

MR. LIONEL: Only -- well, the level of the

water fluctuates every day by reason of various things.

QUESTION: Well, it would take water out of the pool.

MR. LIONEL: It does not take water out of the pool. It is only for hydraulic reasons that the pumping of wells on the Cappaert's property affects the level of that water. We are not taking any water out of that pool.

The Cappaerts pump water under their own land.

QUESTION: Well, if it doesn't affect the pool, what is the government complaining about?

MR. LIONEL: Well --

QUESTION: The government is complaining because it will affect the pool.

MR. LIONEL: It will affect the water level because of the --

QUESTION: Isn't that agreed on?

MR. LIONEL: -- hydraulic relationship between our wells and --

QUESTION: I don't care whether it is hydraulic or biological, it would take out the water. Don't we all agree on that?

MR. LIONEL: I will not agree it will take out the water. It -- the effect of our pumping will be to reduce the level but our pumping is not reaching their water.

QUESTION: We agree it will reduce the level of

the pool.

MR. LIONEL: Yes, sir. Yes, sir.

I stress geologic evidence because there is nothing in that proclamation saying that the fish are biological, zoological, or icthyologic evidence of any kind.

There is nothing in the proclamation saying that the pupfish are of scientific importance, other than as being confirming such geologic evidence. There is nothing in that proclamation which says that the pupfish warrant preservation and yet the denial of the Cappaerts' rights to pump on 21 square miles rested on that proclamation.

I come now to the second reason why the judgment below is wrong and that is because it involves judicial ex post facto action.

As I stated before, the proclamation dates from January, 1952 and yet the first Act of Congress providing for endangered species did not come into being until October, 1966, 14 and a half years later and it was not until October of 1970 that these pupfish were declared endangered species.

That was 18 years and nine months after this proclamation, which was construed below to warrant the destruction of the Cappaerts ranch and all without compensation.

QUESTION: When did the Cappaerts begin to

acquire their property?

MR. LIONEL: They started farming there in 1967. They acquired it shortly before.

QUESTION: '67?

MR. LIONEL: 1967 and approximately half the land was acquired in exchange with the government in 1969 -- the Cappaerts acquired other land which they traded to the government. At the time they traded it, in determining the value of the land being acquired from the government as part of their ranch, it was predicated on the basis that the Cappaerts would be able to pump water.

QUESTION: I suppose what you really want is for the government to condemn this interest if the government wants it.

MR. LIONEL: That is an obvious way. As a matter of fact, the implied reservation doctrine has often been called a financial doctrine that enables the government under that doctrine to acquire water from people and not pay for it.

QUESTION: On the expectation of the Cappaerts, the findings of the district court and the court of appeals are against you, are they not, insofar as any representation by the government were concerned?

MR. LIONEL: We do not argue estoppel in this Court. We did below.

All of the endangered species provides for condemnation of lands required to preserve endangered species. It provides for the condemnation of land, land rights, interest in lands, and, in 1973, with respect to water there can be condemnation.

I turn now to a third reason why the judgment below is wrong and that stems from the legislation on which the withdrawal effected by the proclamation rested.

The sole authority cited in the proclamation is the 1906 Act for the Preservation of American Antiquities. That authorizes a reservation of water -- excuse me.

That authorized a reservation of land in certain instances to become national monuments. It does not authorize withdrawal or reservation of water.

The history of that act -- the legislative history, and this is voluminous, demonstrates that it was sponsored by a consortium of archeological societies that were seeking congressional approval for the preservation and gathering of these artifacts and objects of antiquities which were then being uncovered in the southwestern part of the United States.

QUESTION: Mr. Lionel, are you suggesting that the 1906 authorization would not be broad enough to undertake the preservation of anything except land, as such?

MR. LIONEL: Precisely.

QUESTION: What about something like Crater Lake, which is a unique lake somewhere out in that part of the country. Couldn't they preserve Crater Lake under that set of statutory authorizations?

MR. LIONEL: I am not prepared to say they could. There may be -- there must be other authority for the Federal Government to do it but clearly, the statute is not for the purpose of preserving any --

QUESTION: The 1906 act didn't say real estate antiquities or anything of that kind, did it?

MR. LIONEL: Well, I am not arguing at this point that the preservation of Devil's Hole would not be justified under the 1906 act. My point is that the 1906 act would not authorize the reservation of land and the reservation of water under the methodic reservation doctrine because of the fish in there and that is the government's contention in this case.

There is nothing in the act which deals with the fishes.

QUESTION: Well, is it your position that the fish are not an object of historic or scientific interest?

MR. LIONEL: That is correct.

QUESTION: Within the meaning of the statute, of course.

MR. LIONEL: Within the meaning of the 1906 act

because the entire tenor of that act is to deal with artifacts, prehistoric artifacts. Indeed, the title of that act, the Act for the Preservation of American Antiquities so indicates. The act provides for the gathering of these artifacts and placing them in museums for permanent preservation and the Cappaerts ask, how does one place in a public museum for permanent preservation a fish with a life span of less than one year?

QUESTION: If they had located a dead dinosaur, they could have reserved the area, but not a live dinosaur?

MR. LIONEL: If one could say that it was an artifact, I don't think so. I think an artifact is probably man-made. I would say that someone could quibble that the 1906 act could authorize the creation of a national monument to preserve that.

QUESTION: Well, the reservation of Grand Canyon, wasn't that based on the 1906 act?

MR. LIONEL: Yes, it was, and that is Cameron at 252nd U.S., of which I am aware.

Now, in that case, this Court held that Grand Canyon was an object of scientific importance and interest.

QUESTION: Surely it is not man-made.

MR. LIONEL: Surely it is not. I agree with that and I say that there is nothing in that opinion indicating that this Court's attention was directed to the

legislative history of the 1906 act and I have since read the briefs in that case and can represent that there was nothing in the briefs that called the Court's attention to the history of the 1906 act in Cameron.

But the important thing is that in Cameron, this Court was not concerned with whether or not the act should be used with respect to living creatures. It was purely natural phenomenon.

Now, the fourth reason why this judgment is wrong also rests on the terms of the authorizing statute; the House Report, the debate and, indeed, the express terms of the act provide that withdrawals of land under it shall be limited to the smallest area compatible with the proper care and maintenance of the objects to be protected.

Let's see what we have here.

On the one hand we have a 40-acre tract reserved. As a matter of interest, that is protected by barb wire and only VIP's in the zoological world are allowed to go to Devil's Hole and see what is there, providing the National Park Service will permit them entry.

And on the pther hand, the consequence of that 40-acre reservation of land, the Cappaerts have been enjoined effectively from pumping on 21 square miles of the land.

Now, thus far, I have restricted myself from speaking about the 21 square miles where the Cappaerts have

been enjoined from pumping but based on the expert testimony in this record, pumping in an area of 4,500 square miles, the size of the groundwater basis here involved, called an aquifer, will in time affect the level of the water in Devil's Hole.

No one knows when. No one knows where but this water just percolates and seeps under the earth in no defined paths, little droplets going under the ground and it is shown by the record, experts are unable to predict.

As a matter of fact, the government expert said here, if we had two wells, one adjacent to the other, pumping under one may affect the level of the water in Devil's Hole. Pumping in the other may not.

Thus, if the decision below is affirmed, this 40-acre withdrawal may control pumping in an area of 4,500 square miles. And that is the land area of the State of Connecticut.

Now, the Cappaerts do not have to conjure up possibilities, probabilities, imaginable horribles. The amici do that, and counsel for the State of Nevada will explain to this Court the difficulties that the state will have in administering their water laws if this case is affirmed.

It is enough for the Cappaerts to point to the final decree in this case which -- in which they have been

on
enjoined from pumping/21 square miles in reliance of a withdrawal of only 40 acres and that, based on the authority of a a statute which says, withdrawal from the public domain shall be of the smallest parcel of land possible.

How great a perversion of legislative or congressional intent can we have?

The Cappaerts say that Congress did not authorize the wide-ranging impairment of ownership effected and approved below.

I come now to the fifth reason why the judgment below is wrong and that is the failure of the court below to consider the proclamation in its setting.

QUESTION: To do what?

MR. LIONEL: Consider the proclamation in its setting -- legal setting.

As our brief shows, the law of this Court in 1935 and 1955, the jurisdiction over non-navigable water in the west had been ceded to the several states and territories.

It was not until 1955 in the Federal Power Commission versus Oregon that any question arises with respect to the section of jurisdiction over that water.

And it was not until 1963 in Arizona versus California that the implied doctrine with respect to -- implied reservations doctrine with respect to the federal enclaves was first announced and even in that case it dealt

with navigable waters, the Colorado River, not non-navigable water.

Now, as a Nevada citizen -- and Nevada is an arid land state indeed -- I hope that this Court will reaffirm the earlier doctrine and sharply limit the applied reservation doctrine.

But as counsel for the Cappaerts, I need not and I do not go that far. It would be sufficient if this Court would view that controlling proclamation in the legal climate which existed at the time it was signed and consider it in the light of the law as it was at that time and as everyone understood the law to be.

As we show in the brief, the severance doctrine was first comprehensively formulated by this Court in 1935. It was reaffirmed in Ickes versus Fox in 1937. Both --

QUESTION: What about the Indian Reservation cases?

MR. LIONEL: We say the Indian -- those are Indian cases and we think they should not be considered in the same light.

QUESTION: Well, I don't blame you for not wanting to consider them.

MR. LIONEL: Well, let me tell you why, Mr. Justice White. We think the Indians are wards of the Court, as this Court has said so many times and if the

government wants to reserve land, it should reserve water if it does have power to do so.

QUESTION: Well, what about the Indian Reservation cases?

MR. LIONEL: The Indian Reservation cases came into being because of treaties made by the government with the Indians.

QUESTION: I know, but nevertheless, you set aside the land and all of a sudden the Federal Government claims some water rights in connection with it and it is held that they intended to do so when they reserved the reservations.

MR. LIONEL: Because they said it would be unjust and unfair for the government to not --

QUESTION: Well, the case said that, we can't imagine that the government didn't intend to reserve some water because they certainly realized the Indians needed some water to live on.

MR. LIONEL: Now, this proclamation said, we are interested in that -- among other things we are interested in that pool of water.

MR. LIONEL: That is all it said.

QUESTION: Well, but --

MR. LIONEL: In fact, they didn't say they were interested in the pupfish -- it didn't say the pupfish

were entitled to --

QUESTION: I am not to the fish yet. I am to the water and that is what the argument is. We are arguing about the level of water in this case.

And if there weren't any pupfish in it at all, I suppose that it could be argued that under the proclamation, the government was interested in maintaining that pool, which it said was the unique pool.

MR. LIONEL: But there is nothing --

QUESTION: And it wouldn't be there if it disappeared.

MR. LIONEL: Well, there was no authority, we say, under the 1906 --

QUESTION: Well, I understand that argument.

MR. LIONEL: And, of course, we --

QUESTION: You are saying that the first time that anybody ever heard of the reserved water idea was in 1955. I am just suggesting that you had heard of it in the Indian Reservation cases long before that.

MR. LIONEL: Not with respect to a reservation by the government for the government's purposes out of the public domain.

QUESTION: What do you think an Indian Reservation is?

QUESTION: Well, isn't it true, counsel, that in

the Winters case which I guess is the leading Indian Reservation case, there had been an earlier grant by the Indians to the government of a much larger territory and then a grant back of a smaller area as an Indian Reservation.

MR. LIONEL: That is correct.

QUESTION: In the public domain.

MR. LIONEL: Well, it had been Indian land in the public domain, but the larger portion abutted on the water.

QUESTION: So at Devil's Hole, I suppose, it had at some point been Indian Territory.

MR. LIONEL: It might very well have been.

At any rate, both those decisions were unanimous by this Court and they were reaffirmed in later cases and in May of 1951 this Court in Dority versus New Mexico, which it dismissed for lack -- for want of a substantial federal question did so on the basis of the California Power case.

Thus, this Dority case was only eight months prior in time to the date of the proclamation and if the California Power Doctrine was the law of this Court, which it clearly was and everyone understood it to be, jurisdiction over the water in the west had been ceded to the several states and therefore there was no water to reserve and therefore there was no way that the United States or the President of the United States -- President acting for the

United States could have intended to reserve water and intention is the touchstone of the implied reservation doctrine.

QUESTION: Mr. Lionel, I want to be sure I have your position straight. You are saying that in February of 1952, if somebody bought land right outside the 40-acre tract, dug a well in it and drained the water out and reduced the water level within the pool, that would not have been inconsistent with the President's intention.

That is what I understand your argument to be.

MR. LIONEL: Well, I try to differentiate between the pool and pupfish because it is clearly the -- intention was --

QUESTION: No, I am talking about the pool.

MR. LIONEL: -- to preserve the pool.

QUESTION: Yes.

MR. LIONEL: That is not necessarily my position but I say we are only talking --

QUESTION: In other words you say they could have done that in February 1952. They could have drained the water out of the pool if they had stayed outside the 40-acre tract.

That is what I understand your argument to be.

MR. LIONEL: Under the law that is true because of the section of jurisdiction.

QUESTION: Well, do you -- suppose the -- all you are claiming is -- well, you are claiming, at least you are claiming in part that if the government wants water rights it can get them adjudicated, at least in state proceedings.

MR. LIONEL: That is correct.

QUESTION: And you say, in accordance with state law.

MR. LIONEL: That is correct.

QUESTION: And you would argue, apparently, that if the government had always had this pool set aside and had never given it to Arizona -- or Nevada that it wouldn't have qualified as an appropriated use under the state law.

MR. LIONEL: Well, the state would have a right to say that they could have water, that that may be a beneficial use because of it being a natural phenomenon.

QUESTION: But you would say that at least it would be determined by state law and not the federal law.

MR. LIONEL: That's correct.

QUESTION: That is your fundamental issue.

MR. LIONEL: That's right, Mr. Justice.

QUESTION: Wouldn't you qualify your answer to Mr. Justice Stevens' question as to whether they could pump right outside the pool boundaries by saying if the law of Nevada permitted them to do that.

MR. LIONEL: Clearly and the law of Nevada would not grant a permit for someone to drill and pump if this would affect the beneficial use by someone else and that is one of the problems which will arise by an affirmance of this case, as will be shown by Counsel for the State of Nevada.

MR. CHIEF JUSTICE BURGER: Mr. Lionel, if you were planning on sharing your time with your colleague, you have used a lot of his time up all ready.

MR. LIONEL: I have 30 minutes. He has 15 minutes.

I note that I can reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Mr. Allison.

ORAL ARGUMENT OF GEORGE V. ALLISON, ESQ.

ON BEHALF OF NEVADA

MR. ALLISON: Mr. Chief Justice and may it please the Court:

As it has been indicated, I am representing the State of Nevada and I think the assertion by the United States Government that Nevada's concern in this, and I think the concern of several western states, is indicated by the briefs that were filed in an amicus capacity, is the substantially broader in our eyes than the conflict between the rancher and the pupfish at this time and that there is a substantial conflict, not only a present conflict, but a

real potential for a future conflict and that conflict is the state and federal conflict in the use and management of water in all the western states, particularly a state like Nevada but there are many others that fall in the same category.

Nevada happens to be the driest of all the states. It gets less than nine inches of rain but I think Arizona and many of the other states qualify.

QUESTION: Mr. Allison, would you expand on that a little bit? It is difficult for me to see why the states are so exercised in this case. Is it because of the Taylor Grazing Act?

MR. ALLISON: No. Well, not necessarily. The principle, historically, is that the states have controlled the determination of water rights for use in the particular states and the principle that has evolved is -- and that includes the United States Government, as I think one of the justices indicated earlier, except in the case where Congress expressly indicated otherwise.

Everything else was left historically to the prerogative of the states.

Now, this principle resulted in a great deal of certainty in determining water rights. The certainty in determining the water rights in most states was probably -- well probably still is -- not then but is now the single

most important factor in the development, the economic development of those states and the certainty only came because the states were allowed to determine those rights unless Congress expressly indicated otherwise.

Then when you insert, not an expression of Congress but an implied right considered at a later time than the reservation, right away you begin to raise havoc with the certainty that the states have established in determining those rights. It is at this point that the states become concerned because the reservation position of the government, as I understand it, is the mere act of reserving the land -- nothing further, no consideration of the circumstances, the need, the extent of injury, the importance of the water, the mere act of reserving the land automatically establishes the priority for the water right.

Now, that water right may not be asserted by the United States Government for 20 years in the future. In the meantime, the State of Nevada is granting rights to many adjacent property owners.

So they have been using these adjacent water rights for 20 years. Suddenly 20 years later, the government says, "We have a water right and our priority right is the date we reserved it, even though at that time we didn't know we wanted it." And that is what is causing this concern and I think the magnitude of that is amplified, if

I might just quote one or two short statistics, is that in the State of Nevada, for example, and in fact, I think, in 11 of the western states there are, 61 percent of the land in 11 of the western states that is federally-reserved land.

Right now in the State of Nevada, you cannot have a major ranch unless it is either next to or part of federally-reserved land. You simply can't have it because there is so much federally-reserved land -- 76 percent of the State of Nevada is federally-reserved land.

All major sources of water in the State of Nevada come from federally-reserved land and that includes underground water which is charged by water from run-off from federally-reserved land and that is why the magnitude of the problem is so severe in Nevada and this is true in all the other states.

QUESTION: I gather from the brief filed in the State of Arizona that the City of Tucson is entirely dependent on underground water, pumped water, not just for irrigation but for domestic water use.

MR. ALLISON: That is my understanding of Arizona's position and I assume that is true. I don't find that hard to believe because if the Justices are familiar with the State of Nevada, the three population -- or I should say two and a half population centers that we have are located in areas where there is access to water and you

are right next to federally-reserved land and that underground water is just becoming a major source of water.

There simply isn't enough other water and there really isn't enough underground water, but without that, there is no other development in the state and I think Arizona is essentially in the same problem. So it is not just farmers.

QUESTION: Give me another example where a so-called prior reserved right would seriously interfere with the states.

MR. ALLISON: You mean --

QUESTION: Besides this case. I can understand how it operates in this case but just -- usually setting aside a national forest or something like that usually doesn't imply reserving any water other than what falls on it and runs off.

MR. ALLISON: I might briefly give you an example and I don't know that I am quoting the facts of this case. This is an existing case in the State Engineer's Office and there are some other ramifications to it so I don't pretend I know all the facts but there is a river, the Carson River, that runs out of the Sierras, which is federally-reserved forest. That river runs down through and into a water-holding area in Lahaunton.

Carson City, which is our capital, does not have

any other source of water at the moment and there is a moratorium on building in Carson City.

As a result of that, the city council in Carson City went to the next county to try to get water from wells. The wells happen to be next to the Carson River. The government has protested that and if you track it out, the only legal basis they have to protest that is that the river is going to go down because Carson City is pumping water to supply its people and the basis for that is that the Carson River comes off the federally-reserved land and therefore they have the right, the priority use of that and they can control --

QUESTION: For what?

MR. ALLISON: Because they own the land from which the water comes because they reserved the forest.

QUESTION: You mean they are claiming they have the rights on the water -- the downstream water?

MR. ALLISON: I don't want to get into the position of saying that I know the government's argument. You asked me if I could cite --

QUESTION: Well, anyway, you are in another argument out in your state with the government over reserved rights.

MR. ALLISON: Yes, we have a very clear argument on surface water in the Pyramid Lake Indian case. There are

13,000 defendants in that case, an Indian case. It is a very real problem and it is in the district court level right now.

I hope I didn't misstate the Government's position in that but I think it applies the logic that is there.

It is not Nevada's position that there isn't an implied right. That is not what we are saying. What we are saying is, is that the doctrine of an implied reserve right came out of the Winter case. It came out of an Indian case and in that case they just didn't say, Congress must have intended.

In that particular case, this Court weighed the competing interests and that is how the doctrine arose. They looked at what harm would come to the other users on the river, on the surface stream. They just didn't automatically say, okay, there's an implied -- Congress must have intended that.

And what we are really saying is that the Federal Government should have the burden of establishing very carefully the importance of the need, the extent of injury, all the competing interests that go into it before we imply an intent.

QUESTION: In what forum?

MR. ALLISON: In what forum? Our position is that that should be in the initial forum in the state

the
procedure that is already/existing, established means of --

QUESTION: You mean the state court.

MR. ALLISON: In our state it means an administrative procedure first. Subject, of course --

QUESTION: Reviewable where?

MR. ALLISON: In a federal court because it is a federal question and I think this was consistent with this Court's position in the Eagle case that came out of Colorado.

QUESTION: This case was in the Federal District Court --

MR. ALLISON: Yes, sir.

QUESTION: -- under what head of jurisdiction? Because the plaintiff was the United States?

MR. ALLISON: Yes.

QUESTION: And only for that -- that was the basis of the jurisdiction.

MR. ALLISON: And they filed --

QUESTION: Well, then, would it be your position that, while clearly there was a statutory jurisdictional basis for the federal court to take the case, that there was incumbent upon the federal court to apply Nevada law?

That, I suppose, would be what follows from your brother's argument.

MR. ALLISON: No, no, no --

QUESTION: As far as the cession of jurisdiction over these waters back in the 19th century to the State of Nevada to determine under its law that even the federal court should, by analogy to an area, Railroad against Tompkins kind of a situation would have a duty to apply Nevada law. Is that your point?

MR. ALLISON: No, sir, my point is that there are really three -- Nevada recognizes the implied reservation doctrine, whatever kind of law we want to call that, state or federal law. We have to grant water rights to our citizens by the appropriative means but that doesn't mean that the State Engineer in the administrative procedure in the State of Nevada cannot also recognize an implied right if the circumstances warrant it and that is all we are asking that the states have the opportunity to do, that in the existing system of which all other water rights are determined, that they have the opportunity initially to --

QUESTION: To adjudicate the extending of the federal right.

MR. ALLISON: Subject to review in the federal courts.

QUESTION: Well, when you say the federal courts, though, what is the normal procedure for review of your engineer's decision?

MR. ALLISON: It goes to the district court.

QUESTION: Yes, and then the Supreme Court of Nevada.

MR. ALLISON: Yes.

QUESTION: So don't you really mean the only federal court that would be reviewing it would be this Court on certiorari.

MR. ALLISON: Well, yes, really. Yes.

Yes, it would be a direct review by this Court on certiorari. That is right.

QUESTION: But here this was in a federal district court by reason of a very explicit jurisdictional statute. Isn't that right? The United States was the Plaintiff.

MR. ALLISON: Yes, well, the argument that we have expressed in that particular case is because -- and when we expressed it in the district court is -- at that point, even conceding there is concurrent jurisdiction in the sense that they did have jurisdiction because it was the Federal Government, in this particular case, of course, you have the additional problem of the fact that they did appear in an administrative proceedings and not as alluded to in their brief. They just didn't appear as a friend of the engineer.

They appeared as strongly as they could and that, if for no other reason in this particular place -- particular case, the res judicata principle or the collateral estoppel principle should be applied. But --

QUESTION: Was the United States a party?

MR. ALLISON: Well, they were a party in --

QUESTION: That's easy. Yes or no. You know what a party means.

MR. ALLISON: Mr. Justice, I don't think it is that easy because I don't think you say -- they appeared, they cross-examined, they presented witness, they orally argued opening. They orally argued closing.

I think that is a party. Every time I appear as a party, that is all the things that I do. But they claim they were not a party.

QUESTION: Well, what is the title of the case?

MR. ALLISON: What was the title of the case?

QUESTION: Yes.

MR. ALLISON: Well, the way it arose was that the Cappaerts filed an application to appropriate underground water. At the time that that was filed, the government filed protest on the basis that that pumping would reduce the water level in Devil's Hole.

Pursuant to our procedure, which is an administrative procedure, a hearing was set, a formal hearing at which the state engineer presided.

At that time, the government presented their evidence, everything they had -- presented witnesses, presented the proclamation --

QUESTION: Well, whose side were they on?

MR. ALLISON: They were on the government's side.

QUESTION: So it was a three-prong --

QUESTION: Did the government -- excuse me --

MR. ALLISON: The State of Nevada, the United States Government and Cappaert.

QUESTION: What was that third party, the beneficiary or something?

I mean, I don't know the three-party suit. I get in trouble with three parties.

MR. ALLISON: It is not a suit. I think the question is, the real party in interest, if you have a vital interest in the outcome of the proceedings.

QUESTION: But this was not a regular court action.

MR. ALLISON: It definitely was not a court action. It was an administrative hearing but the results were the same.

QUESTION: So they were a party as much as anybody else.

MR. ALLISON: The United States Government was as much of a party as anybody else. No question about that.

QUESTION: That is what I wanted to know.

MR. ALLISON: In my mind.

QUESTION: Mr. Allison, did the government take

the position that they opposed the reduction in the water level because that was a factor that should be weighed in deciding whether or not to grant the permits, or did they take the position that legally they had a right to object because they owned the water, in effect?

MR. ALLISON: I think they didn't quite go so far as to advocate, at least the Solicitor General representative didn't go quite so far as to advocate that that was a legal right. They felt that it was a factor that should be considered by the State Engineer and they at that time didn't have sufficient evidence and said, well, we would like you to wait.

However, they did introduce the proclamation and by inference, by reading the transcript, I think they alluded to the fact that that was their legal basis and that, really, it was their right -- although the government counsel didn't make an extended argument that way.

QUESTION: Did the engineer rule on that issue, the legal issue?

MR. ALLISON: He ruled to the extent that he indicated that there was reference to a federal right and in his opinion there was not sufficient interest to establish one. That was three or four lines in his decision.

QUESTION: Mr. Allison, was the government a party in the sense that would have enabled it to take an

appeal to the Nevada court from the administrative decision of the engineer?

Could the government have gone up within your judicial system from that administrative proceedings?

MR. ALLISON: Yes, I think they could have. Yes, I think they could have. I am not sure that I can quote you a precedent for that but I don't know of any reason not. I can't pick a case out right now.

QUESTION: Any party at interest often may be allowed to appeal from an administrative tribunal's decision.

MR. ALLISON: Yes, sir. I assume again that to be consistent they could then come directly to the United States even then. I think all the machinery is there right now, without even a ruling from this Court. They won't abide by it.

QUESTION: Mr. Allison, may I be sure about your position? This balancing of the respective interests, whatever they may be --

MR. ALLISON: Yes, sir.

QUESTION: -- that you say is a technique that should be applied --

MR. ALLISON: That is what came out of the Winters case.

QUESTION: Yes, and that is what you say should

have happened in the first instance in your administrative proceeding.

MR. ALLISON: Yes.

QUESTION: Or, if the United States was properly in the United States District Court, as apparently it was and they had a jurisdiction as the one that brought the suit, the same technique would be the governing one to determine these respective rights. Is that it?

MR. ALLISON: Yes, sir.

QUESTION: Now, what is the law?

MR. ALLISON: Well, the law --

QUESTION: Is it state law?

MR. ALLISON: Well, the law, in my opinion, is the Winters case set down by this Court and that is an implied right and an implied right in its very nature involves weighing th circumstances to find what they intended.

That is the law. It is not a state view.

QUESTION: I know, but the principles, whether they are applied in your state tribunals or courts or in the federal court are what? Federal principles under Winters or state principles?

MR. ALLISON: I don't know if it makes any difference whether they call it a federal principle or a state principle. It is not the system that we use under the

appropriation method. It is not the riparian doctrine and as I indicated in my brief, in my opinion, it is a third way that has been set forth by this Court to establish a water right.

QUESTION: And I suppose it has been imposed upon state law, has it not? As an addition or a --

MR. ALLISON: Yes, right. It is another way that it --

QUESTION: It is an addition to your prior appropriation, right?

MR. ALLISON: That is right.

QUESTION: It's a qualification of it, or whatever --

MR. ALLISON: It's an addition. Now, instead of one way, we have two ways in the State of Nevada to establish a water right.

QUESTION: Mr. Allison, before you sit down, does your state, Nevada, in its administrative proceedings or anything else make any distinction between surface water and underground water?

MR. ALLISON: No, not really in the procedures that they go about it because the underground water refers back to the surface water statute and the procedure of finding the application and getting the determination by the state engineer is essentially the same.

There is a difference to some extent in that once

you receive a permit you also have to establish a period of beneficial use and -- in other words, you have to put it to use to determine the amount that you are entitled to. You just don't get it and not use it at all.

QUESTION: Well, that is an old principle, isn't it?

MR. ALLISON: Yes.

QUESTION: Of western water rights.

MR. ALLISON: Right.

QUESTION: But in other words, then, you almost concede the hydrological, if that is the right word, connection between surface water and underground water.

MR. ALLISON: Well, no, not for purposes of the implied reservation doctrine. I concede only that the hydrologists tell me that their cycle, that they are all interrelated but I know that you cannot determine from the surface where the underground water is and that you can't determine -- like, as an example in this case, I am quite confident that President Truman or none of the people that were involved in invoking this proclamation were anywheres near aware of the connection of the underground water in that basin and so it is very difficult to understand how you can go back and say, well, they must have intended to do certain things, if you can't determine from the surface where it is.

Now, it seems to me that there is a solution to that. That is not an impossible burden. Certainly we have enough technology that the government can determine, before they make a reservation, as to what the existence or non-existence of ground water is and what the connections are, and all we are saying is that that is one burden that they should meet before they can a imply an intent.

QUESTION: You are not asking us to overturn the Oregon case or the Winters case. You accept the doctrine in general of the implied reservation of water rights.

MR. ALLISON: We -- well --

QUESTION: That is overlaid as a matter of federal law on state adjudications.

MR. ALLISON: You asked me two questions. I am not asking you to -- we accept the Winters doctrine and the implied reservation doctrine as an addition to creating a right in the State of Nevada.

The Pelton Dam case, in my opinion, is distinguishable and their reason on the reserve right I don't think was complete and I think that case could have been cited --

QUESTION: Your colleague, here, suggests that this whole issue should be determined as a matter of state law entirely and -- but I gather that you seem to accept the implied reservation doctrine in some form as a matter of

federal law because you have read the cases.

MR. ALLISON: Well, I accept it because --

QUESTION: The cases say so.

MR. ALLISON: Yes.

QUESTION: Mr. Allison, one more question and maybe I could ask your opposition this.

In the U.S. Code, section 431, following it is a list of national monuments and the proclamations under which they were established --

MR. ALLISON: Yes.

QUESTION: -- I've reviewed it several times. I do not find this particular monument listed. Is this of any significance? You are not raising any question that this is not a national monument?

MR. ALLISON: No. From the State of Nevada's standpoint I am not and I did not understand that that was the question in the case.

QUESTION: I don't think it is, but I was curious and maybe Mr. Randolph can answer my question.

MR. ALLISON: We are definitely not. Yes, I think that we have always assumed that it was a national monument.

MR. CHIEF JUSTICE BURGER: Mr. Randolph.

We'll try to let you complete today.

MR. RANDOLPH: Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Your friends have used their time up completely.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, ESQ.

ON BEHALF OF UNITED STATES ET AL

MR. RANDOLPH: Mr. Chief Justice and may it please the Court:

The United States brought this suit to prevent the Cappaerts from extinguishing the world's only population of Cyprinodon diabolis, the Devil's Hole pupfish.

We contend in this case that Devil's Hole National Monument was established in 1952 to protect the pool that has been referred to and the fish in it, that the water right of the United States is measured by reference to that purpose and that the Cappaert's pumping of water must be regulated to insure that they do not interfere with that United States' water right, a federal right.

I think I'll tell the Court a little bit about the facts of this case and particularly the circumstances that exist at Devil's Hole.

At the center of this case is an anomaly, a fish that lives in the desert. The area involved, Southern Nevada near the California border, not very far from Death Valley, was not always once the desolate place that it is now.

Thirty thousand years ago it was cool and wet,

streams, lakes, rivers abounded and in fact, Death Valley itself was a lake more than 100 miles long, more than 600 feet deep.

This was the home of the ancestors of the pupfish that live in Devil's Hole today.

But the climate gradually changed. The glaciers to the North receded. The land dried and the animals of the area, which included the mastodon, the sabretooth tiger, all disappeared.

Somehow, however, the pupfish managed to survive, taking refuge in what one writer has called, "tiny islands of water in a sea of sand."

Of the four remaining species of Cyprinodon, the Devil's Hole pupfish has been isolated the longest. The scientists that testified in this case estimate that these fish entered Devil's Hole approximately 10,000 years ago.

Between then and now, this tiny fish, which, as Mr. Lionel pointed out, is but one inch long, has performed nothing short of an evolutionary miracle, evolving to its present condition today, adapting to extreme circumstances in what is, evolutionary-wise, a blink of the eye.

The pool in which Cyprinodon diabolis now resides is the smallest sole natural habitat of any species on the face of the earth. The fish themselves make up the smallest population of species of fish known to man. The surface of

this pool which we have been talking about measures 10 feet by 65 feet. It is open to the sky, but it is 50 feet below the surrounding land surface. All but the western end is bordered by sheer rock.

The water temperature is a constant 92 degrees farenheit year-round.

The entire structure of Devil's Hole and the pool was once a limestone cavern. The geologists testified that eons ago the roof of the cavern collapsed, perhaps by the dissolving action of the water inside, sending rocks down to the bottom, as Mr. Lionel said, more than 200 feet below. Divers have gone down to at least 200 feet in Devil's Hole but no one knows the exact depth.

But one piece of rock, not very much larger than this table here, about nine feet wide at its widest and perhaps 16 feet long, wedged below the surface of the pool to form a natural shelf. In the summer months, sunlight reaches this shelf and about one-half of the pool itself, only for a few hours a day, allowing algae and other small organisms to grow there.

In the winter there are only shadows and the algae dies. The pupfish, as the district court specifically found, are totally dependent on this natural shelf. They spawn there. They feed there and when the algae dies, a great part of the pupfish population dies with it, only,

hopefully, to recover again the following spring.

It is a precarious existence, but the pupfish have been successful at it for 10,000 years.

These fish, a remarkable fish, are able to tolerate extreme temperature changes and ranges in salinity up to six times that of seawater but ever since the first study of them began in 1936 they have been subjects of intense scientific interest.

There are dozens of studies in this record, either in the record in this case or as referred to by the witnesses in this case and all of them relating to the pupfish.

QUESTION: What do they do, if anything, for humanity, Mr. Randolph?

MR. RANDOLPH: Let me read what Dr. Pister, who is one of the biologists, testified, Mr. Justice. It is on page 157 of the Appendix I am reading from now;

"As a research potential," he says, "these have then --" he is talking about the fish, "have an almost unlimited future. Right now I know of any number of graduate students who would just literally give anything to have an adequate number of fish to use for experiments at the doctoral level, to go through and do research papers."

QUESTION: Well, what about?

You know, I mean the fact that a number of graduates may be interested in the archeological history of

them may be a perfectly useful human occupation, but is there anything else?

MR. RANDOLPH: Yes. Let me continue.

QUESTION: Okay.

MR. RANDOLPH: At the bottom, at page 157, he talks philosophically -- I am not going to repeat that -- but at the bottom of page 157 he says, "If this species does become extinct, and heaven forbid! we can never bring it back for all the expertise we have developed ecologically."

Prior to that, on page 157, he says, "These species, these little animals, they may very well hold the key to our future as human beings as they learn to adapt to the changes in their own habitat, just as we are having to do for our own polluted waters, our own smog and so on."

QUESTION: It doesn't sound like a very rosy future, each of us one inch long and living in 92 degrees water and dying within a year.

MR. RANDOLPH: Well, this case is about the extinction of the species of fish. I notice at one point the testimony of Mr. Lionel said, "Well, isn't it true, Doctor --" I think it was another doctor, Dr. Deacon, "that these fish will become extinct?" And Dr. Deacon said, "Yes, that is true and so will homo sapiens. What we are talking about here is the acceleration of the process," and I think that is relevant and I think it is relevant on page 158, what

Dr. Pister says, that it is impossible to judge the value of this fish.

There are intense studies going on now, genetic studies, biological studies, studies by fish experts to determine precisely what it is that caused these fish to adjust, unlike any other species in the world.

What they are worth to us in 2072 can't be measured by what we know of them today, he explains.

I don't think any great scientific breakthrough has come from them yet, though.

QUESTION: Mr. Randolph, does the record tell us why the Government reserved 40 acres? I take it the pool is only 65 feet long.

MR. RANDOLPH: I think the surrounding area of the rocks and everything -- the directive in the act was to reserve the smallest area consistent with maintaining it. If you reserved just the pool you obviously couldn't put a fence around it and this was obviously just a discretionary judgment by the President, as he had the authority to do, so I don't know.

QUESTION: Is it conceivable, to take up Mr. Lionel's argument, that this was the area from which the President intended to exclude walls, thinking this would be sufficient to protect the pool?

MR. RANDOLPH:' No, I don't think that is

conceivable. And I'll explain why later in my argument.

Because of their vulnerability, there have been numerous attempts to raise the pupfish to transplant them. Between 1947 and 1972, there were ten attempts. All of them failed. There is a reference in the record here to a later attempt at Hoover Dam which at one point looked like it might work, but all the scientists testified that they could not qualify it as a success.

It started out with 24 pupfish. By the time the case had reached June, 1973 there were 170 pupfish in this small acquarium near Hoover Dam and I noticed when I distributed to the Court the latest report of the Special Master, which has attached to it a report of Dr. Deacon which points out that the pupfish population at Hoover Dam is dwindling. It is now down to 65.

One reason for this is population threshold and I think this is important to this case. The minimum population needed for a species to survive indefinitely, 24 Cyprinodon diabolis, may not be enough and the sceintists so testified. Inbreeding occurs because of the lack of genetic variations.

The passenger pigeon is an example, as one of the biologists testified in this case. Although thousands of them were left after they had been hunted, they were below their minimum population threshold level and despite efforts

to preserve them, they died off.

There was testimony in the record that some scientists believe the blue whale, for example, has reached that point.

The threshold level of Devil's Hole pupfish obviously cannot be known until it is too late.

The testimony in the record -- some scientists believe that it was somewhere between 100 and 200 fish.

As I stated earlier, the natural shelf at Devil's Hole is crucial to the existence of the pupfish and this is, of course, essential that it be covered with water.

Despite their remarkable ability to adapt to changing circumstances, the one thing the pupfish has not learned to adapt to is the absence of water.

At the normal level, the shelf is fully submerged. It is 1.2 feet below a copper washer which is used as a marker and was installed by the National Park Service in 1962.

The Cappaerts began pumping water in 1968. Yearly, they were taking out of this area 2-billion,281-million gallons of water for their ranch in the desert. The evidence shows, incidentally, that some but not all of their wells are hydraulically connected with Devil's Hole.

As they pumped over the years, the water level in Devil's Hole dropped and in turn the natural shelf began to

be exposed. In 1970, the natural shelf was 46 percent covered although it had been 100 percent before the pumping. By 1971, the shelf became only 21 percent covered with water.

By June of 1972, when the first hearing of this case was held, the natural shelf was covered only 10 to 15 percent with water.

The usual summer population of pupfish at Devil's Hole is about 700. In 1961 it reached a high between June -- in June between 200 and 300 fish, less than half of that that had been in existence before the pumping started. It did slightly better in 1972, going up to about 400 but I notice in the latest Special Master's Report that is before the Court now that last year in 1975, the highest the pupfish population reached was but 294.

The evidence shows therefore, and the district court found that it is necessary to maintain the water level at Devil's Hole until it covers the shelf, that is three feet below the proper marker.

This is the only way to have a continuing, viable population there and that is what the district court ordered.

Now, Mr. Lionel in his argument talked about being prevented from pumping on 21 square miles of his ranch. That is not accurate.

Number one, with respect to the wells that were

under the injunction in this case, he is not prevented from pumping. They are only pumping -- their pumping has to be regulated so they do not drop the water level between 3.0 feet.

Mr. Lionel said in his opening statement that -- and I quoted this -- that the injunction in this case utterly destroys his business enterprise. There is no evidence whatsoever in the record to that effect.

QUESTION: But given the water table, certainly that requirement could be a proscription against pumping if the water table gets low enough.

MR. RANDOLPH: I would refer you, Mr. Justice Rehnquist, to the Special Master's reports, one of which I filed, which shows the hours of pumping from the wells at the Cappaerts ranch. It is not a proscription against pumping and I might point out, while I am talking about this, that some of the wells on the ranch are not even covered by the injunction.

The reason is that the hydrologist who testified for the Federal Government in this case said they were not hydraulically connected with Devil's Hole, even though they were but a few miles from Devil's Hole.

QUESTION: Well, supposing Mr. Cappaert turns on those pumps that are covered by the injunction and the Special Master learns that the water in the pool holding the fish is

down below the three-foot mark. Then how is the mandate or the injunction carried out?

MR. RANDOLPH: Well, he has to stop pumping until the water level recovers.

QUESTION: And if it doesn't recover for several weeks, that is a proscription against pumping for those several weeks, isn't it?

MR. RANDOLPH: I am talking on a yearly basis. Some days he may not be able to pump. On other days he may be able to pump.

QUESTION: Well, and if it is a critical time for irrigating a crop, then not being able to pump for several weeks may not be the same as not being able to pump all year.

MR. RANDOLPH: Well, that may be. That may be.

But the injunction nevertheless does not say, Mr. Cappaert -- incidentally, the farmers live in Vicksburg, Mississippi and when I refer to them I am not referring to that they are doing the pumping. It is people that run the ranch for them. It doesn't say that they can't pump. It says that you cannot pump to a certain extent. And beyond that, Mr. Lionel refers to 21 square miles of the ranch.

If the Court examines the decree in this case, it doesn't cover the entire ranch. There is a great portion in the northwest section of this ranch that is not covered by the injunction. The reason is that although it is a few miles

away, it is not hydraulically connected with Devil's Hole. It is served by another system in the aquifer and therefore, pumping there will not have any effect on Devil's Hole and while I am on this topic, I notice throughout the brief that Mr. Cappaert filed or that Mr. Lionel filed for Mr. Cappaert and also through the State of Nevada they talk about this 40-acre tract controlling 4,500 square miles of an acquifer that, by reserving just 40 acres, the United States has thereby served authority over 4,500 square miles of an acquifer.

That is not so.

The testimony in the record, and I'll give the Court the citation so I can look them up -- at Appendix page 79, the government's expert talks about the aquifer in this 4,500 square miles and I think, I believe, I am looking at it now -- that Mr. Lionel was cross-eximining on this and he said, "If there were substantial pumping, for example, from the site 40 miles northeast of Devil's Hole -- the groundwater moves from the northeast towards Devil's Hole -- what effect would that have?

Well, over a period of decades there may be a small effect.

Pumping at another site 40 miles away at the rate of 2,000 gallons a minute, which is 28 million gallons a day would, the hydrologist testified -- again -- after a period of time have a slight, perhaps indiscernible effect on the

water level at Devil's Hole.

At page 80 of the Appendix, Lathrop Wells was referred to, 15 miles to the north of Devil's Hole. Testimony was -- unconnected. That is not connected in any way with Devil's Hole. You could pump there all you want.

At page 98 and 99 there is further testimony. I won't go into it but the point is, as the hydrologist testified at page 99 of the Appendix, if you get any considerable distance away from Devil's Hole the amount , and I quote,"the amount of recharge which the basin would pick up between the center of pumping and Devil's Hole would replenish it."

It would not have any kind of discernible effect on Devil's Hole.

We are talking about an area directly involved in this case, an area surrounding Devil's Hole, an area that is just a few miles from it.

QUESTION: Well, did you have a record citation for that statement you just made that it is just an area just a few miles from it?

MR. RANDOLPH: Yes, the map. It is Defendant's exhibit five. It gives the location of the wells that are involved in this case. Now --

QUESTION: How far away are the wells?

MR. RANDOLPH: Sir?

QUESTION: How far away are the wells?

MR. RANDOLPH: Between -- I think two and a half miles is the furthest one, Mr. Justice Stevens.

Now, first of all , let me deal with the first argument that Petitioners make in this case which relates to the Act to Preserve American Antiquities.

An antiquity, incidentally, is something belonging to or dating from a time long past and I think the pupfish qualify for that but as petitioners have indicated, the Devil's Hole National Monument was set aside by President Truman in 1952 and Mr. Justice Blackmun, in that appendix to 43 U.S.C. or 16 U.S.C. 431, does not include all the national monuments. I think it is a sampling and I don't know the system by which they were selected but there are any number that are not in there including, I think, the Grand Canyon, as a matter of fact.

QUESTION: No, I think that is there.

MR. RANDOLPH: Is it there?

QUESTION: But in any event, you comfort me.

QUESTION: The Colorado National Monument is there so it is a good list.

QUESTION: The only antiquity mentioned by President Truman was the pool, wasn't it?

MR. RANDOLPH: Well, I -- I -- I don't think so.

QUESTION: Well, what else was mentioned?

MR. RANDOLPH: Because the way the act is -- Mr. Justice, the way the act --

QUESTION: I am talking about the proclamation. What else was mentioned other than the pool?

MR. RANDOLPH: The fish themselves and I'll relate that if I can first talk about the action and then the proclamation.

QUESTION: But the proclamation says "pool."

MR. RANDOLPH: That is right. Yes.

QUESTION: And that is antiquity?

That is an antique?

MR. RANDOLPH: No, antiquity means something from the past relating to the past -- yes.

QUESTION: Well, the pool has been there quite a while. I agree on that. But that is not a generally-understood antique, is it?

MR. RANDOLPH: No, antiquity, not antique.

Now, that act authorizes the President in his discretion to reserve public lands for preservations of objects of historic or scientific interest.

Petitioners say that under this Act there could be no monument to protect the pool and the fish in it. It is hardly clear why. Pupfish are certainly objects of scientific interest.

The Cappaerts in their brief -- and then I notice in their argument -- also stated that the act extends only to artifacts appropriate for preservation in public museums.

Aside from the fact that the Grand Canyon is a national monument and it was held to be properly so in Cameron -- and I don't know of any museum that could hold it -- the C&O Canal is a national monument, not very far from here.

Mr. Lionel talks about the act as preserving only dead objects, I suppose.

Let me give you an example. We pointed it our in our brief and Mr. Justice Rehnquist may be familiar with this -- the Swallow National Monument south of Phoenix was set aside in 1933 and I quote from the Presidential Proclamation there, Because of 'the exceptional growth thereon of various species of cacti."

There are other national monuments that preserve living things, the Buckivan Reef National Monument in the Virgin Islands, the Organ Pipe Cactus National Monument also in Arizona, the Joshua Tree National Monument in California.

QUESTION: Are these all under the Antiquities Act?

MR. RANDOLPH: Yes, Mr. Justice, they are.

It is, we submit, untenable to say that under an act for the preservation of objects of scientific interest the President of the United States could create a monument to protect the pupfish only after they had died and become fossilized. But that is precisely what Mr. Lionel's argument leads you to.

Now, as far as the proclamation is concerned, we

believe it clearly indicates that Devil's Hole Monument was set aside to preserve the pool and the pupfish in it. It is difficult, we think, to read it in any other way.

President Truman was not acting to protect the rocks in this case. In the proclamation he referred to geologic data but he also referred to on page C-2 of the Appendix from which Mr. Lionel quoted that "said pool is of such outstanding scientific importance that it should be given special protection."

The pool is of outstanding scientific importance, not because of the rocks surrounding it but because of the unique species of fish found nowhere else in the world who live in it.

QUESTION: Well, why doesn't the proclamation say that?

MR. RANDOLPH: Well, I think it fairly does, Mr. Justice. The preceding paragraph, when it refers to the scientific importance of the pool, the paragraph preceding that states that the"presence in this pool of a peculiar race of desert fish -- and zoologists have demonstrated this race of fish found nowhere else in the world -- evolved -- only a gradual drying up -- it is more or less a statement of the facts that I just have given the Court. We think it indicates that the scientific interest of that pool is the fish in it and if you remove the fish you extinguish the

scientific interest in the pool.

The record in this case is replete with studies, scientific studies. There are dozens and dozens of them. There is not a single study that I know of in this record, and I stand corrected if I am wrong, that relates to Devil's Hole by a geologist in some way unrelated to the pupfish.

Every study that is either referred to or in this record is because of the pupfish.

QUESTION: Mr. Randolph, if there is no interest in protecting the rocks, why did they need 40 acres?

MR. RANDOLPH: I think that was -- you know, there was scientific interest. Who knows whether they were going to require to set up some kind of a building there to study the fishes --

QUESTION: You were going to explain to me why it is unreasonable to assume that that was the area from which it was intended to exclude wells.

MR. RANDOLPH: I think that when President Truman set this aside, I think the area surrounding it was public land. At that time I don't think that it was necessary -- so far as it appears in 1952, there was no indication that there were any wells in that area. There was no necessity for him to have gobbled up a great big chunk of land because there were no wells.

QUESTION: Supposing they had done what I suggested

to Mr. Lionel and dug a well just 41 acres away, or whatever the distance would be. Could he not then have increased the size of the monument?

MR. RANDOLPH: Yes.

QUESTION: And protected it that way.

MR. RANDOLPH: I think so, but by condemnation but I'll talk a little bit later -- well, maybe I'll mention it now. I think the condemnation argument is sort of a red herring in this case.

The fact is, when this was set aside in 1952, there was nothing to condemn. To say now, as Mr. Lionel says, well, what you ought to do is take our rights by condemnation , is to assume the very issue in this case, that as against the United States they have some rights to take.

QUESTION: Yes. But your argument partially assumes that the other way because they left the unreserved title over and above the 40 acres open to patent and people came in and either got patents or it was exchanged.

MR. RANDOLPH: Well, let me put it this way. If you have a stream, as in the Winters case, as in Arizona versus California, as in Eagle County, any of those cases, the United States Reservation, whether Indian or non-Indian, is on a piece of land that is adjacent to the stream in any way. If you follow this theory out, what it means is that

in order to prevent somebody upstream from diverting water and depriving you of water at your source, you have to take all the stream. In other words, you should take the entire stream.

The Court has never held that. Arizona versus California is to the contrary. Eagle County is to the contrary. The Winters case itself is to the contrary. Powers, which is another Indian case decided by this Court under the Reservations documents to the contrary. The Pelton Dam case is to the contrary.

QUESTION: Well, how do you reconcile what these cases you have just cited and in your description of the holdings with the statement from Beaver versus Portland Cement that following the act of 1877 if not before, all non-navigable waters then part of the public domain became publicii juris, subject to the plenary control of the designated states?

MR. RANDOLPH: Number one, that was dictum.

QUESTION: You are saying, then, that that is no longer a good law?

MR. RANDOLPH: Oh, no, absolutely not.

QUESTION: WhY, because of Pelton Dam?

MR. RANDOLPH: Absolutely.

QUESTION: Do you think Pelton Dam represented a carefully-considered repudiation of Beaver?

MR. RANDOLPH: I don't think it was a repudiation. The Court even cites Beaver and I think you can find other statements in the California Oregon Power case that are inconsistent with the statement you just cited.

I read the briefs in that case and the government's briefs and I think it was carefully considered, yes.

QUESTION: Well, it certainly wasn't reasoned in any way. Pelton Dam has about one paragraph.

MR. RANDOLPH: Yes, because if you read -- first of all, if you read the Desert Lands Act it says nothing about separating the water from the land or anything like that. It doesn't say that at all.

All it says is that with respect to the public lands of the United States, the people are entitled to get a water right pursuant to state law.

The statement in the case that Mr. Lionel relies upon was just a statement in regard to that. It wasn't the act --

QUESTION: Well, but I always thought Beaver was regarded as the leading case construing the Desert Land Act of 1877. Do you disagree with that?

MR. RANDOLPH: In this case -- in -- if you were talking about public land, if you were talking about somebody establishing a water right on public lands and in the public domain, I would say absolutely yes. If you are talking about

reserve rights and land that is not in the public domain, like Devil's Hole, I'd say no, it is not. And Pelton Dam is -- if you follow the Beaver case, look at what you would have to overrule. You would have to overrule Arizona versus California. You would have to overrule --

QUESTION: The statement in Arizona versus California wasn't really a very reasoned statement, was it?

MR. RANDOLPH: Judge Simon Rifkin was the Special Master on it.

QUESTION: Well, he isn't a Justice of this Court, as I recall.

MR. RANDOLPH: And Justice Black, I think, follwed precisely what Judge Rifkin --

QUESTION: He may not be a water expert, either.

MR. RANDOLPH: Pardon?

QUESTION: He may not be a water expert.

MR. RANDOLPH: Well, I think after presiding over Arizona versus California he became --

QUESTION: Well, I don't know, he didn't cite Pelton. I mean, he never, that would --

MR. RANDOLPH: That argument, incidentally, the same argument --

QUESTION: And Pelton never cited the Indian case.

MR. RANDOLPH: That's right. Pelton is inconsistent with the Indian case because how could -- in 1877 --

QUESTION: Well, you shouldn't rely on Arizona against California because it didn't cite Pelton.

MR. RANDOLPH: I do not cite it for the Desert Lands Act, I cite it for the reserve rights.

The removal of the pupfish, as I said, and you remove the scientific importance of this pool and I think President Truman understood that full well. The President referred specifically to the fish, as I have said and thus we think it plain that -- and the courts below, incidentally, agreed -- that Devil's Hole became a national monument, not because of a rock formation but because of a pool of water in the desert containing a remarkable race of fish that had been there for 10,000 years.

That is something worth protecting and preserving and President Truman did it in 1952.

The next question obviously concerns the reservation doctrine and we have discussed that somewhat, but under this doctrine, it is simply that the United States, by reserving public lands, may reserve the waters appertinent to that land -- unappropriated waters and those reasonably necessary to fulfill the purposes of the reservation.

The Petitioners say that requires intent while we submit that President Truman's intent is clear from the face of the proclamation, certainly more so than -- there is not much to -- one talks about implied reservation doctrine.

There is certainly very little to infer with -- in regard to water in President Truman's proclamation. But the constitutional basis for the doctrine is hardly a startling one. It is simply the property clause of the Constitution, giving the authority of the United States to act under the property clause with respect to its land and the Court in Arizona versus California held that under this clause, and I quote, "There should be no doubt about the power of the United States to reserve water rights for its reservations and its property."

That was 1963.

In 1971, this Court held, and I emphasize held -- this is not dictum -- in the Eagle County case that -- again, reaffirming Arizona versus California, saying that as we said in that case, that Federal Government had the authority, both before and after a state is admitted into the union, to reserve waters for the use and benefit of federally-reserved lands.

The federally-reserved lands include any federal enclave -- this was Mr. Justice Douglas speaking for the Court, incidentally, who is from a western state. And he said also that the reservation of waters may be only implied and the amount will reflect the nature of the federal enclave.

Here, however, as I stated, there is very little, if anything, to infer.

The reservation of waters -- waters is mentioned -- the pool of waters and Mr. Cappaert, or Mr. Lionel, has not really explained when he says in his brief that that proclamation did not intend to reserve one single drop of water -- how you can preserve a pool of water without intending to have water in it --?

Now, the fact that the government can reserve water rights as a matter of federal law should hardly be surprising. After all, the Cappaerts are asserting a water right against the United States. The only difference here is that their right supposedly arises under state law.

We are saying that federal right arises under federal law.

None of the parties in this case, or the amici I might add, have suggested that the United States cannot have water rights at all. Rather the argument is that the United States should submit to state law and state procedures to establish them.

Aside from the overruling of cases that would be necessary to get to this result, it is simply another way of saying that there can be no United States water right in Devil's Hole and the reason for that, it is like --

QUESTION: Why does that follow?

MR. RANDOLPH: The reason for that is, like most western states, Nevada follows a doctrine of appropriation.

That is a rule of capture. You capture the water. Priority in time, first-come, first-served. It requires at least two things, a diversion of the water from its natural source and application of the water diverted to a beneficial use.

We are not diverting any water in Devil's Hole. We are seeking to preserve it and I might add that under the usual doctrine of beneficial use, beneficial use is defined in state law as application to things like irrigation, to stock watering, industrial uses.

It was only in 1969 that Nevada amended its law, a great movement forward, to allow beneficial use to mean recreation.

QUESTION: Are you suggesting that -- on what Nevada argued here today, namely that there ought to be in some forum the kind of balancing of all these interests, would mean that if the Federal Government submitted to it, the Federal Government is bound to lose?

MR. RANDOLPH: There is no way the United States can get a right -- a water right under state law --

QUESTION: Well, you don't suggest, do you, that if the United States were noticed into a Nevada water hearing to adjudicate its rights that it wouldn't have to appear?

MR. RANDOLPH: Oh, no. As a matter of fact --

QUESTION: You are just suggesting that in such a proceeding it would be federal -- your right would be

measured by federal law --

MR. RANDOLPH: Absolutely, I --

QUESTION: Which is what the Eagle River case is saying.

MR. RANDOLPH: That is right. I rely on that, incidentally, Mr. Justice White, I rely on the general adjudication.

QUESTION: Yes. Yes.

MR. RANDOLPH: And the reason I rely upon that is I have heard a lot about the uncertainty -- well, this creates an uncertainty. We don't know how much water the Federal Government has. We don't know the connection of wells.

If Nevada wants to end that uncertainty, they can do so tomorrow. They can start a general adjudication in a basin, that is, the Ash Meadows Basin, which would adjudicate priorities of all the rights of the people that are involved in this case and other people who might be involved and so on and so forth and make it absolutely definite. They have never done that.

They have the right to do it. They have statutory authority. They can join the United States in that proceeding pursuant to the McCarran Act, but it is still a federal right that is involved in this.

QUESTION: And they have to recognize the right

as you define it today.

MR. RANDOLPH: Absolutely.

QUESTION: And that would mean you were bound to win, just as you did below.

MR. RANDOLPH: Yes, that we have a right -- we have a water right that means that it should not be interfered with to a certain extent. Now, there is some indication --

QUESTION: Well, in point of time it just goes back to the date of the Presidential Proclamation.

MR. RANDOLPH: To the Presidential Proclamation.

If there were other appropriative rights --

QUESTION: Right, prior appropriative rights.

MR. RANDOLPH: -- existing at that time -- you notice the proclamation says, "subject to vested rights."

QUESTION: Right.

MR. RANDOLPH: So all it takes is, something that no one else had integument to at that time.

There is also some suggestion here that this case would -- involves groundwater, surface water. There is a distinction.

Reserved rights doctrine, sure, it has been applied.

The surface water, don't apply it to groundwater.

In other words, this suggests the case would come

out differently if, instead of being fed by underground aquifers, Devils' Hole was fed by a surface stream that was diverted by the Cappaerts for irrigation purposes.

There is no logical reason why the results should be different. In both situations the establishment of the monument is the same and the purpose is the same, to reserve sufficient water to preserve the pool and the pupfish in it.

Both cases, incidentally, deal with water in both situations, the same resource. And we have quoted in our brief, I think, at page 32, the fact of the interrelationship between groundwater and surface water cycles.

I might also state that it is not entirely clear to us that Devil's Hole is groundwater. It is a pool, a standing pool and it is open to the sky. It might be considered groundwater in some regimes. In others it may be considered surface water.

QUESTION: Well, but it is recharged from groundwater.

MR. RANDOLPH: Yes, it is like a spring-fed lake, for example.

They also say, Nevada says, that the movement of groundwater is uncertain. The effect of pumping from wells might not be known for years and well-users could invest money only to have them realize years later that they were affecting someone else's right, in which case they would have

to stop pumping.

QUESTION: Mr. RAndolph, may I be sure, did your last answer to me suggest that even if the government -- if there is an affirmative here -- that, nevertheless, a proceeding might still be initiated to determine the extent of the interests and whether any vested interest back to the date of the proclamation and so forth?

MR. RANDOLPH: Yes, the procedure in Nevada is, it can be done on a petition from the water-rights owners or a petition issued --

QUESTION: Filed where? Administrative?

MR. RANDOLPH: With the state engineer.

QUESTION: Yes, so it is an administrative proceeding first.

MR. RANDOLPH: Or on the State Engineer's own initiative, if he decides to use it.

QUESTION: I see. What would he do, set up a proceeding in which again the initial --

MR. RANDOLPH: I think the word is intercici -- He would determine the rights of the various pumpers and people vis-a-vis each other -- who has priority and who has a junior right and so on and so forth.

QUESTION:All with review again in the Nevada courts and ultimately here?

MR. RANDOLPH: Yes, sir. And the United States is

subject to that under the McCarran Act. It could join the United States at any time.

As far as this uncertainty, the fact is that that is true under Nevada law, too. If you get a water right, a permit to pump, it may not be until years later that you find out that you are interfering with somebody else down the road but -- and that is not a reason for denying the United States the right.

Moreover, the fact of this case is that the hydraulic connection between the eight wells of the Cappaerts and Devil's Hole was shown, and shown conclusively.

As a matter of fact, in June of 1973, the Cappaerts finally stipulated to fact that they regulate the water level in Devil's Hole by pumping from their wells.

I have already talked about condemnation as an argument and I think that is adequately answered. That is, assumes the issue in the case. That is, that they have a right as against the United States, even though they did not come onto this property until 1967 and start pumping then.

As far as res adjudicata, which I notice is alluded to in the brief by both parties in this case but was raised below, if at all, only by the State of Nevada, this decision of the State Engineer was not res adjudicata with respect to the United States.

The state law requires the state engineer to

decide this and give a permit for pumping subject to existing rights.

This is a suit to determine whether the United States had existing rights and the State Engineer when he decided this case said -- and you'll find it at the very end of the proceedings -- this permit is given subject to existing rights.

Indeed, the Cappaerts do not even have, according to the record in this case, any water right protected in Nevada now. All they have is a permit to pump and so far as the record shows, they have never gone back and gotten a certificate of appropriation which would give them a vested right under Nevada law.

Moreover, there were only -- out of the eight wells involved in this case, there were only six -- two of those wells were pumped and 12 after this case was begun in 1972. They weren't even part of this proceeding before the State Engineer.

Beyond that, there are areas of the ranch that were not involved. Beyond that, the injunction applies to future wells. We don't think that the decision of the State Engineer, an engineer trained in hydraulic matters, was an adjudication of the government's right in this case.

There was one mention of a federal water right in Devil's Hole but that was mentioned by Mr. Cappaert's

counsel, not by the government and as they said in that case, at the time the government was conducting studies to find out the hydraulogy of the area -- and I think as even the Cappaerts counsel said, no matter what we decide in this water proceeding now, this proceeding for a permit, those studies will go on and there is no need to wait for them. And they did go on and six months later the United States determined that the Cappaerts were responsible for lowering the water level in Devil's Hole and that is why we brought this suit.

Therefore, we suggest and we submit that the decision of the Court of Appeals in this case should be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 3:18 o'clock p.m., the case was submitted.]