American Indian Law Review

Volume 31 | Number 1

1-1-2006

Winner, Best Appellate Brief in the 2006 Native American Law Student Association Moot Court Competition

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WINNER, BEST APPELLATE BRIEF IN THE 2006 NATIVE AMERICAN LAW STUDENT ASSOCIATION MOOT COURT COMPETITION

Sean P. Krispinsky[*] *& Sarah J. Bannister*[**]

Questions Presented

1) Whether Integer's water rights adjudication statute satisfies the McCarran Amendment, 43 U.S.C. § 666?

2) Whether the Integer Supreme Court correctly determined the purpose of the Fish River Indian Reservation?

3) Whether reacquired tribal land holds a date-of-reservation priority date?

Opinions Below

The opinion of the Integer Supreme Court is unreported. The order and judgment of the Integer district court are also unreported.

Statement of Jurisdiction

The Integer Supreme Court entered its final judgment. Subsequently, a petition for a writ of certiorari was granted by this Court. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

Statutes Involved

Relevant provisions of the McCarran Amendment, 43 U.S.C. § 666, are reproduced as an appendix to this brief.

Statement of the Case

The Fish River Indian Reservation ("Reservation") occupies 100,000 acres at the convergence of the Blue and Fish Rivers within the State of Integer. (R. at 1.) In addition to its importance as a source of water for agricultural irrigation, the Blue River also supports commercial and sport fisheries. *Id.*

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The Reservation was established by an 1882 Executive Order ("Order") enacted pursuant to an Act of Congress authorizing the establishment of reservations within the State of Integer "for the Indians of the Fish River area and such other Indians as the President may decide to settle thereon." *Id.* The Act also authorized federal funds for housing, health care, and training in the "agricultural arts" for Indians of the Fish River Reservation. *Id.*

Although the 1882 Order did not explicitly state the purpose of the Reservation, the lead federal negotiator observed in a letter to the President appended to the Order that "the Indians much love this site due to its ready access to fishing grounds." *Id.* Furthermore, the negotiator "recommended the selected [Reservation] site because it contain[ed] lands suitable for irrigated agriculture and [would] facilitate the conversion of the Indians to a farming economy." *Id.* Historical documents relating to the course of negotiations indicate that the Fish River Indians depended on fish in the Blue River and that the tribal leaders insisted on locating the reservation near the Blue River. *Id.*

In 1893, the reservation was allotted pursuant to the General Allotment Act of 1887, 24 Stat. 388 (1887), and by 1934, 90,000 of the reservation's original 100,000 acres were owned by non-Indians (R. at 1). Following the passage of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (2000), the Fish River Indians formed a tribal government (Confederated Tribes of the Fish River Indian Reservation or "Tribes") and eventually reacquired through purchase 40,000 of the 90,000 acres sold to non-Indians (R. at 1).

At present, non-Indians own 50,000 acres within the Reservation and use water from the Blue River to irrigate their crops. *Id.* Although the tribal government has placed only 10,000 acres of its reacquired land under irrigation, it could convert an additional 25,000 acres of reacquired land to agricultural production with proper irrigation. *Id.* The Blue River provides only enough water to irrigate 60,000 acres on the reservation; the total acreage of the Indian and the non-Indian landowners to be irrigated is 85,000 acres. *See id.*

The State of Integer commenced an adjudication of the surface water rights to the Blue River and its tributaries. (R. at 1.) The Integer Department of Water Resources ("IDWR") is authorized to commence such an adjudication and does so by notifying all potential claimants that they must file claims. *Id.* The United States asked the IDWR to dismiss the adjudication on the grounds that the Integer adjudication scheme did not satisfy the McCarran Amendment. (R. at 2.) The IDWR deferred decision on the dismissal and required the United States to file its claims. *Id.*

Subsequently, the United States filed four claims for water on behalf of the Tribes: (1) water for domestic, commercial, municipal, and industrial use ("DCMI"); (2) water for heavy commercial use in developing a tourist resort on the reservation; (3) water for agricultural irrigation use for the 35,000 acres of reacquired tribal land and individual Indian allotments; and (4) water to supply the tribal fisheries. (R. at 2.) The United States claimed an 1882 date-of-reservation priority date for all water claims. *Id.* The IDWR refused to dismiss the proceeding and rejected the DCMI, heavy commercial, and fisheries claims, but approved the irrigation claim and awarded those water rights a priority date of 1882. *Id.* The IDWR determined that the practicably irrigable acreage ("PIA") standard should be used to quantify the Tribes' water rights. *Id.*

The district court affirmed the IDWR's determination with regards to the McCarran Amendment, and concluded that it had to give deference to IDWR findings of fact, and would uphold any "reasonable" interpretations of law. (R. at 2.) The district court also affirmed the IDWR's decision to allow only the Tribes' water claims for agricultural irrigation use based on the court's determination that the primary purpose of the Reservation was to convert the Indians into a farming community. (R. at 3.) The district court agreed with the IDWR's determination that the reacquired tribal lands held a priority date of 1882 and that the Tribes' water rights should be quantified using the PIA standard. *Id.* The Integer Supreme Court affirmed the judgment of the district court without opinion. *Id.*

Summary of Argument

The Integer Supreme Court erred in concluding that the McCarran Amendment is satisfied by the Integer water rights adjudication scheme. The requisite strict construction that ought to be afforded to waivers of sovereign immunity was never employed by the Integer courts. Consequently, the Integer Supreme Court incorrectly concluded that the McCarran Amendment's definition of "suit" would include an administrative proceeding as long as there is a provision allowing for judicial review. In addition to clearly violating the plain language meaning of the text of the McCarran Amendment, this interpretation also ignores the concerns that this Court has expressed in determining the scope and protections necessary for evaluating the waiver of immunity under the Amendment. Furthermore, the Integer Supreme Court erred in concluding that the present water rights adjudication was comprehensive. Because the adjudication fails to assess the groundwater rights of the parties involved, any disposition reached as to the respective

surface water rights of the Blue River will be subject to ongoing piecemeal litigation due to the nature of the reserved rights that the United States and Confederated Tribes of the Fish River Indian Reservation possess.

The Integer Supreme Court also erred in determining that the primary purpose of the Fish River Indian Reservation was to create an agricultural community. The text and supporting documents of the Executive Order creating the Reservation, interpreted in light of the federal government's policy goal of supporting tribal self-sufficiency, indicate that the Reservation was established with the purpose of serving as a permanent homeland for the Fish River Tribes. The creation of the Fish River Reservation as a permanent homeland impliedly reserved sufficient water for the Tribes to use their lands and natural resources to create a livable domestic environment and to generate income for tribal members through multiple activities, including agriculture, fishing, and tourism. Application of the *Gila River* quantification method mandates that the Integer Supreme Court should have granted the Tribes' claims for water for domestic and municipal uses based on present consumption rates and future population forecasts, development of its proposed tourist resort, irrigation of up to 35,000 acres of cropland, and maintenance of tribal fisheries.

The Integer Supreme Court correctly determined that the reacquired tribal lands hold an 1882 priority date for their appropriative water rights. When a tribe reacquires land from non-Indian purchaser, the tribe regains all water rights that have not been lost through nonuse with their original date-of-reservation priority date. Because there is no indication that the non-Indian purchasers of the 40,000 acres of allotted land forfeited any of the original reserved water rights through nonuse, the Tribes regained their original water rights with the 1882 priority date upon repurchase of the land.

Argument

I. The Integer Supreme Court Erred in Concluding That the Requirements of the McCarran Amendment Are Satisfied Under the Integer Water Rights Adjudication Scheme

Enacted in 1952, and codified at 43 U.S.C. § 666 (2000), the McCarran Amendment "waives United States sovereign immunity should the United States be joined as a party in a state-court general water rights' adjudication." *Cappaert v. United States*, 426 U.S. 128, 146 (1976). The Amendment is designed to facilitate the comprehensive determination of water rights in an effort to avoid the "piecemeal adjudication of water rights in a river system." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819

(1976). Additionally, the Amendment is an effort to "avoid[] the generation of additional litigation through permitting inconsistent dispositions of [water rights]." *Id.* at 819. Indeed, "with respect to water rights, the relationships among which are highly interdependent," the adjudication of such interests is "best conducted in unified proceedings." *Id.*

A. In Contravention of This Court's Jurisprudence, the Integer Supreme Court Failed to Recognize That Waivers of Sovereign Immunity by the United States Must Be Narrowly Construed

It is a fundamental principle of this Court's jurisprudence that "[t]he Government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it." *Price v. United States*, 174 U.S. 373, 375-76 (1899). The "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981). To be sure, "'[a]ny such waiver must be strictly construed in favor of the United States,' *Ardestani v. INS*, 502 U.S. 129, 137 (1991), and not enlarged beyond what the language of the statute requires." *United States v. Idaho*, 508 U.S. 1, 7 (1993). This Court has also explained that "waivers of federal sovereign immunity must be 'unequivocally expressed' in the statutory text," *id.* at 6, and neither the Executive Branch nor the Judicial Branch can effect a waiver of sovereign immunity, because such decisions have been relegated exclusively to the acumen of Congress, *see OPM v. Richmond*, 496 U.S. 414, 424-34 (1990); *United States v. Shaw*, 309 U.S. 415, 501-02 (1940).

The McCarran Amendment is undoubtedly subject to the same rules of construction that apply to other waivers of sovereign immunity. *See Idaho*, 508 U.S. at 6-8 (rejecting the application of a relaxed set of interpretive rules when considering the McCarran Amendment and endorsing a strict construction of the Amendment along with a reiteration of the aforementioned rules of interpretation for waivers of sovereign immunity). Consequently, in affirming the state district court decision without opinion, (R. at 3), the Integer Supreme Court sanctioned the flawed conclusion that a provision for judicial review can convert an administrative process into a "suit" within the meaning of the McCarran Amendment, (R. at 2). Not only did the courts below provide little more than mere conjecture to support this proposition, (*see* R. at 2-3 (concluding *without analysis* that "the provision for judicial review" made Integer's procedure a "suit"); R. at 3 (affirming the district court's conclusion *without* opinion)), but the Integer courts also clearly failed to recognize that this Court's precedent demands an exacting consideration of the specific

language that a statute utilizes in waiving sovereign immunity. *Compare Idaho*, 508 U.S. at 7 (waiver must not be "enlarged beyond what the language of the statute requires"), *with* (R. at 2-3 (failing to employ or even demonstrate an acknowledgement of the requisite strict-construction standard for interpreting waivers of United States sovereign immunity)).

Thus, the Integer Supreme Court neglected to adhere to this Court's admonition that the "statutory text" must provide an unequivocal expression of the actual waiver of sovereign immunity. *Idaho*, 508 U.S. at 6. Such a failure by the court below ignores this Court's pronouncement that:

> [I]n granting such consent Congress has an absolute discretion to specify the *cases* and *contingencies* in which the liability of the government is submitted to the courts for judicial determination. Beyond the letter of such consent the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the government.

Price, 174 U.S. at 376 (quoting *Schillinger v. United States*, 155 U.S. 163, 166 (1894)) (emphasis added). Necessarily included within Congress's power is the authority to determine when *bodies other than the courts* may settle on the scope and application of the waiver of sovereign immunity.

Here, the text of the McCarran Amendment provides no explicit waiver of the United States' sovereign immunity to state administrative proceedings. *See generally* 43 U.S.C. § 666(a) (referring only to "any suit" and "the judgments, orders, and decrees of the *court* having jurisdiction," and never mentioning state administrative proceedings) (emphasis added). In addition, this Court's most recent decision regarding the interpretation of waivers of sovereign immunity strongly advises against reading "into the [waiver] something that isn't there," and reaffirms a strict judicial adherence to the explicit language of the waiver. *See United States v. Olson*, 126 S. Ct. 510, 512 (2005) (holding in the context of the Federal Tort Claims Act that the liability of a "private person" means nothing more than the liability of a "private person," and therefore does not incorporate the liability of a "state or municipal entity.") In addition to highlighting the grave methodological error of the court below, this Court's contemporary sovereign immunity decisions reaffirm Congress's exclusive "discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts," *id.*, and unambiguously compels a strict construction of the "consent . . . given to join the United States as a defendant in any suit . . . for the adjudication of rights to the use of water of a river system or other source," 43 U.S.C. § 666(a).

B. The Integer Supreme Court Erred in Concluding That the United States Had Been Properly Joined Pursuant to the McCarran Amendment Because the Integer Adjudication Process Does Not Make the United States a Defendant in Any Suit

Although the Integer Supreme Court affirmed the view "that the provision for judicial review made [the proceeding below] a 'suit' within the court's jurisdiction," (R. at 2-3), the court's failure to justify its conclusion leaves us to presume that the state court erred in its application of this Court's mandates for properly interpreting waivers of sovereign immunity. Even if we assume *arguendo* that the Integer Supreme Court employed the appropriate analytical framework when making its decision, the plain language meaning of the phrase "defendant in any suit" clearly indicates that Congress did not intend to expand the United States' liability to include the determinations and predilections of various state administrative schemes.

1. The Plain Language Meaning of the Phrase "Defendant in Any Suit" Does Not Include Parties to State Administrative Proceedings

The text of the McCarran Amendment makes it quite clear that Congress intended to waive the United States' immunity only in *judicial* proceedings. Congress permitted the "[j]oinder of [the] United States as defendant" in the McCarran Amendment, 43 U.S.C. § 666(a), by giving consent to:

> [J]oin 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 . . . the United States is a necessary party to such *suit*, . . . and [the United States] shall be subject to the *judgments, orders, and decrees* of the *court having jurisdiction*. . . . *Provided,* That no *judgment* for costs shall be entered against the United States in any such *suit*.

Id. (emphasis added). Furthermore, § 666(b) provides that "*[s]ummons* or other *process* in any such *suit* shall be served upon the Attorney General or his designated representative." In addition to the inherently legalistic nature of the phrases "suit," "defendant," "summons," and "process," is the inescapable textual mandate that the United States be subject only to the "*judgments, orders, and decrees* of the *court having jurisdiction*." *Id.* (emphasis added). This latter phrase provides textual guidance as to what Congress meant by "suit." The McCarran Amendment certainly does not provide that the United States will also be subject to the decisions of any *administrative agency having jurisdiction* where the United States is a *participant*. Therefore, the

plain language reading of the statute implores the conclusion that the Court refrain from "read[ing] into the Act something that is not there." *Olson*, 126 S. Ct. at 512.

This conclusion is bolstered by this Court's assessment of what constitutes a "suit." As was demonstrated by Chief Justice Marshall in *Cohens v. Virginia*, this Court has always presumed that a "suit" can be commenced and prosecuted only in a "Court of Justice." 19 U.S. (6 Wheat.) 264, 407-08 (1821). In *Upshur County v. Rich*, this Court declared that:

> [A] proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions . . . is purely administrative in its character, and cannot, in any just sense, be called a suit; and that an appeal in such a case, to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quantity, proportion and value, is not a suit.

135 U.S. 467, 477 (1890). As applied to the Integer adjudicatory scheme, where "IDWR makes an initial recommendation regarding disposition of the claims and then hears objections from claimants and others who object to IDWR's recommendation," (R. at 1), which is then followed by IDWR making a final "determination on a claimed right," *id.*, this Court's accepted definition of "suit" is clearly not satisfied. *See also Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449, 464 (1829) ("[I]f a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit."); *Rank v. United States*, 142 F. Supp. 1, 71-72 (S.D. Cal. 1956) (discussing the preceding cases and concluding that "[t]he word 'suit' does *not* include a proceeding before a State Water Board") (emphasis in original).

Such a result is further supported by the various dictionary definitions presently in use, as well as those relied on at the time the McCarran Amendment was passed. The contemporary dictionary definition of "suit" is "an action or process in a *court* for the recovery of a right or claim." *Merriam-Webster's Collegiate Dictionary* 1178 (10th ed. 1996) (emphasis added); *see also Black's Law Dictionary* (8th ed. 2004) ("Any proceeding by a party or parties against another in a *court of law*") (emphasis added). Furthermore:

> Dictionary definitions of "suit" at the time of the McCarran Amendment's enactment similarly show that the term properly refers to a proceeding initiated and conducted in a court, not an administrative proceeding. *See, e.g., Black's Law Dictionary* 1602 (4th ed. 1951) ("applies to any proceeding by one person or

> persons against another or others in a court of justice"); *Bouvier's Law Dictionary* 1148 (Baldwin's Century ed. 1948); *Ballentinie's Law Dictionary* 1249 (1948 ed.); *The Cyclopedic Law Dictionary* 1609 (3d ed. 1940).

Br. of the Plaintiff/Appellant/Cross-Appellee at 30 n.15, *United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994) (No. 92-36983). Consequently, the plain language reading of the McCarran Amendment, this Court's assessment of what constitutes a "suit," and the relevant dictionary definitions from the time of the McCarran Amendment's passage as well as today, all compel the conclusion that Integer's administrative procedure does not satisfy Congress's requirement that the United States be joined as a "defendant" in a "suit." It is appropriate to conclude that Congress intended to limit the waiver of United States sovereign immunity to only those proceedings that can be considered a suit. Such proceedings must necessarily take place in a "court having jurisdiction."[1] *See* 43 U.S.C. § 666(a).

2. The Integer Supreme Court Erroneously Concluded That the Mere Provision for Judicial Review Converts the IDWR Disposition into a Suit Within the Meaning of the McCarran Amendment

Although it is a basic notion of procedural due process that as long as an administrative determination can be reviewed by a court it will satisfy the basic concerns of the Due Process Clause, *see Yakus v. United States,* 321 U.S. 414, 433, 444 (1944), it is also a fundamental tenet of procedure that Congress may always require more than the protections mandated by the Due Process Clause, *see Califano v. Yamasaki*, 442 U.S. 682, 692-93 (1979). Notwithstanding this Court's procedural due process jurisprudence, in the unique context of Congressional waivers of sovereign immunity, there is a presumption against broad waivers of immunity, and a strict adherence to the protections mandated by Congress. *See supra* Part I.a. When assessing

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1. Although not necessary under this Court's plain language strict construction approach to waivers of sovereign immunity, it is also worth noting that the legislative history of the McCarran Amendment demonstrates that Congress implicitly considered and rejected consent to the jurisdiction of state administrative agencies in addition to state courts, as Congress clearly understood at the time that consent to the jurisdiction of both was an option. *Compare* S. Rep. No. 82-755, at 5 (1951) (specifically limiting conferral of McCarran Amendment jurisdiction to "state courts") *with* H.R. Rep. No. 82-7691 (1952) (considering whether to submit to the jurisdiction of both "judicial and administrative agencies" for the disposition of "rights to the use of water or the administration of such rights."); *see also* Br. of the Plaintiff/Appellant/Cross-Appellee at 36, *United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994) (No. 92-36983).

whether Integer's procedures comport with Congress's specific waiver of immunity, it is a mistake to conclude that basic principles of procedural due process ought to counsel our understanding of the scope of the waiver of sovereign immunity. Therefore, when the Integer Supreme Court endorsed the view that by merely providing a potential mode of judicial review the Integer scheme satisfied the "suit" requirement of the McCarran Amendment, the court mistakenly mixed two very distinct lines of this Court's precedent.

The Integer Supreme Court concluded that the IDWR proceeding was a "'suit' within the court's jurisdiction" because of "the provision for judicial review." (R. at 2-3.) Under Integer's scheme, "[a]ny party dissatisfied with IDWR's determination is authorized to appeal the decision to a special state district court vested with jurisdiction to hear water rights appeals from the IDWR." (R. at 1.) Subsequently, "[t]he opposing party on any appeal to the district court is the IDWR and any other water right claimant who objects to a particular determination." *Id.* However, because the Integer Supreme Court affirmed the view that "review of the IDWR decision [is] governed by the state administrative procedure act," *id.* at 2-3, reviewing courts are "bound to give deference to agency findings of fact and to uphold 'reasonable' interpretations of state law," *id.*

a) The Integer Supreme Court Erred in Concluding That the Provision for Judicial Review Converted the IDWR Proceeding into a Suit

In concluding that the challenged IDWR proceeding was a "suit" that satisfied the conditions of waiver set forth in the McCarran Amendment, (*see* R. at 2-3), the Integer Supreme Court mistakenly concluded that the possibility of appeal somehow converted an administrative proceeding into a court proceeding thereby satisfying the plain language meaning of "suit." As demonstrated *supra* Part I.b.i., the IDWR proceeding itself certainly does not constitute a "suit" within the meaning of the McCarran Amendment. However, neither can the provision for judicial review transform the IDWR proceeding into anything more than a simple state administrative proceeding. It is apparent that the court erred in applying this Court's jurisprudence by attributing a status to the administrative proceedings of the IDWR retroactively. (*See* R. at 2-3 (concluding that the IDWR proceeding was "made . . . a 'suit" because of "the provision for judicial review."))

Although noting that "a proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions . . . is purely administrative in its character, and cannot in any just sense, be called a suit," *Upshur County*, 135 U.S. at 477, this Court also recognized that at some point, the status of the proceeding can change, reflective of the forum in which it is

conducted. While an administrative appeal, without more, will also fall short of constituting a suit, *see id.*, this Court has nevertheless acknowledged that "such an appeal may become a suit, if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other," *id.*

As applied to the Integer adjudicatory scheme, the *Upshur County* holding compels the conclusion that the IDWR proceeding is not a suit. At most, when on appeal to the special district court the proceeding may *become* a suit, but not prior to the presence of the "parties litigant" before a court with the general "power to determine questions of law and fact." *Id.* Since the IDWR is not a "court of justice" vested with the powers to "determine questions of law and fact," *id.*, but rather is an "executive" agency "purely administrative in its character," *id.*, only upon the successful granting and commencement of an appeal could the proceeding even arguably be considered a suit. Nevertheless, such a procedure would explicitly violate the mandates and intent of the McCarran Amendment.

b) Even If the Integer Proceeding Becomes a Suit, This Status Would Vest at the Appellate Stage of the Proceeding, and Would Consequently Not Satisfy the McCarran Amendment

There are five critical flaws with the Integer Supreme Court's conclusion that merely providing for judicial review of the IDWR decision satisfies the McCarran Amendment. (*See* R. at 3.) These flaws all demonstrate that even if the proceeding could be considered a suit at the appellate stage, such a system violates the scope of waiver articulated in the McCarran Amendment's text. First, as demonstrated *supra* Part I.b.ii., it would be a grave misapplication of this Court's jurisprudence to conclude that merely satisfying the requirements of the Due Process Clause, by allowing for judicial review of administrative decisions, translates into the fulfillment of the McCarran Amendment. Nowhere in the McCarran Amendment does the text allude to consent being granted to a scheme that merely provides for judicial review of an administrative determination.

Second, it is unclear whether a dissatisfied party "authorized to appeal" the IDWR decision can claim this appeal as a matter of right, or if Integer has merely provided for the discretionary appeal of certain decisions, akin to certiorari, which would depend entirely on the district court's predilections regarding the appeal. (*See* R. at 1 (declaring only that an appeal is "authorized," but not that it may be invoked as a matter of right).) The Integer courts offer no guidance on point, and therefore, it is unclear whether the

Integer district court will necessarily play a role even if an appeal is requested. Hence, it is uncertain whether the proceeding will ever have the potential to reach the status of a "suit."

Third, even if Integer provides an appeal by right from the IDWR disposition, there nevertheless is no court involvement prior to the appeal. Consequently, the McCarran Amendment is not satisfied *during* the IDWR proceedings because these proceedings are not the "suit" that Congress consented to. *See* 43 U.S.C. § 666(a) (giving consent to "join the United States as a defendant in any suit" but not consenting to joining the United States in an administrative proceeding that precedes a suit).

Fourth, under a scheme where the appeal constitutes a "suit" for purposes of satisfying the McCarran Amendment, the United States would not be the *defendant* at the point of suit, as the terms of the Amendment specifically prescribe. *See id.* Indeed, although "[c]onsent is given to join the United States as a *defendant* in any *suit*," *id.* (emphasis added), the fact that the United States is no longer the defendant when the suit is established upon appeal demonstrates that such a system is precisely not what Congress intended. It is clear that a "suit" is requisite from the initial point of joinder of the United States, rather than after the fact, when the United States is actually the petitioner, if not the plaintiff, in the actual "suit."

Finally, and perhaps most importantly, even if we ignore the aforementioned flaws and assume *arguendo* that it is otherwise acceptable for the "suit" provision of the Amendment to vest at the appellate stage of Integer's proceedings, the fact that the Integer courts give such substantial deference to the IDWR's "findings of fact" (R. at 2), and will also uphold any "reasonable interpretations" of law, *id.*, demonstrates that the Integer scheme effectively prevents a "suit . . . for the adjudication of rights to the use of water of a river system or other source" from occurring at the appellate stage. *See* 43 U.S.C. § 666(a). Integer's scheme makes the IDWR's factual determinations dispositive, and accordingly, hobbles the court's involvement, whether there is an appeal or not. Because of the deference afforded to the IDWR under the Integer administrative procedure act, (*see* R. at 2), the rights of the United States and the Tribes are determined prior to the appellate stage of the proceeding. Therefore, the McCarran Amendment's condition that the "suit" must be for the "adjudication of rights" is virtually ignored under Integer's scheme. Rather, Integer has manifested a system where the "adjudication of rights to the use of water of a river system," 43 U.S.C. § 666(a), occurs prior to the initiation of a "suit." Such a scheme is clearly beyond the scope of any reasonable plain language reading of the McCarran Amendment. *See id.*

3. The Integer Supreme Court Failed to Adequately Recognize the Significance That This Court Has Placed on the Adequacy of State Proceedings Undertaken Pursuant to the McCarran Amendment

In the context of water rights adjudication generally, and the McCarran Amendment specifically, the procedural safeguards and the fact-finding mechanisms employed during the initial disposition of rights are critical. Indeed, factual determinations can often be dispositive to the disposition of water rights. *See, e.g., Cappaert*, 426 U.S. at 143 n.7 (noting the significance of the factual determination that pumping within two and one half miles of a pond would infringe on reserved rights). Furthermore, for the interests of affected tribes and the United States to be adequately protected under the McCarran Amendment's design, the relevant adjudicatory system must ensure recognition of the fact that "questions [arising from the collision of private rights and reserved rights of the United States], including the volume and scope of particular reserved rights, are federal questions which, if preserved, can be reviewed [by the Supreme Court] after final judgment by the [state] court." *Colorado River*, 424 U.S. at 813 (quoting *United States v. District Court for Eagle County*, 401 U.S. 520, 526 (1971)) (first and second alteration in original). However, if the administrative proceeding fails to provide adequate procedures, akin to those commonly afforded in courts of law, it is likely that there will be a substantial risk that these "federal questions" are not preserved or recognized in the record of the state proceeding. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 570 (1983) (recognizing that only if "the state adjudications are adequate to quantify the rights at issue in the federal suits" will it be permissible for a federal court to dismiss a case in favor of a "state court" proceeding pursuant to the McCarran Amendment); *Colorado River*, 424 U.S. at 820 (noting that "if the state proceeding were in some respect inadequate to resolve the federal claims," it may be appropriate for a federal court to refrain from dismissing a proceeding in favor of a state "court").

The *Colorado River* standard requires federal courts to acknowledge the intent of the McCarran Amendment and defer to state courts the jurisdiction to adjudicate comprehensive water right dispositions. *Id.* This obligation is limited, however, by this Court's subsequent recognition that the adequacy of state proceedings is critical when assessing whether a federal court should relinquish such jurisdiction. *See San Carlos Apache*, 463 U.S. at 570. This Court has persistently tied the presumptive adequacy of state proceedings to the use of state courts in assessing the dispositions of water rights. *See, e.g., id.* at 548-49, 569-71 (employing references throughout to "state courts," and

concluding that "any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought before [the Supreme Court], a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment"); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19 (1983) (describing the choice of federal courts when deciding to refrain from exercising jurisdiction over water rights as a "decision whether to defer to state courts"); *Colorado River*, 424 U.S. at 809-14, 817 (considering only "state courts" throughout). To be sure, such an interpretation is arguably bolstered by the principle of parity among the state and federal *courts*.

Furthermore, one of the critical reasons given by this Court in *Colorado River* to implore the federal courts to refrain from exercising their jurisdiction was "to avoid duplicative litigation." *Colorado River*, 424 U.S. at 817. This interest is not supported when the state proceeding does not rise to the level of a "suit" until an appeal is made. Indeed, the standards that a state proceeding must satisfy in order to be deferred to under the McCarran Amendment are higher than those required for federal courts to exercise any of the rare abstention doctrines. *See id.* at 818 ("[T]he circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention."); *Moses H. Cone*, 460 U.S. at 15 (same). Since the majority of Integer's scheme is administrative, and therefore executive in nature, *see supra* Part I.b.i, these concerns are not present here.

The Integer system fails to properly recognize that despite the fact that the present action has come before this Court, the adequacy of state procedures depend on the presumption that federal courts will not need to be employed later in the process to protect the rights of the United States or any concerned tribes. *See Moses H. Cone*, 460 U.S. at 28 (1983) ("[T]he decision to invoke *Colorado River* necessarily contemplates that the federal court will have nothing further to do in resolving any substantive part of the case, whether it stays or dismisses.") Here, because the Integer system relies primarily on administrative adjudication, reviewed by a water court employing an extremely deferential standard, (*see* R. at 1-3), it is likely that the federal courts will necessarily become a persistent means of relief under the Integer system. Indeed, the present action demonstrates this point. Such a scheme should trigger this Court's obligation to ensure that Indian water rights, protected by federal law, are safeguarded from "state encroachment." *See San Carlos Apache*, 463 U.S. at 571.

4. The Ninth Circuit's Decision in United States v. Oregon Further Counsels in Favor of Reversing the Integer Supreme Court

In *United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994), *cert. denied*, 516 U.S. 943 (1995), the court of appeals held that Oregon's water rights adjudication procedure was comprehensive and properly constituted a "suit" within the meaning of the McCarran Amendment. 44 F.3d at 766-70. Although the United States continues to assert the view that the decision in *Oregon* is inherently flawed, the difference between the situation in *Oregon* and the situation here provide additional reasons why reversal of the Integer Supreme Court is necessary. *See* Br. for the United States in Opp'n to Pet. for Writ of Cert. at 7-12, *Klamath Tribe v. Oregon*, 516 U.S. 943 (1995) (No. 95-151) (arguing that although the Ninth Circuit erred in its interpretation of the scope of liability under the McCarran Amendment, because of the posture of the proceeding and the absence of any other opinions on point, certiorari was unwarranted at that time).

First, in *Oregon*, the state court was automatically made a part of the adjudication process because a judicial hearing was automatically scheduled. 44 F.3d at 764. Here, a dissatisfied party is "authorized to appeal" an IDWR decision, however, it is unclear whether this authorization constitutes an appeal by right. *See supra* Part I.b.ii.2. Thus, in the *Oregon* system, the court is literally supervising *all* determinations made by the state administrative agency, but here this may never be the case. Furthermore, the United States would arguably remain the *defendant* in the *Oregon* proceeding since an appeal is not necessary to trigger review by a court.

Second, in *Oregon*, the supervising court was also required to enter a final judgment, "affirming or modifying the order as it considers proper." 44 F.3d at 764. Here, if there is an appeal to the Integer courts, an uncertainty to be sure, the court nevertheless must adhere to the deferential standard required by the Integer administrative procedure act. (R. at 2.) This latter system effectively makes the relevant adjudication occur at the agency level. In the *Oregon* system, the court performs *de novo* review of all agency determinations. *See* Br. for the United States in Opp'n to Pet. for Writ of Cert. at 9-10 (the Oregon "state court will accord *de novo* review to the administrative water right determinations in the judicial review phase of the . . . adjudication.") Here, the Integer courts afford deference to the IDWR's findings of fact and conclusions of law. (*See* R. at. 2).

Finally, the posture in the Oregon proceeding was tremendously different from the posture in this case. In *Oregon*, the United States and Klamath Tribe were challenging the proceeding in federal court prior to any actual

adjudication. *See* 44 F.3d at 762-63. In light of the assurance that the Oregon courts would employ *de novo* review of the adjudication, the threat of complete disregard for the United States' and Klamath Tribe's rights as a result of the whims and bias of the Oregon agency was minimized. *See also* Br. for the United States in Opp'n to Pet. for Writ of Cert. at 9. Conversely, in the case at bar, the Integer system has taken full effect, and the merits of the adjudication were assessed despite the efforts of the United States and the Confederated Tribes of the Fish River Indian Reservation. With the minor exception of the IDWR's priority date determination, the Integer courts have afforded total deference to the IDWR's findings and conclusions. (*See* R. at 2-3.) This difference in posture demonstrates a particular need for this Court to reverse the Integer Supreme Court, and find that the IDWR process flouts the McCarran Amendment.

C. In Contravention of This Court's Jurisprudence, Integer Failed to Require the Comprehensive Adjudication of Rights to the Use of Water of a River System or Other Source

Congress has consented to a waiver of the United States sovereign immunity only in cases "involving a general adjudication of 'all of the rights of various owners on a given stream.'" *Dugan v. Rank*, 372 U.S. 609, 618 (1963) (citation omitted). In explaining this comprehensiveness requirement, this Court noted that:

> The McCarran Amendment, as interpreted in *Colorado River*, allows and encourages state courts to undertake the task of quantifying Indian water rights in the course of *comprehensive water adjudications*. Although adjudication of those rights in federal court instead might in the abstract be practical, and even wise, it will be neither practical nor wise as long as it creates the possibility of duplicative litigation, tension and controversy between the federal and state forums, hurried and pressured decisionmaking, and confusion over the disposition of property rights.

San Carlos Apache, 463 U.S. at 569 (emphasis added). Therefore, the comprehensiveness requirement is designed to ensure the "'conservation of judicial resources and comprehensive disposition of litigation.'" *Colorado River*, 424 U.S. at 817 (citation omitted).

Here, the Integer proceeding has failed to satisfy this Court's comprehensiveness requirement because the proceeding only adjudicated "surface water rights from the Blue River and its tributaries." (R. at 1.)

Although the Integer Supreme Court endorsed the view that "the proceeding was sufficiently comprehensive under the requirements of the McCarran Amendment," (R. at 2-3), this conclusion is nevertheless without rationale and in direct contravention of this Court's jurisprudence. By ignoring the adjudication of all groundwater claims, the Integer proceeding merely begs future litigation of the surface water rights established in the present proceeding.

This Court has recognized that "'[g]roundwater and surface water are physically interrelated as integral parts of the hydrologic cycle.'" *Cappaert*, 426 U.S. at 142 (citation omitted). As a result of this interrelation, the *Cappaert* court held that "since the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation, . . . the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." *Id.* at 143. Therefore, because of the fact that the Tribes' and United States' reserved rights are likely to be affected by future uses of groundwater, the present adjudication is clearly unsatisfactory under the requirements of the McCarran Amendment. Due to the hydrological connection between groundwater and surface water generally, Integer's decision to ignore groundwater will only result in future piecemeal litigation, in direct contravention of the purpose behind the McCarran Amendment. *See Colorado River*, 424 U.S. at 819 (noting that a fundamental purpose of the Amendment is to avoid the "piecemeal adjudication of water rights in a river system"). Therefore, the Integer proceeding also violates the scope of the McCarran Amendment by failing to comprehensively adjudicate "the use of water of a river system." 43 U.S.C. § 666(a).

II. The Integer Supreme Court Erred in Determining That the Primary Purpose of the Fish River Reservation Was to Create an Agricultural Community

A. The 1882 Order Intended to Reserve Water from the Blue River

When the federal government establishes an Indian reservation, it impliedly reserves water in the amount necessary to accomplish the purposes of the reservation. *See Arizona v. California*, 373 U.S. 546, 600 (1963) ("We . . . agree that the United States did reserve the water rights for the Indians effective as of the time the Indian reservations were created"); *Winters v. United States*, 207 U.S. 564, 576-77 (1908); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46 (9th Cir. 1981). In *Winters*, the Supreme Court first

addressed the issue of reserved water rights for Indian reservations when it adjudicated a dispute over rights to water from the Milk River at the edge of the Fort Belknap Reservation. Although the 1888 agreement creating the Fort Belknap Reservation failed to expressly reserve water rights, the Court held that ambiguities in agreements with the Indians (e.g., the silence regarding water rights) should "be resolved from the standpoint of the Indians." *Winters*, 207 U.S. at 576. Accordingly, because the purpose of the Fort Belknap reservation was to allow the Indians to become self-sufficient through raising crops and livestock, *see id.*, and the reservation lands "were arid, and, without irrigation, were practically valueless," the Court held that the agreement necessarily reserved rights to sufficient water to fulfill the purposes of the reservation, *id.* at 577.

In the 1960s, the Supreme Court affirmed the *Winters* principle of reserved water rights for Indian reservations and extended the doctrine to Indian reservations created by Executive Order. *Arizona,* 373 U.S. at 598-600. In *Arizona*, the Court adjudicated a dispute over the amount of water that the southwestern states could remove from the Colorado River and its tributaries. *Id.* at 551. The United States, relying on the *Winters* reserved rights doctrine, asserted water claims on behalf on five Indian reservations (created entirely or in part by Executive Orders) located in Arizona, California, and Nevada. *Id.* at 596. The Court first held that Indian reservations created by Executive Order possessed the same reserved water rights as those reservations created by treaty or statute. *Id.* at 598. Second, the Court held that the federal government intended to reserve water rights when it established the five reservations because the "water from the [Colorado] river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." *Id.* at 599.

Here, the 1882 Order impliedly reserved rights to water from the Blue River. The *Winters* doctrine applies to reservations created by Executive Order, such as the Fish River Reservation. *Arizona*, 373 U.S. at 598; *Colville*, 647 F.2d at 46. Furthermore, the history of the negotiations leading to the Order evince an intent to reserve water rights. The government's lead negotiator emphasized the Tribes' reliance upon fishing grounds in the Blue River (R. at 1), indicating the importance of the Blue River to the Indians. The negotiator also clearly understood that the Indians could not establish an agricultural society without using water from the Blue River for irrigation. (*See* R. at 1.) Thus, the only reasonable interpretation of the Order is that it meant to reserve enough water for the purposes of the Reservation.

B. The Integer Supreme Court Should Have Concluded That the Fish River Reservation Was Created to Provide a Permanent Homeland

1. Indian Reservations Can Be Created for Multiple Purposes and Those Purposes Should Be Broadly Interpreted to Further the Goals of Tribal Sovereignty and Economic Self-sufficiency

The purposes for which an Indian reservation was established define the amount of the water that was reserved. *See Arizona*, 373 U.S. at 600-01; *Colville*, 647 F.2d at 47; *In Re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source*, 35 P.3d 68, 73 (Ariz. 2001). In general, a federal reservation of land impliedly reserves only the amount of water necessary to support the purpose of the reservation. *Cappaert*, 426 U.S. at 141 (purpose of a federal reservation of a limestone cavern limited to preserving the pool and its rare desert fish species). Furthermore, the amount of water reserved is limited to that necessary to fulfill "the very purposes for which a federal reservation was created" (i.e., "primary purpose"); water used to fulfill "secondary" uses of the reserved land is not impliedly reserved. *United States v. New Mexico*, 438 U.S. 696, 702 (1978).

Although courts will strictly construe the purpose for which the federal government reserves non-Indian land, *id.* at 718 (holding that the purpose of the government reservation of Gila National Forest was solely to preserve the timber and continue favorable water flows, not to allow for stockwatering or wildlife preservation), some courts have suggested that the purposes for which Indian land is reserved should be given a broader interpretation in order to further the federal goal of Indian self-sufficiency.[2] *State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 712 P.2d 754, 768 (Mont. 1985) (citing *United States v. Finc*, 548 F.2d 822, 832 (9th Cir.1976) *rev'd on other grounds*, 433 U.S. 676 (1977)). In the context of reserved rights for Indian reservations, courts have been willing to identify multiple primary purposes for the reservation, rather than limiting the reservation to one primary purpose. *United States v. Adair*, 723 F.2d 1394, 1410 (9th Cir. (1983) ("Neither *Cappaert* nor *New Mexico* requires us to choose between these activities [fishing and farming] or to identify a single

2. Although frequently cited by courts in deciding Indian water rights cases, *see, e.g.*, Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981); *In re* the Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 753 P.2d 76, 94 (Wyo. 1988), *aff'd without opinion*, 492 U.S. 406 (1989), both *Cappaert* and *New Mexico* dealt with non-Indian federal reservations of land and may not be the appropriate precedent to follow in determining the scope of Indian reserved water rights. *See In re* the General Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 35 P.3d 68, 73 (Ariz. 2001).

essential purpose which the parties to the 1864 Treaty intended the Klamath Reservation to serve"); *Colville*, 647 F.2d at 47-48 (holding that the Colville Reservation was created for the dual primary purposes of providing for an agrarian society and preserving the Tribe's access to its fishing grounds); *United States v. Washington*, 375 F. Supp. 2d 1050, 1064 (W.D. Wash. 2005) (agreeing that primary purposes of the Lummi Reservation included agricultural and domestic use).

Traditionally, courts have determined the purposes for which an Indian reservation was created by examining the text and history of the document creating the reservation, the history of the Indians for whom the reservation was created, and even the Indians' need to adapt to changed circumstances. *See Colville Confederated Tribes*, 647 F.2d at 47. Treaties and agreements between the federal government and the Indians should be construed liberally in favor of the Indians and understood as the Indians themselves would have understood the terms. *See County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 252, 269 (1992); *United States v Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Winters*, 207 U.S. at 576-77. Furthermore, the text and history of such agreements should be interpreted in light of the federal goal of encouraging Indian self-sufficiency. *See Greely*, 712 P.2d at 768.

2. The Fish River Indian Reservation Was Created for the Broad Purpose of Providing the Tribes with a Permanent Homeland

The Integer Supreme Court should have decided that the Fish River Reservation was created for the purpose of providing a homeland for the Fish River Indians, a purpose that accommodates the Tribes' varied uses of its land (e.g., tourism, agriculture, and fishing) to achieve economic self-sufficiency. The Supreme Court has acknowledged that Indian reservations were created to create a "home and abiding place" for Indians. *Winters*, 207 U.S. at 565; *see also Colville*, 647 F.2d at 47 (the general purpose of an Indian reservation is "to provide a home for the Indians" and the purpose "is a broad one and must be liberally construed.") Recently, the Supreme Court of Arizona held that "the purpose of a federal Indian reservation is to serve as a 'permanent home and abiding place' to the Native American people living there." *Gila River*, 35 P.3d at 76 (quoting *Winters*, 207 U.S. at 565). That court endorsed the "permanent homeland" purpose of an Indian reservation based on concerns of fairness and respect for the federal policy of encouraging tribal self-sufficiency and economic development, stating that "just as the nation's economy has evolved, nothing should prevent tribes from diversifying their

economies if they so choose and are reasonably able to do so." *Gila River*, 35 P.3d at 76.

Here, a liberal interpretation of the text and supporting documents of the 1882 Executive Order mandates a finding that the Fish River Reservation was established for the broad purpose of serving as a permanent homeland for the Indians, rather than just for the narrow purpose of creating an agricultural community. Like the Executive Order creating the Indian reservation in *Colville*, 647 F.2d at 47 n.8, the Act of Congress authorizing the creation of the Fish River Reservation simply stated that the Reservation was "for the Indians of the Fish River area . . . to settle thereon," (R. at 1). Liberally construed, this language indicates that the federal government intended the Fish River Indians to settle permanently on the Reservation and become self-sufficient. The documents and circumstances surrounding the creation of the Reservation support this liberal interpretation. Although the federal government's lead negotiator recommended the Reservation's location based on "its suitab[ility] for irrigated agriculture," (R. at 1), the Indians probably did not believe that the Reservation was established solely for agricultural purposes. Indeed, the tribal leaders insisted on locating the Reservation near the Blue River to preserve the Indians' access to fish. *Id.* The negotiator himself acknowledged the importance of the Blue River fishing grounds to the Indians, *id.*, indicating that the federal government took the Indians' traditional reliance on fishing into consideration when it established the Reservation. *Id.* Additionally, the federal government's commitment to "provid[ing] health care, housing and training in the 'agricultural arts' for any Indians of any reservation," (R. at 1), further support a finding that the government was trying to give the Indians the land and resources to create a stable, permanent self-sufficient society.

The appellee's argument that the purpose of the Fish River Reservation cannot be to serve as a permanent homeland based on the reasoning of *In Re the Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 94 (Wyo. 1988), *aff'd without opinion*, 492 U.S. 406 (1989), will fail because the *Big Horn* rationale has not been expressly adopted by this Court and the *Big Horn* court's analysis was severely flawed. In *Big Horn*, as part of its adjudication of the dispute over rights to water from the Big Horn River System, the Wyoming Supreme Court rejected the argument that the Wind River Reservation was established for the purpose of providing the Indians with a permanent homeland. *Id.* at 97. Although this Court affirmed this decision, it did so without an opinion, leaving courts outside the state of Wyoming free to find that the purpose of a federal Indian reservation is to serve as a permanent homeland. *See Gila River*, 35 F.3d at 76.

This Court should reject the rationale of the Wyoming Supreme Court in *Big Horn* and find that the purpose of the Fish River Indian Reservation was to provide the Fish River Indian Tribes with a permanent homeland for two reasons. First, the *Big Horn* court applied an excessively formalistic and rigid treaty interpretation technique to reject the permanent homeland purpose argument. For example, the treaty stated that the lands comprising the Wind River Reservation would be "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians" and for other Indians. *Big Horn*, 753 F.2d at 95 (quotation marks omitted). The treaty does not state that the land was set aside only for agricultural purposes; one could reasonably infer from the treaty language that the Shoshone could use the land for agriculture, but were not required to do so. Additionally, the court misinterpreted explicit treaty references to the federal government's desire to "civilize" the tribes by converting them into farmers to mean that the reservation lands and the reserved water could only be used for agricultural purposes. The court should have interpreted this language in light of the federal government's broader purpose of providing Indians with skills to become self-sufficient. At the time the Wind River Reservation was established, the most likely path to self-sufficiency for Indian tribes in the area was through agriculture, but including such terms could not reasonably have been meant to preclude the tribes from using their lands and reserved water rights in other ways to increase the tribes' economic self-sufficiency. Two of the five judges in *Big Horn* agreed with this position, stating that the purpose of an Indian reservation should not be limited to only agricultural use, but instead encompasses "any use that is appropriate to the Indian homeland as it progresses and develops." 753 P.2d at 119, 135 (Thomas and Hanscum, J.J., dissenting).

Second, even if the *Big Horn* court correctly interpreted the treaty as reserving the Wind River lands solely for agricultural purposes, that treaty fundamentally differs from the 1882 Executive Order establishing the Fish River Reservation. In *Big Horn*, the treaty included specific and explicit language about the federal government's intent to convert the Indians into farmers. *See, e.g., Big Horn*, 753 P.2d at 95-96 ("In order to insure the civilization of the tribes entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said *agricultural reservations*.") (emphasis in original). The assumption was that the Indians who agreed to the Wind River treaty understood and agreed to this language. Here, in contrast, there is no evidence that the Fish River Indians ever read or knew about the federal negotiator's letter to the President in which he declared the intent to convert the Fish River Indians into an agricultural community. Based on the limited record available, the Fish River

tribal leaders who negotiated for the establishment of the reservation probably believed the purpose of the Executive Order was to give them a permanent homeland on which they could fish and hunt free of interference from white settlers.

In light of the text and circumstances surrounding the creation of the Fish River Indian Reservation, the purpose of the Reservation was to provide a permanent homeland for the Tribes and to allow the tribes "to diversify[] their economies [away from agriculture] if they so choose and are reasonably able to do so." *Gila River*, 35 P.3d at 76. Here, the government and the Fish River Indians clearly envisioned that the Indians would use the Reservation for fishing and agriculture because those were the two major activities by which the Indians could support themselves. (R. at 1.) It is unreasonable, however, to assume that the government meant for the Indians to restrict themselves to using the land for agriculture when they could use the land in a more productive fashion, such as for creating a tourism resort.

C. The Integer Supreme Court Should Have Granted All of the Tribes' Claims for Water Because These Uses Further the Permanent Homeland Purpose of the Fish River Reservation

1. Where the Purpose of the Indian Reservation Is to Provide a Permanent Homeland, Courts Should Not Use the PIA Standard

The establishment of an Indian reservation reserves water in the "amount necessary to fulfill the purposes of the reservation, no more." *Washington*, 375 F. Supp. 2d at 1064 (quoting *Cappaert*, 426 U.S. at 140). In quantifying reserved Indian water rights, courts have commonly used the practicably irrigable acreage ("PIA") standard first enunciated in *Arizona*, 373 U.S. at 600 (affirming the Special Master's determination that "enough water was reserved to irrigate all the practicably irrigable acreage on the reservations"). PIA is defined as "those acres susceptible to sustained irrigation at reasonable costs." *Big Horn*, 753 P.2d at 101. Quantification of water rights using the PIA standard requires a showing that crops can actually be grown on the land using irrigation and that the irrigation is economically feasible. *Gila River*, 35 P.3d at 77-78.

The use of PIA as the default method for quantification of Indian reserved water rights has been seriously criticized on several grounds. *See generally* Martha C. Franks, *The Uses of the Practicably Irrigable Acreage Standard in the Quantification of Reserved Water Rights*, 31 Nat. Resources J. 549 (1991) (arguing that the PIA standard forces tribes to pursue economically irrational development plans in order to obtain water rights). First, the *Arizona* Court

did not explicitly state that PIA was the exclusive method for measuring Indian reserved rights, *see Arizona*, 373 U.S. at 600; the Court merely endorsed the application of PIA to determine water rights for the reservations involved in the case before the Court. *See id.* at 601. Second, indiscriminate use of PIA to quantify Indian reserved rights risks penalizing tribes based on the location of the reservation. *See Gila River*, 35 P.3d at 78. Third, the persistent use of the PIA standard is inconsistent with the overall decline in agricultural acreage due to productivity increases and alternative methods of revenue generation. *See id.* Finally, the PIA standard may actually award the tribe more water than it needs to fulfill the purposes of the reservation, which is inconsistent with the *Cappaert* "minimal need" rule. This penalizes non-Indians who are seeking to use water from the same source and creates an irrational distribution of water resources. *See id.*

In recognition of the limitations of the PIA standard, the Arizona Supreme Court recently adopted a multi-factor quantification method tailored to the factual circumstances of each reservation. *Gila River*, 35 P.3d at 79. The court suggested that the following non-exclusive factors should be accounted for in quantifying a tribe's reserved rights: (1) the tribe's historical use of water in rituals; (2) cultural significance of water to the tribe; (3) the geography, topography, and natural resources of the Indian reservation; (4) the reservation's economic infrastructure; (5) past use of water for certain purposes; and (6) the tribe's present and projected future population. *Id.* at 79-80.

Here, the use of the PIA standard to quantify the Fish River Reservation's reserved water rights was incorrect because the purpose of the reservation was to provide a permanent homeland for the Tribes and to encourage the Tribes to use the resources of their lands to become economically self-sufficient. Presently, only 10,000 acres of tribal lands are being irrigated for agricultural purposes. (R. at 1.) Although another 25,000 acres could be used to grow crops for agricultural purposes, (R. at 1), this may not be the most economically rational use of reservation resources. Instead of using the PIA standard to determine how much water the reservation should receive, the Integer Supreme Court should have adopted the more flexible *Gila River* inquiry.

2. The Integer Supreme Court Should Have Awarded the Tribes Enough Water to Support Their DCMI, Heavy Commercial Use, Agricultural, and Tribal Fisheries Claims Based on the Gila River Method

Treaties and agreements establishing Indian reservations are understood to impliedly reserve enough water to make the reservation livable. *Washington*,

375 F. Supp. 2d at 1064-65. Although water for DCMI use has often been considered part of the reserved rights granted for agricultural use, *Big Horn*, 753 P.2d at 99, where agricultural water rights are small, the DCMI reserved rights should be awarded and quantified separately, *Washington*, 375 F. Supp. 2d at 1066-67. Here, because the relative amounts of agricultural and DCMI reserved rights are unknown, the court should have granted the Tribes' separate claim for water for DCMI uses. Using the *Gila River* quantification approach, the court should then have used estimates of future population in conjunction with the present estimates of water consumption per capita to determine the Tribes' minimal DCMI needs.

Because the Tribes' development plans for the tourist resort constitutes "the optimal manner of creating jobs and income for the tribe [and] the most efficient use of the water," the court should have granted the Tribes' heavy commercial use claim. *Gila River*, 35 P.3d at 80 (quotation marks omitted). The Fish River Indian Reservation resort, which will include a visitor center, museum, golf course, and hotel, is part of the Tribes' comprehensive economic development plan and represents the Tribes' rational decision to capitalize on increasing interest in Native American life and the outdoors. The development of a resort that will generate income and jobs for tribal members fulfills the Reservation's twin purposes of providing a permanent homeland for tribal members and increasing the Tribes' economic self-sufficiency. The resort will provide jobs for tribal members, who otherwise might have to leave the Reservation in order to earn a living. The resort will also create an income stream for the Tribe that will allow the Tribe to render improved services to Indians living on the tribal lands and will reduce the Tribe's dependency on assistance from the federal government. As this use of Reservation resources clearly advances the Reservation's purpose of serving as a permanent homeland for tribal members, sufficient water to support the resort development plan was reserved when the Reservation was created.

The creation of an Indian reservation impliedly reserves enough water to support present and anticipated future agricultural use of the land. *See Arizona*, 373 U.S. 600-01; *Colville*, 647 F.2d at 48. Here, the purpose of establishing the Reservation as a permanent homeland for the Tribes clearly included providing the Tribes with the ability to cultivate as much land as possible for agricultural purposes. The court correctly awarded the Tribes' enough water to continue irrigation of the 10,000 acres currently put to agricultural use. To the extent the remaining 25,000 acres of arable tribal land can feasibly be put into agricultural production, the Tribes should be granted sufficient water to irrigate all 25,000 acres, even though that will cause some

of the non-Indian land to be withdrawn from agricultural production due to lack of water.

Finally, when Indian reservations are created for the purpose of preserving a tribe's access to fishing grounds, courts have held that the creation of the reservation impliedly reserved sufficient instream flows to sustain the operation of tribal fisheries. In *Adair*, 723 F.2d at 1414-15, the court agreed that the creation of the Klamath Indian Reservation impliedly reserved enough water to support a tribe's exercise of its retained fishing rights to the extent required for the tribe to maintain a moderate living. The court based its holding on an express provision in the treaty creating the reservation that guaranteed the Klamaths exclusive fishing rights within their reservation. *Id.* at 1409. In *Colville*, the court found an implied reservation of water to support tribal fisheries even though the Executive Order creating the reservation did not explicitly reserve the exclusive right to fish on the reservation; the court, instead, relied upon the Indians' historic reliance upon fishing to justify the reserved right. 647 F.2d at 47-48.

Here, the Tribes are in a similar position to the *Colville* Indians because the Order establishing the Fish River Reservation did not explicitly reserve a right to fish. The Tribes' historical reliance on Blue River fishing grounds and the evidence that tribal leaders insisted on locating the Reservation near those fishing grounds (R. at 1), however, support a finding that the creation of the Reservation necessarily reserved sufficient instream flows to preserve those fisheries to the extent needed to provide the Tribes with a moderate living. *See Adair*, 723 F.2d at 1415. The Tribes, therefore, are entitled to instream flows from the Blue River in the amount necessary "to support a productive habitat" for tribal fisheries, even if the instream flows coupled with the Tribes other water uses eliminate most existing non-Indian uses. *United States v. Adair*, 187 F. Supp. 2d 1273, 1277 (D. Or. 2002).

III. The Integer Supreme Court Correctly Determined That the Reacquired Tribal Lands Hold a Priority Date of 1882

A. Winters Rights with a Date-Of-Reservation Priority Date Are Conveyed from Indian Allottees to Non-Indian Purchasers

The creation of an Indian reservation impliedly reserves a right to a sufficient quantity of water to fulfill the purposes of the reservation. *Winters*, 207 U.S. at 576-78. The priority date of *Winters* rights is the date that the reservation is established. *Id.* at 577. Indian allottees possess a right to use the water impliedly reserved by the creation of the reservation and that those rights also hold a date-of-reservation priority date. *See United States v.*

Powers, 305 U.S. 527, 532 (1939) ("[W]hen allotments were made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners.")

Non-Indian purchasers of allotted land may acquire the "full quantity of water available to the Indian allottee" with a date-of-reservation priority date. *Colville*, 647 F.2d at 51; *Adair*, 723 F.2d at 1417; *United States v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984). The non-Indian purchaser's right, however, is subject to three constraints. First, the non-Indian water rights are limited in quantity to those held by the Indian allottee. *Colville*, 647 F.2d at 51. Second, although the Indian allottee cannot lose his right to reserved water through nonuse, the non-Indian purchaser only acquires the right "to water being appropriated by the Indian allottee at the time title passes" and to the water that the non-Indian appropriates "with reasonable diligence" after title transfer; this right carries a date-of-reservation priority date. *Id.* The non-Indian purchaser may, however, lose the right to the Indian allottee's reserved water right through nonuse. *Id.* When a tribe reacquires lands within its reservation sold to non-Indians by Indian allottees, the tribe acquires the water rights appurtenant to the land that have not been lost through nonuse with their date-of-reservation priority date. *Anderson*, 736 F.2d at 1362; *Big Horn*, 753 P.2d at 114; *Washington*, 375 F. Supp. 2d at 1075.

B. The Reacquired Tribal Lands Hold an 1882 Priority Date Because the Non-Indian Purchasers of Allotted Land Did Not Lose Their Winters Rights Through Nonuse

The Integer Supreme Court properly assigned an 1882 priority date to the reacquired tribal lands. The 40,000 acres of reacquired land originally passed to non-Indian purchasers through Indian allottees. (*See* R. at 1.) Under *Anderson*, the non-Indian purchasers could have acquired and maintained the full measure of the allottees' *Winters* rights through reasonable diligence and continued use. There is no evidence in the record that the non-Indian purchasers of the allotted land lost any of the original allottees' water rights through nonuse. Thus, the Tribes reacquired the full measure of its original *Winters* rights with their original priority date of 1882 when they purchased the land from the non-Indian owners.

Conclusion

For the foregoing reasons, the judgment of the Integer Supreme Court should be reversed with respect to questions 1 and 2, and affirmed with respect to question 3.

APPENDIX

"The McCarran Amendment"
43 U.S.C. § 666 – Suits for adjudication of water rights

(a) Joinder of United States as defendant; costs

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. 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, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.

(b) Service of summons

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State

Nothing in this section 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.