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Jurisdictional Aspects of Indian Reserved Water Rights in Montana and on the Flathead Indian Reservation After Adsit

ROBERT PEREGOY

I. INTRODUCTION

The issue of Indian water rights is presently a vital issue in tribal, state and federal relations. Highly sensitive and controversial, this matter has often pitted the tribes and the federal government against the various western states in an attempt to resolve the competing interests of Indian and non-Indian water users. At the core of the issue is whether state or federal courts will provide the jurisdictional forum for the adjudication of Indian reserved water rights. The purpose of this paper is to examine the jurisdictional aspects of those competing interests in light of court decisions addressing the issue of Indian water rights. Beginning with a general historical overview of water rights, this presentation opens into an examination of Indian water rights as developed in case law. A discussion of Indian water rights in Montana follows, in which there is special emphasis on the problems of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation in light of recent Montana legislation and circuit court opinions. The remainder of expository materials include a consideration of tribal efforts to establish water codes despite political and bureaucratic barriers. The final section analyzes the problem of competing interests of Indian and non-Indian water users from a policy perspective.

II. HISTORICAL BACKGROUND OF WATER RIGHTS

To understand the disputes over Indian water rights and the legal principles applicable to them, it is necessary to examine the two major systems of water rights in the United States. The primary systems for allocating water are the riparian system of the water abundant eastern states and a few western states and the appropriative system employed in most of the arid western states.

A. Riparian System

The riparian system originally entitled each land owner with property abutting a stream to insist on maintenance of the stream flow in its natural condition. The modern view accords each landowner the right to make reasonable use of the water which depends upon the circumstances of that use (1). Each riparian owner must not unduly interfere with any other user's reasonable use of the water. The right runs with the land, cannot be separated from it, and continues to exist whether or not it is put to beneficial use. All riparian owners are entitled to a continuation of the flow; if shortages occur due to drought, the right of each riparian owner diminishes proportionately (2).

B. The Appropriative System

The appropriative system, founded on entirely different premises, reflects historical and geographical differences between the eastern and western states. With the discovery of gold in 1849, miners began to occupy and operate mines on the public domain in the West. To impose order on the ensuing state of chaos, miners established customs and rules to regulate ownership and operation of the mines, and user rights to water. In that regime water rights were not appurtenant to the land. The rules provided that the first to locate the mining claim and the first to use the water held a prior right and would be guaranteed the right to continue to take the same amount of water from the source without interference by any later appropriator. "First in time, first in right" became a descriptive slogan of the appropriative system. The right is retained as long as the water is put to beneficial use; conversely, the right is lost if the water is not used beneficially. "Use it or lose it," then, arose as another slogan descriptive of this system. In the event of drought the entire share of the last appropriator is lost before the share of the next "in time" is diminished. Thus appropriation dates are vitally important. The older appropriators enjoy a high degree of certainty while the newer ones risk losing future supplies in water short years (3). One sees that the appropriative system of many western states is central to the conflict over Indian water rights.

Historically, the United States owned all western lands not privately held under sovereigns and possessed the power to dispose of those lands and water, together or separately. By its acquiesence the federal government recognized the rules and customs of the appropriative system established by the miners and pioneers. The existence of federal authority to dispose of the water and the actual disposition of the water under the emerging system of prior appropriation resulted in conflict between the first appropriator of water and later federal patentees who claimed an unencumbered title to the land. By an 1866 act Congress confirmed the rights of the miners and the rights of the prior appropriators of water (4). An 1870 amendment to the 1866 Act clarified congressional intent, declaring anyone who acquired title to public lands took such title burdened with easements for water rights previously acquired. In 1877 Congress passed the Desert Land Act which provided that water rights on tracts of desert land depend on prior appropriation and that all surplus non-navigable water should be held free for appropriation--subject to existing rights--by the public, for irrigation, mining and manufacturing purposes. This act applied specifically to Arizona, California, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming. An 1891 amendment extended the provisions to Colorado (5). In 1935, the United States Supreme Court held in California-Oregon Power Co. v. Beaver Portland Cement Co. (6) that the Desert Land Act applied to all the public domain of the states and territories. The Court further held that the Act severed water from the public lands, leaving the unappropriated water of non-navigable sources open to appropriation for use by the citizens of the states pursuant to local law.

In the 1935 California-Oregon Power case the Supreme Court held that the question of relative rights to water among the various citizens of a state is a question for state law. Thus, states began to enact legislation establishing varied water law systems. While a dispute raged among the states over using the appropriative as opposed to the riparian system, the states ignored the role of federal law for many years as a pattern of reliance on state water law

emerged. The states did not bother to address the question of the federal sovereign's right to make use of the unappropriated water to fulfill its own purposes or how such a right might be established and recorded. In the 1908 case of Winters v. United States the Supreme Court declared the existence of the federal reserved water right with the claim to an early priority and a right to expand the use of water in the future as the need arose (7) but did not establish a means of determining the amount of use or allowable types of use. This declaration caused vehement protests from the states and from their water users (8) and set the stage for subsequent court battles among the tribes, the federal government and the states in an effort to resolve these competing interests:

> This response resulted in part from the failure <of the states and non-Indian water users> to recognize the already established principle that the source of authority to administer the use of water was the federal sovereign. It also demonstrated a failure to fully appreciate the concept of federal supremacy as applied to the fulfillment of the sovereign's objectives (9).

C. Reserved Water Rights

1. Federal Reserved Water Rights

The power of the federal government to reserve water rights is founded on the property clause of the United States Constitution which permits Congressional regulation of federal lands (10). The Property Clause provides: "The Congress shall have the power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States. . . ." (11). Congress also has broad powers to regulate navigable streams under the Commerce Clause. A noted authority on water law has synthesized the basic aspects of the federal water reservation doctrine:

> If the United States, by treaty, act of Congress or executive order reserves a portion of the public domain for federal purpose which will ultimately require water and if at the same time the Government intends to reserve unappropriated water for that purpose, then sufficient water to fulfill the purpose is reserved from appropriation by private users (12).

Reserved water rights are federally-created rights, neither established nor exercised in accordance with state law (13). Most authorities assert that the reserved right arises when the reservation is created even though the water is not use for years thereafter (14). The reserved right is superior to appropriative rights established after the date of the reservation (the priority date) and to riparian rights (15).

2. Indian Reserved Water Rights

Indian water rights are distinctly different from other federal reserved water rights and are therefore subject to separate treatment. First and foremost, Indian water is held in trust for the Indians by the federal government and the United States is held to a fiduciary duty in protecting these rights on behalf of the tribes:

> Indian water rights are different from federal reserved rights for such lands as national parks and national forests, in that the United States is not the owner of the Indian rights but is a trustee for the benefit of the Indians. While the United States may sell, lease, quit claim, release or otherwise convey its own federal reserved water rights, its powers and duties regarding Indian water rights are constrained by its fiduciary duty to the tribes who are beneficiaries of the trust (16).

Thus, while the federal government enjoys relative liberty to balance competing federal and non-federal interests in administering water rights of other federal enclaves, it is obliged to effectuate as to Indian rights an uncompromising loyalty commensurate with its fiduciary duty to Indian tribes:

> <U>nder a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this court, <the United States> has charged itself with moral obligations of the highest responsibility and trust. Its conduct . . . should therefore be judged by the most exacting fiduciary standards (17).

The legal principles governing Indian water rights began in 1908 with the United States Supreme Court's landmark decision in the case of Winters v. United States (18). In Winters the United States brought an action in the federal district court in Montana on behalf of the Indian tribes on the Fort Belknap Indian Reservation. The case concerned the Indians' rights and interests in the Milk River and the conflicting claims of non-Indians who predicated their rights under Montana's appropriative system. The United States sought to enjoin upstream non-Indian defendants from diverting water necessary for irrigating pasture and farmland on the reservation after defendants' use left insufficient water for Indian projects. The district court granted the injunction, the circuit court upheld it, and the United States Supreme Court affirmed the decree. The principle issue for resolution by the Supreme Court was whether, when the federal government set land aside for the Indians, there were rights reserved to the use of the water from the Milk River. The Supreme Court stated: "The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of the Fort Belknap Reservation. . . ." (19). In rejecting the defendant's contention that rights to the use of water were not reserved for the Indians, the Court further stated:

> The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was a cession of the waters, without which they would be valueless, and "civilized commun-

> ities could not be established thereon." And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession (20).

The non-Indian water users' defense was that they were prior appropriators with superior right on the basis of having acquired water rights under state law and of putting the water to beneficial use. The court rejected the defendant's argument:

> The power of the government to reserve the waters and exempt them from appropriation under state laws is not denied, and could not be. . . . That the government did reserve them we have decided, and for a use which would be necessarily continued through the years (21).

In affirming the Winters decision of the Ninth Circuit Courts of Appeals, the Supreme Court substantially addressed the federal-tribal confrontation which the case presented (22). The Supreme Court relied on United States v. Rio Grand Dam and Irrigation Co. and United States v. Winans (23), which precluded state interference with rights to the use of water in which there is a federal interest. In Winans the United States Supreme Court held that the treaty establishing the Indian reservation for the Yakima Tribe involved a grant to the federal government which the tribe had not reserved for itself, rather than a grant of the rights from the federal government to the tribe. In the Winters decision the United States was upholding its fiduciary obligation as trustee for the Indians against adverse claimants asserting states' rights: "The government is asserting the rights of the Indians" (24).

Subsequent decisions have applied the Winters Doctrine to specific situations. On July 16, 1855 United States and the Flathead, Kootenay and Upper Pen d'Oreilles concluded the Treaty of Hell Gate, establishing the Flathead Indian Reservation in northwest Montana. Almost forty years later, Montana was admitted to the Union subject to the limitation

of the disclaimer clause in its Enabling Act that Indian lands within the limits of the state "shall remain under absolute jurisdiction and control of the Congress of the United States" (25). Michael Pablo, a Flathead Indian, diverted and applied water from Mudd Creek upon a parcel of land within the exterior boundaries of the Flathead Reservation. Pablo's successors in interest brought suit against the United States, contending that they succeeded to Pablo's rights to the water on the basis that the rights were acquired by local statute or custom. In United States v. McIntire the court rejected the claimed applicability of state law to the rights to use the water in the Flathead Indian Reservation, emphasizing rights were reserved to Indians by the treaty:

> Being reserved, no title to the waters could be acquired except as specified by Congress. . . . <T>he Montana Statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling in the reservation (26).

Thus, in the 1939 McIntire decision the Court of Appeals for the Ninth Circuit recognized that the Flathead Tribes reserved to themselves through the 1855 Hell Gate Treaty Winters Doctrine rights to the use of water within the Flathead Reservation and that those rights were immune from state law (27). In 1942, three years after the McIntire decision, the Ninth Circuit addressed whether the tribes retained title to the south half of the (navigable) Flathead Lake, in Montana Power v. Rochester (28). Montana Power contended that title to the beds of navigable waters passed to the states upon admission to the Union, absent a contrary intention. In analyzing the issue whether title to the south half of Flathead Lake resided in the Tribes, the court cited the Hell Gate Treaty which "reserved for exclusive use and benefit of the tribes a large tract of land, the northern boundary of which bisected the Flathead Lake. . ." (29).

> <W>e do not believe the question is one of the state law. . . .<T>he treaty leaves no room for doubt that the government chose to hold the entire area, submer-

> ged lands no less than uplands, in trust for the Indians rather than for the future state to be carved out of the region (30).

Montana Power argued that the 1887 General Allotment Act and the Flathead Allotment Act of 1904 subject lands abutting Flathead Lake to the laws of Montana. The Court quoted the Enabling Act of Montana which provides that, until Indian title had been extinguished, all Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. The Rochester Court stated:

> So far as we have been advised, the beneficial ownership of the Indians in the bed and shores of the lake has not been extinguished by the Government. . . . It is inadmissible to suppose that the United States having agreed to hold this area in trust for the exclusive use and benefit of the Indian tribes, intended to put the tribes at the mercy of the future state . . . (31).

In 1975 the City of Polson, Montana sued the Tribes, contending, again, that the Flathead Reservation had been diminshed, or terminated, by the Flathead Allotment Act of 1904. The State of Montana intervened in Polson's behalf, and in 1977 the Tribes and the United States filed suit against Polson and the State, contending that the Reservation had not been disestablished and that the Tribes had authority to enact reasonable ordinance and negotiations concerning the use of the bed and banks of the south half of Flathead Lake. The district court ruled in favor of Polson and the state and the Ninth Circuit reversed in favor of the Tribes on January 11, 1982 in Confederated Salish and Kootenai Tribes and United States of America v. Names Namen, City of Polson and State of Montana. The Supreme Court denied certiori on October 29, 1982, allowing the Ninth Circuit's decision to stand, thereby ruling the Tribes have authority to regulated structures, both Indian and non-Indian owned on the shoreline of the southern portion of Flathead Lake.

Officials of the various states continued to challenge the immunity of Indian water rights from state laws under the Winters Doctrine. The next major Supreme Court case after Winters to address the issue of Indian water rights was Arizona v. California (32). In this case the federal government asserted rights to water in the mainstream of the Colorado River on behalf of five Indian reservations in Arizona, California and Nevada. Congress created the original Colorado River Indian Reservation by an act in 1865, but the reservation was later expanded through an Executive Order. Arizona argued, in part, that the judicial doctrine of equitable apportionment should be use to divide the water between the Indians and other people in the State of Arizona. Rejecting this view, the Supreme Court stated:

> An Indian Reservation is not a State. . . . Moreover, even were we to treat an Indian reservation like a State, equitable apportionment would still not control since, under our view, the Indian claims are governed by the statutes and Executive Orders creating reservations (33).

Arizona further contended that the federal government had no power, after Arizona became a state, to reserve waters for the use and benefit of federally reserved lands. In rejecting this notion, the Court cited the Commerce and Property clauses of the Constitution and stated: "We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property" (34).

Arizona further argued that, in any event, water rights cannot be reserved by Executive Order. The Supreme Court emphatically rejected this contention: "In our view, these reservations, like those Congress created directly, were not limited to land, but included water as well" (35).

Arizona also contended there was a lack of evidence that the United States intended to reserve water for the Indians in establishing reservations. The Court also rejected this contention, saying:

> Most of the land in these reservations is and always has been arid. If the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries. It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind--hot, scorching sands--and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised (36).

Finally the Supreme Court, in agreeing with the Master's conclusions in the proceedings below, ruled on the issue of the quantity of water to be reserved:

> He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservation and ruled that enough water was reserved to irrigate all the practically irrigable acreage on the reservation (37).

The Master's Report which supplied the foundation for the decision in Arizona v. California stated that the concept of irrigable acreage "does not necessarily mean, however, that water reserved for Indian reservations may not be used for purposes other than agriculture and related uses" (38). The Supreme Court affirmed this in a supplemental decree in 1979 (39). The Master's Report explained that irrigable acreage had been the initial purpose of the reservation (40), but he added that the government could use the right for any purpose that might benefit the Indians (41).

In Cappaert v. United States (42) the Supreme Court held that Winters rights extend not only to streams, lakes and springs which arise upon, border or traverse a reservation but also to groundwater which underlies a reservation. The Court based their decision on their understanding of the purposes for which a reservation founded:

> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus variable water. Intent is inferred if the previously unappropriated waters are necessary to fulfill the purposes of the reservation, no more" (43).

Virtually all Indian reservations were created with the purpose of securing a place where Indian people and tribes could become self-sustaining (44). Congress intended to instill in the Indians the "habits of industry and civilization" (45). The Winters Court noted that the purpose in establishing the Fort Belknap Reservation was to make the Indians "a pastoral and civilized people," and without water the reservation would not have served these purposes. One scholar in the area of Indian law concluded, "these purposes are broad enough to include almost any beneficial use of water" (46).

III. FEDERAL/STATE JURISDICTION OVER INDIAN WATER RIGHTS

Past doctrine has indicated that the state courts were barred by the doctrine of sovereign immunity from filing any suits against the United States to determine any of its water rights, including those held by the United States as trustee for the Indian tribes (47). Further, it is undisputed that Indian tribes may not be joined as defendants for a determination of their rights in the absence of specific congressional language (48). In 1952 Senator McCarren attached a rider to Justice Department appropriation bill which became known as the McCarren Amendment. The Amendment altered the adjudicative forum of Indian water rights by allowing state courts in certain limited instances to assume jurisdiction over Indian water rights, although Senator McCarren later admitted that Indian water rights were not intended to come within the reach of the Amendment.

A. The McCarren Amendment

The McCarren Amendment provides:

> a) 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. . . . The United States, when a party to any such suit shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty. . . . (c) Nothing in the Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream (49).

According to the Senate Report accompanying the bill, which closely follows the actual wording of the law, the purpose of the legislation was to:

> <P>ermit joinder of the United States as a party defendant in any suit for the adjudication of rights to the use of water of any river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water rights by appropriation under state law, by purchase, exchange, or otherwise, and that the United States is a necessary part to such suit (50).

Thus, Congress strived to achieve this goal by a waiver of the federal government's sovereign immunity to suit when comprehensive adjudication of water rights is involved (51). Initially only federal water rights obtained under state law were presumed to be included within the scope of the McCarren Amendment. However, the Supreme Court in two non-Indian water rights cases, United States v. District Court in and for Eagle County (52) and United States v.

Water District No. 5 (53), held that the McCarren Amendment applied to federal reserved water rights and gave state courts jurisdiction to adjudicate federal water rights. Those decisions left unclear whether federal rights included tribal water rights. The courts addressed this question in Colorado River Water Conservation District v. United States and Akin v. United States (54), commonly known as Akin.

B. The Akin Decision

The Akin decision clarified in part the applicability of the McCarren Amendment to Indian water rights. Akin arose when the United States filed suit in the United States District Court for the District of Colorado naming over one thousand water users on the streams involved as defendants seeking an adjudication within the state water system and sought dismissal of the federal suit. The Tenth Circuit Court of Appeals held that the McCarren Amendment allows the United States to be joined as a defendant in any state action involving the United States' water rights (55) but did not impliedly repeal a general statute authorizing federal district courts to exercise original jurisdiction over all civil action the United States commenced (56). The United States appealed, but the United States Supreme Court dismissed the federal action, citing several factors which weighed in favor of the state proceedings. The Akin court recognized that the case did not turn on a jurisdictional problem of federal courts to adjudicate United States' claims concerning reserved water rights, but on whether the Colorado System for water resource allocation and the adjudication of conflicting claims to that resource were adequate to resolve federal claims (57). The Court recognized that the Colorado System had established elaborate procedures for the allocation and adjudication of conflicting water claims (58). The Court stated this would avoid a "piecemeal adjudication of water rights" (59), and noted that the policy behind the McCarren Amendment favored unified adjudication which was more available in state court. Other factors the Court cited in dismissing the federal action included that only the

complaint had been filed in the federal proceeding, there was a great distance between the federal court and state courts, and the United States had previously participated in other state adjudications.

The Supreme Court concurred with the Tenth Circuit concerning jurisdiction and the applicability of the McCarren Amendment to the particular fact situation Akin presented. Senator McCarren, the bill's principal sponsor, state the McCarren Amendment:

> . . . is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties any subsequent decree would be of little value (60).

The McCarren Amendment permits but does not necessarily require the United States to be subjected to state jurisdiction (61). The effect of the McCarren Amendment after Akin is to give concurrent jurisdiction to the state and federal courts over controversies involving federal rights to the use of water (62). Justice Brennan stated that concurrent jurisdiction rests on considerations of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation" but not on considerations of proper constitutional adjudication or state-federal regulation (63). He concluded that only in exceptional circumstances will federal suit be dismissed because of the presence of concurrent state proceedings (64).

Justice Stewart's dissent in Akin is instructive. He asserted that the issues involved were ones of federal law:

> A federal court is more likely than a state court to be familiar with federal water law and to have experience in interpreting the relevant federal statutes, regulations, and Indian treaties. It is not necessary to determine that there is no state-court jurisdiction of these claims to support the proposition

> that a state court is a more appropriate forum than a state court for determination of questions of life-and-death importance to Indians (65).

Armed with the McCarren Amendment and Akin, states, particularly in the northwest, began reviewing laws and policies in preparation for assuming jurisdictions over Indian water rights. The states, engaging in wishful thinking, appeared to believe that Akin ended all doubts as to the intent of the McCarren Amendment to include all reserved rights within its purview so that it finally could settle all remaining uncertainties regarding the legal claims of reserved water rights. One of the most controversial situations concerns the State of Montana where the legislature recently enacted legislation to enable it to begin McCarren Amendment adjudications of tribal water rights in state courts. This action is the topic of the next section.

IV. THE MONTANA SCENARIO: INDIAN WATER RIGHTS AFTER AKIN, SENATE BILL 76 AND ADSIT

A. The Montana Water Use Act: Senate Bill 76

In 1973 the Montana Legislature passed the Montana Water Use Act (66), declaring as state property the waters in Montana (67). With the passage of the 1979 legislative amendments to the 1973 Act (Senate Bill 76) (68), the state sought to undertake the adjudication of all existing claims to Montana water (69).

Senate Bill 76 divides the state into four water districts and provides the adjudicatory machinery to implement the Act (70). The procedure outlined in the Act requires the following for the "establishment" of a water right:

> 1. Issuance of an order from the Montana Supreme Court requiring all claimants to file a statement of each claim. (The order issued from the Montana Supreme Court on June 8, 1979 provides, in part: FAILURE TO FILE A CLAIM AS REQUIRED BY LAW WILL RESULT IN A CONCLUSIVE PRESUMPTION THAT THE WATER RIGHTS OR CLAIMED WATER RIGHT HAS BEEN ABANDONED).

2. Submission of all filed claims (71), to the water judge in the division in which claimed water has been diverted (72).

3. Issuance of preliminary decrees of water rights by water judges (73), based upon reports of the water masters (74).

4. Entry of final decree of water right binding all parties after the passage of a reasonable time without objection to the preliminary decree (75).

5. If a claimant takes objection to the preliminary decree, there will be a hearing for the purpose of adjudicating the right (76).

6. Each claim filed must be accompanied by a $40.00 filing fee (77).

During the legislative proceedings and hearings leading to the enactment of Senate Bill 76 tribal attorneys and council persons met with state legislators in an attempt to have Indian reserved water rights excluded from the state legislation on the basis of their unique nature and the federal-tribal relationship. Evelyn Stevenson, tribal attorney for the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, stated: "We came away from those many sessions that winter discouraged" (78). The Legislature was unwilling to give substantive consideration to the position of the tribes and finally voted to include Indian water rights in the state adjudication program.

B. Northern Cheyenne Tribe v. Adsit (79) and Related Cases

In January 1975 the Northern Cheyenne Tribe brought suit in United States District Court for the District of Montana to adjudicate water rights in the Tongue River and Rosebud Creek in Montana. In March of 1975 the United States brought suit for the same purpose in its own right and as fiduciary on behalf of the Northern Cheyenne and other tribes. Judge Battin consolidated the cases and stayed the

proceedings in February 1976 pending the outcome of the Supreme Court's decision in Akin. The State of Montana, defendant in those cases, moved to dismiss as a result of the Akin decision.

In anticipation of the enactment of Senate Bill 76 the United States Justice Department and Office of the Solicitor, in exercising their fiduciary duty to the tribes, filed four suits in the Montana United States District Court in April 1975: United States v. AMS Ranch, Inc. (80); United States v. Aasheim (81); United States v. Abell (82); and United States v. Aageson (83). The AMS Ranch case sought to adjudicate the water rights in the Marias River System for the Blackfeet Tribe, Glacier National Park, the Lewis and Clark National Forest, and the United States Bureau of Reclamation. The Aasheim case concerned the Sioux and Assiniboine Tribes of the Fort Peck Indian Reservation and sought adjudication of the tribal water rights in the Poplar River Basin and the Big Muddy Creek System. The Abell case involved tthe Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation. The tribes sought adjudication of their rights to surface and ground waters. Abell also involved the reserved water rights of the Flathead Irrigation Project, the National Bison Range, Glacier National Park, the Flathead National Forest, the Lolo National Forest, various tribal and non-tribal power sites, private power interests, the Bureau of Reclamation's Hungry Horse Dam Project and other federal reservations and interests. The Aageson case involved the Blackfeet Tribe as well as the tribes of the Fort Peck and Fort Belknap Reservations.

The filing of those suits ignited widespread public controversy in Montana and provided the press with renewed fodder for the forthcoming battle over Indian water rights (84). A staff editorial in the Billings Gazette referred to the Winters case as "coming alive after 70 years" and as a "smoldering battle between Indian and non-Indian water users" (85). A Kalispell newspaper ran an article quoting Ron Marelenee, a Republican U.S. Congressman representing the Eastern District of Montana:

> Sometimes I have the feeling that if the present officials of the federal government had held their jobs 100 years ago, they would have ordered the U.S. Cavalry to attack the settlers of the West--with the government paying for the ammunition. A more "civilized" war is being conducted by the federal government in 1979, but the adverse effects on Montanans are just as devastating because the government is trying to rig the result. <As to the federal government's initiating and funding the litigation> I am of the opinion that this <is> a total waste of money and that Interior Secretary Andrus acted in a capricious, vindictive and political manner. . . . Sovereign jurisdiction by the tribes is not and cannot be the answer that is in the best interests of Indians or any other Americans. Neither is automatically throwing the force of the government behind every dispute involving Indians (86).

On May 11, 1979 Senate Bill 76 took effect. The Montana Supreme Court ordered implementation and authorized the Department of Natural Resources to notify relevant parties. On November 26, 1979 in a single consolidated motion, U.S. District Judges James F. Battin and Paul G. Hatfield granted the state's motion and dismissed all these federal actions in favor of state court proceedings as an exercise of "wise judicial administration," relying on the Akin decision (87).

The United States and the Indian Tribes appealed the dismissal to the Ninth Circuit Court of Appeals, arguing that it was predicated as an erroneous application of Akin. They maintained that because the Montana Constitution and Enabling Act contain disclaimers of jurisdiction over Indian tribes, the litigation in Montana differs from the Colorado litigation which was the subject of Akin. They further argued that the specific factors underlying the Akin decision were not present in the Montana litigation and that the contrast required retention of federal jurisdiction (88).

In Northern Cheyenne v. Adsit the Ninth Circuit Court of Appeals considered the consolidated dismissals. On February 22, 1982 the Circuit Court reversed the decision of the lower court, holding that the McCarren Amendment does not grant jurisdiction, and thereby repeal state disclaimers in a

state which expressly disclaims jurisdiction over Indian lands within its Constitution and Enabling Act. The Court stated:

> In no way does the McCarren Act repeal any of the jurisdiction of the federal courts. The Act merely extends the United States' consent to suit in certain cases. . . .(89). It cannot be read to amend a state constitution disclaiming subject matter jurisdiction over such matter. . . .(90). The district court's decision would rob the disclaimer/non-disclaimer distinction made by Congress of all significance and meaning, and would deprive the 1968 Amendment to Public Law 280, which requires tribal consent to a repeal of a disclaimer, of any effect. Accordingly the district court's basis for decision was erroneous (91).

The Adsit court distinguished facts in Akin, prefacing their holding and persuasive dicta by pointing out that the "conservation of judicial resources is not a proper reason for dismissing a case from the federal courts" (92). The court said: "An action properly filed in district court is not to be dismissed or referred to state court simply because the district court considers itself too busy to try to action." (93). The court noted that Akin involved a completed proceeding which had been in the adjudicative process for years. Further, the court recognized that the federal action involved only one section of the state and that the United States was already a party in state proceedings in other water divisions. Finally, the court was cognizant that Akin did not involve allegations that the United States would be subject to conflicts of interest in representing its varied interests, as well as tribal interests. Thus the court viewed the Adsit case as unlike the Akin case in which the Tribe was not a necessary party and the United States, as trustee to Indian water rights, could apparently act as trustee without conflict of interest. The Adsit court declared the tribes to be a necessary party to the court proceeding and noted that neither Congress nor the Tribes had consented to suit in state court. The Adsit court stated:

> Under these circumstances, where sovereign immunity of the Tribe has not been waived, and there is a conflict of interest between the Tribe and the United States, the Tribe could only protect its rights by intervening, at the expense of its basic right to sovereign immunity. We will not put the Tribe to this Hobson's. . . . Our examination of this conflicts factor leads us to concluded that it would not be wise or appropriate for the federal court to give up its traditional jurisdiction and defer to state court in this case (94).

In comparison to the Akin facts, the Adsit court distinguished the Montana situation where the Montana state court litigation had not passed the notice stage. Moreover, the court noted that the comprehensive plan outlined in Senate Bill 76 was not enacted until four years after the first federal suit was filed. In addition, the Adsit court recognized that the district courts stayed the proceedings in the various cases, "apparently" awaiting the enactment of Senate Bill 76 (95).

Distance was a major consideration in Akin as the federal proceedings were 300 miles from the water district in question (96). The Akin court relied on the difficulties to parties in traveling to the location of the federal forum. The Adsit court emphasized the distance factor was not present in Montana and therefore could not operate to include these federal rights encourage dismissal of the suit (97).

The Adsit court concluded by noting the Supreme Court has expressly and repeatedly recognized the obligation of federal courts to retain jurisdiction in all but the most exceptional circumstances (98). Recognizing that the circumstances of the Montana litigation are sufficiently distinct from the factors warranting exceptional treatment in Akin, the Adsit court stated:

> If this court were to further extend Akin in the Montana case to a suit brought by an Indian tribe, the result could prevent Indians from fully litigating their rights to water in federal court. Each time a tribe sued in federal court, the state need only join the Un-

> ited States as a party to obtain dismissal of the federal action. It is contrary to all reason to permit the states to frustrate federal jurisdiction merely by joining the United States as a party (99).

Thus, the Ninth Circuit Court of Appeals ruled that the State of Montana does not have jurisdiction over Indian water rights and that the appropriate forum for the adjudication thereof is the federal district court. The tribes are thus not filing with the state for determining water rights on their reservations (100).

While Adsit clearly indicates that the State of Montana has no jurisdiction over Indian water rights, the tribes are "quietly pleased" and cautiously optimistic (101), realizing that the state of Montana has appealed Adsit to the United States Supreme Court. One informed commentator, prior to the United States Supreme Court opinion in Adsit, suggested that it is likely that either the Ninth Circuit or the U.S. Supreme Court will affirm the district court decision dismissing the federal cases (102). Based on the seemingly conflicting positions of the Tenth Circuit in Akin and the Ninth Circuit in Adsit, the Supreme Court granted certiorari to resolve the issue in November of 1982. Although Adsit did not involve the constitutionality of Senate Bill 76, the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation have raised the issue in a recent suit filed in federal district court against the State of Montana. Examination of the arguments of the tribes and the state in that case follows below.

C. Constitutional and Jurisdictional Issues of Senate Bill 76: The Confederated Salish and Kootenai Tribes, et al. v. The State of Montana.

After Akin several informed commentators considered whether the Akin opinion may exclude the possibility of the tribes filing water rights suits in federal courts, rather than the United States' doing so as their trustee (103). The filing and federal court treatment of an action by the Confederated Salish and Kootenai Tribes in late 1981 seems to have put this question to rest.

On October 21, 1981 the Confederated Salish and Kootenai Tribes (hereinafter, CS & K Tribes) (104), of the Flathead Indian Reservation in northwestern Montana filed suit in federal district court against the the State of Montana, seeking a preliminary injunction to prevent Montana from taking any action to enforce the Montana Water Use Act, as amended, within the Flathead Indian Reservation (105).

1. The CS & K Tribes argued that the Montana Water Use Act, as amended (Senate Bill 76), is unconstitutional as applied to waters within and appurtenant to the Flathead Indian Reservation. They contended that application of the 1979 Act will impair, diminish and extinguish water rights on the Flathead Reservation without Congressional authorization (106). The CS & K Tribes relied primarily on Worcester v. Georgia (107), Williams v. Lee (108), United Staes v. McIntire (109), United States v. Alexander (110), Colville Confederated Tribes v. Walton (111), and the Commerce Clause of the U.S. Constitution (112).

The CS & K Tribes further argued that the McCarren Act does not authorize the State of Montana to regulate water rights on the Reservation and that enforcement of Senate Bill 76 would deprive the Tribes of rights guaranteed by the 1855 Treaty of Hell Gate (113). Moreover, the CS & K Tribes argued that application and enforcement of the Montana Water Use Act is pre-empted by federal law (114), would impair the Tribe's right to self-government (115), and would violate Montana's Enabling Act and Constitution (116).

Further, the CS & K Tribes cleverly contended that the $40.00 filing fee required by the Montana Water Use Act of 1979 constitutes an unlawful tax upon the water rights of the Tribes and their members (117). In addition, the Tribes asserted the 1979 Act was void on its face insofar as it applied to reserved Indian water rights (118). Further, the Tribes argued the Act is unconstitutional because it deprived the tribes and their members of equal protection of the law and that it violates fishing rights guaranteed by the 1855 Hell Gate Treaty (119).

The Tribes also asserted that even if the state conducts a general stream adjudication pursuant to the McCarren

Amendment, the Tribes and their members may not be joined without their consent (120). Finally, the Tribes argued that since Montana asserts its jurisdiction over the Tribes and their water rights is indispensible to the operation of the Act and proceedings thereunder, all provisions of the Act must fail as they related to the Flathead Reservation (121).

On the foregoing bases, the CS & K Tribes moved for a preliminary injunction to prevent Montana from enforcing Senate Bill 76 which would subject the Tribes and their members to a January 1, 1982 filing date. The Act, recognizing only past water uses, conclusively presumes that Indian reserved water rights would be abandoned when the filing dates passed. The Tribes asserted this would cause irreparable harm to them and their members.

2. The State's Position

The State of Montana prefaced its brief by stating (122), "defendants do not in any way assert jurisdiction over Indian water rights without a waiver of sovereign immunity" (123). They did assert jurisdiction pursuant to the Montana Water Use Act over the surplus waters flowing through and touching the reservation (124). Further, they asserted jurisdiction over the United States, as trustee for the Tribes (125).

Essentially, the State argued procedural matters rather than articulate a position founded on substantive and controlling law (126). Specifically, Montana argued the CS & K Tribes failed to name the United States as an indispensable party to the suit, and thus injunctive relief should not be considered without "indispensable parties" (127). The State argued the Tribes have not met the requirements for a preliminary injunction in that they do not face irreparable harm in the event the Montana Water Use Act is enforced because the Tribes are not being denied the use of water (128). In conclusory fashion, the State evaded the issue that the imposition of the filing fee constituted an unlawful state tax on the Tribes, noting the filing fee was not burdensome (129). The defendant State of Montana's conclusion was that C S & K Tribes did not satisfy any of

the requisites for the granting of a preliminary injunction and therefore there was not justification for granting their request for equitable relief (130).

3. The Procedural Status of the Case

A main thrust of Montana's argument in the case was that several issues of the CS & K Tribes had raised were being actively litigated in the Ninth Circuit court of Appeals in Adsit (131). On November 10, 1981 both parties moved to file a stipulation which was ordered to be filed in consideration of the CS & K Tribes' withdrawal of their application for preliminary injunction (132). The stipulation embodied several important agreements. The Tribes agreed to file two statements under the Montana Water Use Act. The first claim filed concerned the Tribes' water claims. The second involved the Tribes' filing on behalf of all allottees and tribal members with interests in Reservation lands in federal trust status (133). The stipulation expressly states that the Tribes or tribal members would not be bound by the Montana Water Act on the Reservation, nor would their agreement to the stipulation constitute a submission to the jurisdiction of the State of Montana or define the nature and extent of Indian reserved water rights (134). Further, the defendant State agreed to preclude asserting that water rights covered in the two statements would be conclusively presumed abandoned pursuant to the 1979 Water Rights Act. The parties also agreed that no further action would or need be taken pending the outcome of the Adsit case in the Ninth Circuit (135).

Both the State of Montana and the CS & K Tribes thus awaited the pending decision of the Ninth Circuit Court in Adsit which held that the State has no jurisdiction over Indian water rights. Based on the Adsit decision, which has been granted certiorari by the Supreme Court, the CS & K Tribes began preparation to file a motion for summary judgment to gain final disposition of their case against the State of Montana (136). Recognizing the ruling in Adsit and the State's primary reliance on the resolution of the issues therein, it is likely the Court will grant the Tribes' motion.

However, it is possible the district court will stay the proceedings, pending a Supreme Court disposition of Adsit.

V. QUANTIFICATION OF INDIAN WATER RIGHTS AND THE COMPETING INTERESTS OF INDIAN AND NON-INDIAN WATER USERS

The preceeding analysis indicates that the federal government, beginning with Winters, recognized an implied water right arising from the purposes for creating the reservation. While the Court's primary concern was the existence of Indian reserved water rights, it did not decide their full scope. Subsequent cases have addressed quantification but have not established a consistent standard for determining the quantity of Indian rights to reserved water. There are three basic lines of authority (137).

The first, based upon and expanding the Winters approach, asserts that Indian water rights should remain open-ended where adjustment to reasonable future needs can be met. In addition to Winters, two Ninth Circuit Court of Appeals cases exemplify this line of reasoning. In 1956, in United States v. Ahtanum Irrigation District (138), the Court held the quantity of water is not to be measured by the use at the time the reservation was created because water was reserved for future use. In Conrad Investment Co. v. United States (139) the Ninth Circuit held Indians were entitled to water for present uses and future requirement, leaving the decree open for modification as needs increased (140). The Tribes favor this approach as it protects them from losing out altogether in sharing the use of water resources because of a more rapid and aggessive pace of non-Indian development. Moreover, it can allow for the protection of the environment and wildlife of the reservation consistent with tribal norms, values and priorities. Though attractive to Indians, this approach creates uncertainty with other water users who are unable to determine how to ascertain their water rights. Non-Indian water users find an exploitive system drives them to argue that such uncertainty impedes planning, investment and economic development.

The second line of authority as to water rights quantification looks to past and present water uses. The "present uses approach" quantifies the reserved water based on the amount utilized or determined at the time of the

judicial proceeding In United States v. Walker River Irrigation Dist. (141) the Ninth Circuit said the reserved right quantity should be fixed according to present agricultural and non-agricultural use stabilized over a period of time. The Court considered a number of factors, including population trend of the tribe, number of acres cultivated, available water, present needs for domestic use, stock watering, and power generating (142). The past and present use standard reflects the influence of the prior appropriation (beneficial use) doctrine of the west. Non-Indians favor this approach since it affords a vehicle for ascertaining their water rights and therefore should facilitate planning, investment and economic development. The argument against this approach is that future development needs of the tribe are ignored. This view posits that tribal requirements for water are at an artificially low level because of inadequate government representation of Indian interests in the past, and to fix tribal water rights at present uses effectively would relegate the reservations to a permanent state of underdevelopment (143). Moreover, the Winters court appeared to contemplate an economically viable community, indicating the use of water was "to change the Indians to a pastoral and civilized people" (144).

The Supreme Court offered the third line of authority as to a standard for quantification in Arizona v. California: the amount necessary for all "practically irrigable acreage" (145). The argument in favor of this approach reasons that the standard accomodates present and future needs and facilitates the determination of a fixed amount. However, the court did not expressly declare irrigable acreage as the applicable standard for all Indian agricultural water:

> <The Master> found the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practically irrigable acreage on the reservations (146).

In a 1979 Supplemental Decree the Supreme Court stated that water found to be reserved under Arizona v. California may be used for purposes other than agricultural or related uses (147).

Proponents of efficient water management argued that Indian reserved water rights must be fixed in quantity and priority to accomodate the competing interests of Indian and non-Indian water users. One commentator has noted that while some factions consider quantification to be highly desirable, no one is sure they will be satisfied with the outcome of these efforts:

> Certainty is fine but not when water rights are permanently lost through quantification. <Many> might be given water rations that are substantially less than what their future projections had called for. . . .The American Indians might see themselves as having the most to lose by quantification (148).

The issue as to who will decide--the judiciary, Congress or an administrative agency--still remains unsolved. Proponents of the state position advocate that state courts, legislators and administrative forums are appropriate. On the other hand, tribal advocates fear, with good reason, that they will not receive a "fair day in court" in these forums. Thus, tribal leaders espouse tribal and federal courts or judicious federal administrative proceedings to be the appropriate forums. With regard to Montana, Adsit clearly indicated that Indian reserved water rights will be adjudicated in federal courts.

Amidst all the controversy and debate over jurisdiction and quantification, courts and partisans have paid little attention to the federal government's policy of self-determination and the potential role of the tribes themselves as appropriate entities to aid in resolving the issue of quantification. The next section focuses on the Tribal Water Code of the Confederated Salish and Kootenai Tribes as a vehicle for aiding the resolution of this matter on the Flathead Indian Reservation.

VI. INDIAN SELF-DETERMINATION: PURPOSES OF THE RESERVATIONS, TRIBAL WATER CODES AND COMPETING INTERESTS

As in the case of the treaty creating the Fort Belknap Reservation for the Gros Ventres and the Assiniboine Tribes--the treaty whose interpretation was at issue in the

Winters case--the purpose of the Treaty of Hell Gate with the Flathead, Pen d'Oreilles and Kootenai Indians was to provide a permanent home for the tribes where they could learn and adopt the habits of civilization and industry. The Hell Gate Treaty preserved exclusive hunting, fishing and pasturing rights (149). The government agreed to establish schools at suitable points on the reservation with the goal of providing agricultural and industrial instruction (150).

Implicit in the construction of these terms is the desire of the federal government to move a tribe from a hunting and fishing society to one founded on agriculture and industry. This was consistent with the government's policy to assimilate Indian tribes and people into the economic and cultural mainstream of America. As the Winters court noted, without water the reservation would not have served these purposes. As one informed commentator stated, "These purposes are broad enough to include any beneficial use of water (151)."

Recognizing these historical factors, it is justifiable to assume that Congress intended Indian tribes to remain abreast with the advancing development of American society. Logically, as to water rights and use, why should tribal economics be forced to remain agriculturally based vis-a-vis the national economy in a modern, post-industrial society and consequently remain to languish in a permanent state of underdevelopment? In order to assume the "habits of civilization and industry," it is obvious that tribes must retain or acquire the flexibility to adopt and to change as societal and tribal needs and priorities are balanced in a constantly changing environment. This is particularly true in view of the current and deepening energy crisis in which tribes are subject to increasing pressure to develop their energy resources. The principle of Indian reserved rights the Court illuminated in Winters should remain open-ended, so that tribes may exercise their reserved water rights to meet future uses, based on rationally calculated and agreed-upon tribal priorities for water usage and development.

Consider the case of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation. The Tribes established their present form of government pursuant to the Indian Reorganization Act in 1934. The corporate existence clause of the charter established the tribal government's role as to economic development:

> In order to further the economic development of the Confederated Salish and Kootenai Tribes in Montana in conferring upon the said tribe certain corporate rights, powers, privileges, and immunities; to secure for the members of the tribe an assured economic independence; and to provide for the proper exercise by the tribe of various functions heretofore performed by the Department of the Interior, the aforesaid tribe is hereby chartered as a body politic and corporate of the United States of America, under the corporate name "The Confederated Salish and Kootenai Tribes of the Flathead Reservation" (152).

Moreover, the preamble of the tribal Constitution directly relates the welfare of the Tribes to the water resources of the Tribes:

> We, the people of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, in order to establish a more perfect and effective tribal government, promote the general welfare and rights secured to us by the Treaty of Hell Gate, July 16, 1855, conserve and develop our lands, water and other resources, and secure to ourselves and our posterity the fullest measure of tribal sovereignty and self-government, do ordain and establish their Constitution of the Confederated Salish and Kootenai Tribes of the Flathead (153).

In 1970 the President of the United States declared the new Indian policy of the federal government to be self-determination without termination:

> This, then, must be the goal of any new national policy toward the Indian people: To strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And, we make it control without being cut off from federal concern and federal support (154).

The underlying rationale of this policy was to enable tribes to assume more control and direction over government

programs and policies which necessarily impact tribal welfare and well-being. In response to this policy and in carrying out the mandates of the tribal Constitution and Corporate Charter, the Tribal Council of the Confederated Salish and Kootenai Tribes established in 1981 an Earth Resources Department which includes a Water Office. The Tribal Council has charged the Water Resources Department with the responsibility of identifying and planning future water needs and uses of the tribes in an effort to eventually document tribal water rights (155).

Plans for on-going and future use on the Flathead Reservation relate to economic development and include varied and far-ranging uses. On-going uses include the Flathead Irrigation Project and related hydroelectric power components. The on-going use of Kerr Dam, located on tribal land leased to Montana Power by the Tribes, is a major aspect of on-going use. Presently the contract is up for renewal and both the Tribes and Montana Power have submitted proposals for the administration thereof.

Future uses include small scale hydroelectric power development of reservation drainages, minerals exploration and development, increasing geothermal water usage for supplemental home heating and aquaculture, establishment of an ethanol plant and a small scale alcohol plant for processing the post and pole aspect of the tribal timber resources. Recreation and tourism related to water resources is a growing tribal enterprise and holds much potential in light of Flathead Lake and related drainage systems. Tribal regulation of water both as to quantity and quality is a primary necessity in order for this area of economic development to flourish.

Development of tribal fisheries and hunting and fishing on the reservation are also important future areas of water use the Tribes are exploring. Presently, three feasibility studies are being conducted in this area: (1) protection of fisheries in relation to hydroelectric development; (2) wildlife preservation and concurrent water needs; and (3) the administering and regulating the use of the water (156).

Rationally to develop these plans and resources as to water rights and uses the Tribes established a comprehensive Tribal Water Code in 1981, pursuant to the Indian Reorganization Act and tribal powers enunciated in the Tribal Constitution and Corporate Charter. The Tribes recognized the necessity of protecting and preserving their rights as reserved to them and guaranteed by the 1855

Treaty of Hell Gate, subsequent Executive Orders and court decisions. In order to establish a system for administering and regulating the use of waters on the Reservation, the Council moved to require all users of water within the exterior boundaires of the Flathead Reservation to file sufficient information with the Tribes concerning each user's present and planned use of water so that the Tribes could develop a comprehensive Tribal water code for recording, administering and regulating the use of the water (157).

The Code calls for the selection of a Tribal Water Office Administrator and staff to administer the Code. The significant provisions require every person to file by December 31, 1982 a statement of present and future water use in the following format:

1) the name and mailing address of the declarant;
2) the source or sources from which the water is or will be diverted or withdrawn;
3) the volume of water which is or will be diverted or withdrawn, stated in cubic feet per second in the case of diversions and in gallons per minute in the case of withdrawals;
4) the total annual amount of water which is or will be diverted or withdrawn, stated in acre-feet;
5) the legal description of the point or points of diversion or withdrawal;
6) the legal description of the lands on which the use of water will be made;
7) the legal description of any lands on which diverted or withdrawn water will be impounded either permanently or for temporary storage;
8) physical description of capacities, material composition and other pertinent details of all diversion works, pumps, wells, conveyance facilities and impoundments used with respect to each diversion or withdrawal;
9) the purpose or purposes for which the water is or will be diverted or withdrawn;
10) the best estimate of quantity and quality of return flows;

11) the date the declarant first made use of the water;
12) the dates and periods of use;
13) map of definite location (158).

An enforcement provision empowers the Water Office administrator to commence civil action on behalf of the Tribes against water users found in non-compliance (159).

On April 1, 1982 the Tribal Council issued an official press release taking the position not to mandate Tribal water regulations until the Supreme Court finally decides the issues. Accordingly, the Council mandated the Water Office to begin accepting voluntary filings. The official tribal statement recognized that the State of Montana cannot validly implement its Water Use Act (Senate Bill 76) on the Reservation since the Adsit court held that Indian Tribes and federal government are the proper authorities to regulate water use within the boundaries of the reservation and that Montana does not have jurisdiction to adjudicate Indian water rights. The Tribal Council made clear that all valid water claims on the Flathead Reservation will assure this protection (160).

The ultimate approval of tribal water codes rests with the Secretary of Interior. Due to proposed regulations governing the regulation of Indian reserved water rights and pending litigation, the Secretary of Interior issued a directive to the Commissioner of Indian Affairs on January 15, 1975 (161) and instructed all agency superintendents and area directors to disapprove any tribal ordinance, resolution, code or other enactment by the tribe purporting to regulate the use of water on an Indian reservation:

> <Tribal water codes> could lead to confusion and a series of separate legal challenges which might lead to undesirable results. These may be avoided if our regulations could first be adopted (162).

Although federal regulations which provide for tribal regulation of reserved waters have been proposed two times, they have not been finalized and the Secretarial Order has not been rescinded. Therefore, the present position of the

Solicitor of Indian Affairs is that tribal water codes are not valid since they have not been approved by the Secretary of the Interior (163).

The regulations the Department of Interior proposed on January 5, 1981 are founded on water entitlements determined on the irrigable land base (164). The Billings Area Office of the Bureau of Indian Affairs had taken the position that authorities should consider applying the multi-use concept encompassing all water needs, not solely irrigation (165). This position recognized that adoption of those regulations would severely limit the opportunities of the Tribes to address and develop their water resources, particularly those Tribes who do not have an irrigable land base of any significance.

Although the Flathead Tribes have considerable irrigable acreage, it is important to consider planned future uses of water in recognition of the reality that future forecasts are subject to the whims of the national economy and to changes in technology which may make it possible to enter resources into the marketplace (which presently may not be economically feasible or attractive). While "practically irrigable acreage" may bring the agricultural land under protection, the multi-use aspect would provide for future uses based upon new technology and uses. During the interim, tribes could use the unassigned waters for other purposes and/or lease them to the highest bidders. This option could satisfy the concerns of the states and provide more certainty, planning, investment and lead to future economic development for all parties concerned. This would protect the interest of tribes who possess mineral reserves, large forest acreage and significant fish and wildlife resources.

Another problem with the proposed regulations lies in the area of public policy questions of equity and fairness as applied to the reservations. Federal government water projects, including the Flathead Irrigation Project (FIP), are exempt from the proposed federal regulations as to its rules governing tribal water codes. For all practical purposes, this exemption eliminates most water on reservations, including Flathead, from tribal control (166). On October 6 and 7, 1981 the CS & K Tribes sponsored their First Annual Water Conference, the purpose of which was to advise local resi-

dents of the history of Indian reserved water rights, current developments and options for protection of those rights in light of Montana's attempt through Senate Bill 76 to exert jurisdiction over them. Merle Axtell, Flathead Irrigation Project Engineer, stated the FIP intended to file federal reserved water rights with the State of Montana. The filing would, practically speaking, appropriate for the Project's use all water arising on or flowing through the Flathead Indian Reservation. The Tribes, pursuant to Confederated Salish and Kootenai Tribes v. State of Montana, took the position that the only governing body which has constitutional, legal and valid jurisdiction to control and permit water use within the exterior boundaries of the Flathead Reservation is the Confederated Salish and Kootenai Tribes. Accordingly, the Tribes passed a resolution declaring that any water rights filing to be made for existing water use by the United States of America, Department of Interior, Bureau of Indian Affairs or Flathead Irrigation Project should be made with the Tribes rather than the State of Montana (167). The Superintendent of the Bureau of Indian Affairs, Flathead Agency, requested approval of the resolution by the Billings Area BIA Director (168).

The water use regulations the Department of Interior proposed, in exempting federal irrigation projects which in many instances may lay claim to all reservation waters, renders tribal water dependent upon tribal control of water supplies and distribution among the users. On January 29, 1982 the Confederated Salish and Kootenai Tribal Council revised their Tribal Water Code:

> The Ordinance, as proposed, does not purport to regulate the use of water on the Flathead Reservation, nor does it attempt to grant or determine the validity of those rights. The code merely requires filing of information pertaining to existing proposed water uses with the Tribes in order for them to develop, in the future, a comprehensive Tribal Code for recording, administering and regulating the use of water within the interior boundaries of the reservation (169).

The Tribal Council recognized that a recording of existing and proposed water uses on the reservation is imperative if the Tribes are to protect, preserve and administer their property, wildlife and natural resources, mandated by the Tribal Constitution and approved by the Secretary of Interior pursuant to the Indian Reorganization Act.

On February 16, 1982 Thomas Pablo, Chairman of the Confederated Salish and Kootenai Tribal Council, wrote to the Secretary of Interior James Watt requesting approval of the revised Tribal Water Code on the following basis:

> It is our understanding that the moratorium on the approval of Tribal water codes was imposed because the United States' and/or Tribal authority to regulate water on Indian Reservations was in litigation. . . .Since the legal challenge to the Tribes regulating water on the reservations is no longer an impediment to approve Tribal Water Codes. . . . <We> urge that you give immediate consideration and approval of the Tribe's Ordinance as proposed (170).

The Adsit decision of the Ninth Circuit Court of Appeals of February 24, 1982 certainly strengthens the tribe's position. However, the Department of Interior is presently balking at approval. The Tribes have sent two delegations to Washington in an effort to urge approval. The barriers to administrative approval of the Tribal Water Code are inextricably intertwined in a political-legal-bureaucratic maze in Washington, D. C. and present a situation confronting the Tribes which have little hope for approval. At the core of the maze is William Coldiron, Solicitor of the Department of Interior. Mr. Coldiron is from Montana and was the chairperson of Montana Power Company prior to his appointment by Mr. Reagan. Montana Power Company presently is in competition with the Confederated Salish and Kootenai Tribes for the administration of Kerr Dam, a huge hydroelectric facility situated on tribal lands leased to Montana Power by the Tribes. The project generates twelve to fourteen million dollars of profit annually. It appears that Mr. Coldiron is potentially in a classical conflict of interest

situation. He is taking the position that any tribal water code must address only Indian water and not water arising upon or flowing through the reservation used by non-Indian users. He has stated that it is his belief that this position in no way affects his fiduciary duty to protect the interests of the Tribes. According to Tribal Attorney, Evelyn Stevenson, the Tribes have a "cold chance in hell" in gaining approval of the Tribal Water Code (171).

One strategy for the Tribes to overcome this moratorium is to file suit to have it set aside. The purpose of the moratorium was to give the Secretary time to consider tribal water codes and attendant circumstances. That was in 1975--over seven years ago, a time lapse which purportedly constitutes administrative delay under the Administrative Procedures Act. Such administrative delay serves the interests of non-Indian landowners and the energy cartel, as an entrenched bureaucracy refuses to protect Indian rights as part of its fiduciary duties and responsibilities.

It is apparent that the Tribes face an uphill battle in seeking approval of their Water Code. This Code was established in exercise of the Tribe's constitutionally delegated powers as a sovereign entity and as a responsible exercise in self-determination as an initial effort to plan for both on-going and future uses of their reserved water rights. Yet, while the established policy of the federal government is self-determination without termination, they are once again balking at carrying out their fiduciary duty as trustee and protector of tribal rights and resources. In the area of water rights the Confederated Salish and Kootenai Tribes are facing the paradox thrust on them and other tribes: governmental mandates and pressures to assimilate and develop but prohibition against doing so because such development and self-determination may threaten the economic well-being of non-Indians. Perhaps the final resolution of the matter will have to come from the Supreme Court. The State of Montana's appeal of Adsit may provide the vehicle.

VII. CONCLUSION

The doctrine of Indian reserved water rights was announced by the Supreme Court in 1908 in the Winters decision. Subsequent cases have refined the Winters doctrine. Issues of state-federal jurisdiction over these rights have since arisen. The Akin decision, interpreting the McCarren Amendment, held that the State of Colorado had jurisdiction over Indian water rights since it was not a disclaimer state and had a comprehensive state-wide water system in place before federal litigation was commenced to determine jurisdiction. Relying on Akin and the McCarren Amendment, the State of Montana enacted a Water Use Act purporting the exert jurisdiction over Indian water rights. Subsequent to litigation initiated by the federal government in the exercise of its fiduciary responsibilities to the tribes, the Ninth Circuit Court of Appeals ruled in Adsit that the federal government, not the State of Montana, has jurisdiction over Montana Indian water rights. The decision recognized Montana as a disclaimer state, that the comprehensive state water plan was enacted after the litigation was initiated, and the special factors present in Akin were lacking.

Although Adsit settled the jurisdictional question as to Indian water rights in Montana, issues of quantification of water rights remain. The Confederated Salish and Kootenai Tribes of the Flathead Reservation has established a Tribal Water Code in exercising their rights and responsibilities in an effort to plan for on-going and future uses and to balance competing Indian and non-Indian interests. The Secretary of Interior has not yet approved the code and it is unlikely approval will be forthcoming in the near future. Resolution of Indian reserved water rights may require a strong stance by the United States Supreme Court. It is a highly sensitive political issue since it involves the potential reallocation of resources and wealth among Indians and non-Indians. Whether the federal government will exercise its fiduciary duty to the tribes and protect their reserved water rights from aggressive non-Indian interests remains to be seen.

NOTES

1. Charles Estes, "Indian Water Law--An Introduction," in Indian Water Policy in a Changing Environment, American Indian Lawyer Training Program, Oakland, CA, 1981, at 1.
2. On the riparian systems, see Clark, Waters and Water Rights, Vol. 1, Chapter 2 and Vol. 7, Chapter 31 (1967).
3. William Canby, American Indian Law, West Publishing Co., St. Paul, Minn., 1981, pp. 240-241.
4. Harold A. Ranquist, "The Winters Doctrine and How It Grew: Federal Reservation of Rights to Use of Water," 1975 B. Y. U. L. Rev. 639, 642-664 <hereinafter cited as Ranquist>.
5. Id., at 643.
6. 295 U.S. 142, 160-163 (1935).
7. 207 U.S. 564 (1908).
8. Ranquist, at 645.
9. Ibid.
10. Cappaert v. United States, 426 U.S. at 138 (1976).
11. U.S. Const. Art. IV, Sec. 3, 2.
12. F. Trelease, Federal-State Relations in Water Law 109 (1971) <hereinafter cited as F. Trelease>.
13. United States v. The Rio Grande Ditch and Irrigation Co., 175 U.S. 690, 703 (1899).
14. C. Meyers and A. Tarlock, Water Resource Management 1972 (1971). Accord, United States v. Hibner, 27 F. 2d 909, 912 (ED. Idaho 1928): "<T>he failure of the Indians to use their water will not cause either abandonment or a forfeiture of their rights thereto."
15. Arizona v. California, 373 U.S. 546 (1963); United States v. Ahtanum Irrigation District, 236 F. 2d 321 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957).
16. Clyde, "Special Considerations Involving Indian Rights," 8 Nat. Resources Law, 237, 247 (1975). See also National Water Commission, Water Policies for the Future, 477 (1973).
17. Seminole Nation v. United States, 316 U.S. 286, 297 (1891).
18. 207 U.S. 564 (1908).
19. Id. note 1, at 575.
20. Ibid.

21. Id. at 577.
22. 174 U.S. 690 (1899).
23. 198 U.S. 371, 381-382 (1905).
24. 207 U.S. 564, 577 (1908). See also, William Veeder, "Indian Prior and Paramount Rights," 51 North Dakota Law Review, 107, 125 (1974-1975) <hereinafter cited as Veeder>.
25. Enabling Act, State of Montana.
26. United States v. McIntire, 101 F. 2d 650, 653 (9th Cir. 1939).
27. Professor Stone of the University of Montana School of Law views McIntire as a very narrow case "of questionable utility." See Flathead Tribes' First Annual Water Conference Report, Confederated Salish and Kootenai Tribes, 1981, pp. 42-44.
28. 127 F. 2d 189 (9th Cir. 1942).
29. Id. at 190.
30. Id. at 191.
31. Id. at 192.
32. 373 U.S. 546 (1963).
33. Id. at 597.
34. Id. at 598.
35. Id. at 599.
36. Id. at 600.
37. Id. at 601.
38. S. Rifkind, Report of the Special Master in Arizona v. California 265 (1962). <Hereinafter cited as S. Rifkind>.
39. Supplemental Decree to Arizona v. California, 1979.
40. The issue of quantification of Indian water rights is yet to be settled. Although the government's intent to reserve water for the Indians on reservations has been clearly established, the case law has not set forth a consistent standard for determining the quantity of Indian water rights to be observed. Issues of quantification are addressed in Section V.
41. Ibid.
42. 426 U.S. 128 (1976).
43. 426 U.S. 128, 139 (1976).
44. 438 U.S. 696 (1978).
45. See McClanahan v. Arizona Tax Commission, 411 U.S. 164, 174 (1965); Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685, at 686 (1973).

46. See Getches, Federal Indian Law, West Publishing Co., p. 599.
47. State ex re. Reynolds v. Lewis, 88 N. M. 636 (1976); see also, Elizabeth McCallister, "Water Rights: The McCarren Amendment and Indian Tribes' Reserved Water Rights," 4 American Indian Law Review 303 (1976) <Hereinafter cited as E. McCallister>.
48. United States v. Fidelity and Guaranty Co., 309 U.S. 506 (1940).
49. 43 U.S.C. Sec. 666 (1970).
50. S. Rep. No. 755, 82nd Cong., 1st Gen-Z (1951).
51. See Jeff Taylor and Duane Birdbear, "State Jurisdiction to Adjudicate Indian Water rights," 18 Nat. Resources Law Journal 221, 225 (1978) <hereinafter cited as Taylor and Birdbear>.
52. 401 U.S. 520 (1971).
53. 401 U.S. 527 (1971).
54. 424 U.S. 800 (1976).
55. 504 F. 2d 115 (1974).
56. 28 U.S.C. Sec. 1345 (1970).
57. 424 U.S. 800 (1976), 96 S. Ct. 1236, 1247.
58. Id., 96 S.Ct. at 1239-1240.
59. Id., 96 S.Ct. at 1207.
60. S. Rep. No. 755, 82nd Cong., 1st Sess., 8 (1951).
61. 504 F. 2d 115, 119 (1974).
62. See E. McCallister (1976) at 306.
63. 424 U.S. 800 (1976), 96 S.Ct. at 1246.
64. Ibid.
65. Id., at 96 S.Ct. at 1250-1251.
66. The Montana Water Use Act <Hereinafter, 1973 Act>; Montana Code Annotated <Hereinafter cited as MCA> Secs. 85-2-201 through 210 (1978), repealed, Mont. Laws Ch. 697, Sec. 37.
67. See Sharon Morrison, comments on Indian Water Rights, 41 Montana Law Review 39 (1980) <Hereinafter cited as Morrisson>.
68. 1979 Mont. Laws Ch. 697, now codified as MCA Secs. 3-7-101 to -502, 85-2-211 to -243, 85-2-701 to -704, 2-15-212 (1979), amending Secs. 3-5-111, 85-2-102, -112, -113, -114, 401 and -406; repealing 85-2-201 to -210.
69. MCA Sec. 85-2-211 (1979).

70. Michael Lamb, "Adjudication of Indian Water Rights: Implementation of the 1979 Amendments to the Montana Water Use Act," 41 Montana Law Review 73, 74-75 (1980) <Hereinafter cited as Lamb>.

71. MCA Sec. 85-2-221 (1979). Claimants must have filed a statement of a claim with the Department of Natural Resources and Conservation by January 1, 1982. Exceptions were provided for those Indian tribes which were negotiating with the state; the deadline for negotiating tribes to file claims is January 1, 1985.

72. MCA Sec. 3-7-201 (1979) provides for the designation of water judges. Judge Bernard W. Thomas (Lower Missouri River Basin), Judge Robert W. Holter (Clark Fork River Basin), Judge Diane G. Barz (Yellowstone River Basin), and Judge W. W. Lessley (Upper Missouri River Basin) were designated water judges. Judge W. W. Lessley was selected Chief Water Judge.

73. MCA Sec. 85-2-231 (1979).

74. MCA Secs. 3-7-301 to -311 (1979) provide for the appointment, terms and conditions of appointment, and duties of Water Masters.

75. MCA Sec. 85-2-234 (1979).

76. MCA Sec. 85-2-233 (1979).

77. MCA 85-2-225 (1979).

78. Flathead Tribes' First Annual Water Conference, at 14.

79. Northern Cheyenne Tribe of the Northern Cheyenne Reservation v. Adsit, (9th Cir. 1982) <hereinafter cited as Adsit>.

80. No. CV 79-22 BLG (D. Mont., filed April 5, 1979).

81. No. CV 79-40 BLG (D. Mont., filed April 5, 1979).

82. No. CV 79-3M (D. Mont., filed April 5, 1979).

83. No. CV 79-21 (D. Mont., filed April 5, 1979).

84. See Robert Dellwo, Recent Developments in the Northwest Regarding Indian Water Rights," 20 Nat. Res. J. 101, 114 (1980).

85. Billings Gazette, 11 April, 1979.

86. Kalispell News, 16 May, 1979.

87. Northern Cheyenne Tribe v. Tongue River Water Users, 484 F. Supp. 31 (D. C. Mont. 1979).

88. Adsit at 726.
89. Id. at 727.
90. Id. at 729.
91. Id. at 729-730.
92. Id. at 732.
93. Ibid.
94. Ibid.
95. Id. at 734.
96. Id. at 733.
97. Federal Government's policy of self-determination and the potential role of the tribes themselves as appropriate entities to aid in Ibid.
98. Id. 734-735.
99. Id. 734.
100. See Char-koosta, the newspaper of the Salish, Pen d' Oreille and Kootenai Tribes of the Flathead Indian Reservation, 1 March 1982, pp. 1, 3 <hereinafter cited Char-koosta>.
101. Id. at 3.
102. Professor Stone, School of Law, University Montana suggested this as a potential outcome of Adsit; Flathead Tribes' First Annual Water Conference, at 43.
103. Hereinafter referred to as CS & K Tribes.
104. See generally Taylor and Birdbear, at 234.
105. Brief of the CS & K at 47, No. 81:149 (D. Mont., filed October 21, 1981) <hereinafter cited as Plaintiff's Brief>.
106. Id. at 8-11.
107. 31 U.S. 515, 561 (1832).
108. 348 U.S. 217, 214 (1959).
109. 101 F. 2d 650 (9th Cir. 1939).
110. 131 F. 2d 359 (9th Cir. 1942).
111. 647 F. 2d 42 (9th Cir. 1981).
112. U.S. Const., Art. I, Sec. 8, Clause 3.
113. Plaintiff's Brief at 11.
114. Id. at 20-24.
115. Id. at 25-28.
116. Id. at 28-33.
117. Id. at 33-36.
118. Id. at 36-37.
119. Id. at 37-38.
120. Id. at 38-41.
121. Id. at 42-43; also, 43-47.

122. Brief for State of Montana, No. 81-189 at 2 (D. Mont., filed November 8, 1981 <hereinafter cited as defendants' brief>.
123. Id. at 2-3.
124. Id. at 3.
125. Id. at 3.
126. Id. at 6-10.
127. Id. at 25.
128. Id. at 15.
129. Id. at 17-18.
130. Id. at 25.
131. Id. at 11-13.
132. CS & K Tribes v. Montana, Motion for Leave to SIU Stipulation, 81-149 (filed November 10, 1981).
133. Id. at 1.
134. Id. at 2.
135. Id. at 2-3.
136. Telephone interview with Evelyn Stevenson, Tribal Attorney for the CS & K Tribes, April 16, 1982.
137. See "Indian Reserved Water Rights: The Winters of Over Discontent," 88 Yale Law Journal 1689, 1695 (1979).
138. 236 F. 2d 321 (9th Cir.) cert. denied. 352 U.S. 988 (1956), reversed on other grounds, 333 F. 2d 897 (9th Cir. 1968), cert. denied, 381 U.S. 938 (1965).
139. 161 F. 829, (9th Circ. 1908).
140. Id. 832, 835.
141. 104 F. 2d 334 (9th Circ. 1939).
142. Id. at 340.
143. See Susan Campbell, "A Proposal for the Quantification of Reserved Indian Water Rights," 74 Columbia Law Review 1299, 1314 (1974).
144. 207 U.S. at 576.
145. 373 U.S. 546 (1963), decree at 376 U.S. 340 (1964).
146. 373 U.S. at 600.01.
147. Federal Government's policy of self-determination and the potential role of the tribes themselves as appropriate entities to aid in Arizona v. California, 1979 Supplemental Decree.
148. See Michael Laird, "Water Rights: The Winter Cloud over the Rockies: Indian Water Rights and the Development of Western Energy Resources," American Indian Law Review, Vol. 7 (1979), 155, 167-168.
149. Hell Gate Treaty with the Flathead, Upper Pen

d'Orielle and Kootenai Indians, Art. 3.

150. Id., Art. 5.

151. See Getches, Footnote 46, supra.

152. Corporate Charter, Confederated Salish and Kootenai Tribes.

153. Constitution, Confederated Salish and Kootenai Tribes.

154. Richard Nixon, "Self-Determination Without Termination," Message to Congress (91st Cong., 2nd Sess.), Washington, D. C. U.S. Government Printing Office, 1970.

155. Telephone interview with Mr. James Paro, Director, Earth Resource Department, Confederated Salish and Kootenai Tribes, Flathead Indian Reservation, 23 April 1982.

156. Ibid.

157. Water Code of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, Draft B, December 15, 1981 <Hereinafter cited as CS & K Tribal Water Code>.

158. Id. at 4-5.

159. Id. at 7.

160. Char-koosta, 1 April 1982.

161. Memorandum to Commission of Indian Affairs, Re: Tribal Water Codes from Secretary of Interior, 15 January 1975.

162. Ibid.

163. Memorandum to the Commissioner of Indian Affairs from the Acting Associate Solicitor of Indian Affairs, March 30, 1981.

164. Regulation of Reserved Waters on Indian Reservations, Federal Register, 5 January, 1981, Volume 86, Number 2.

165. Memorandum to Commissioner of Indian Affairs through the Office of Trust Responsibilities from Billings Area Office, BIA Director, 5 February 1981.

166. Id. at 2.

167. Resolution of 82-13 of the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

168. Memorandum to Billings Area BIA Director from BIA Flathead Agency Superintendent, 30 October, 1981.

169. Ordinance 75 A (Revised), Water Code of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, enacted 29 January, 1982.

170. Letter from Thomas Pablo, Chairman of the Confederated Salish and Kootenai Tribes, to Secretary of Interior James Watt, February 16, 1982.

171. Telephone interview with Evelyn Stevenson, Tribal Attorney (CS & K Tribes), 25 April 1982.

* In July, 1983, in Montana, et al. v. Northern Cheyenne Tribe, et al. No. 81-2188, and in Arizona, et al. v. San Carlos Apache Tribe, et al., No. 81-2147, the United States Supreme Court held that the McCarran Amendment provides state courts with jurisdiction to adjudicate Indian water rights, thereby removing any limitations originally on that jurisdiction which state enabling acts or federal preemption, under the doctrine of Colorado River Conservation District v. United States, 424 U.S. 800 (1976) <Ed.>.