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Adjudication of Indian Water Rights: Implementation of the 1979 Amendments to the Water Use Act

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COMMENTS

ADJUDICATION OF INDIAN WATER RIGHTS: IMPLEMENTATION OF THE 1979 AMENDMENTS TO THE MONTANA WATER USE ACT

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I. INTRODUCTION

With the passage of the 1979 amendments to Montana's Water Use Act (Senate Bill 76),[1] the state undertook the adjudication of all existing claims to Montana water.[2] While the act as amended has been the subject of criticism, its enactment is the first affirmative step in an adjudicatory process necessary for the preservation of water rights in Montana.

The complete adjudication of water rights in Montana requires a determination of exactly what rights are held by the several Indian tribes located throughout the state,[3] and what rights are reserved by the federal government on non-Indian reservations. To that end the act as amended provides for resolution of those claims through negotiated compacts between the interested parties, or alternatively, through adversary proceedings in state court.[4] As might be anticipated, it is the question of Indian reserved water rights that has become the primary point of contention in the adjudication scheme.

Prior to passage of Senate Bill 76 the federal government filed actions in the appropriate federal district courts in Montana on behalf of the Montana Indians to avoid a water rights adjudication in state courts.[5] This action was prompted by the tribes' desire to avoid a conflict of interests which might attend a state division of

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1. 1979 Mont. Laws, ch. 697, now codified at MONTANA CODE ANNOTATED [hereinafter MCA] §§ 3-7-101 to -502, 85-2-211 to -243, 85-2-701 to -704, 2-15-212 (1979); amending §§ 3-5-111, 85-2-102, -112, -113, -114, -401 and -406; repealing §§ 85-2-201 to -210.

2. MCA § 85-2-211 (1979).

3. The federal Indian reservations located in Montana are the Blackfeet, Flathead, Rocky Boy's, Fort Belknap, Fort Peck, Crow, and Northern Cheyenne.

4. MCA §§ 85-2-701 to -704 (1979).

5. Actions were filed in the Billings, Missoula, and Great Falls divisions of the Montana Federal District Court: Northern Cheyenne Tribe v. Tongue River Water Users Ass'n, No. 75-6-BLG (D.Mont. 1979), United States v. Tongue River Water Users Ass'n, No. 75-20-BLG (D.Mont. 1979), United States v. Bighorn Low Line Canal, No. 75-34-BLG (D. Mont. 1979), United States v. Velva Aasheim, No. 79-40-BLG (D.Mont. 1979), United States v. Arvin S. Aageson, No. 79-21-GF (D.Mont. 1979), United States v. AMS Ranch, Inc., No. 79-22-GF (D.Mont. 1979), United States v. Annette A. Abell, No. 79-33-M (D.Mont. 1979).

water between the state and the Indian reservations.[6] Thus arose three questions which form the substance of this comment, and which must be answered before the water rights adjudication in Montana can be completed:

1) Should the state or federal courts provide the forum for adjudication of Indian reserved water rights?

2) To what extent should negotiation be used to resolve the issues surrounding Indian reserved water rights?

3) What standard should be applied to quantify those rights?

II. The Basis for the Adjudication

Montana lags far behind other western states in developing a system for fixing priorities of water rights and keeping records of those claims. With the exception of adjudicated streams, prior to the enactment of the 1973 Montana Water Use Act there was no requirement that a water claim be recorded.[7] Rights were determined on the basis of "first in time is first in right."[8] Without records fixing the date of diversion and describing the amount of a claim, resolution of a water right dispute in many cases would be entirely guesswork. This situation, combined with the judicial doctrine of abandonment, which requires claimants to use their claim or lose it,[9] in many cases reduced water rights adjudication in Montana to chaos.

Senate Bill 76 was enacted to resolve much of this uncertainty. The law, effective May 11, 1979,[10] is designed to expedite and facilitate the adjudication of existing water rights. It divides the state

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6. The Supreme Court recognized the problems inherent in granting state jurisdiction over Indians when it wrote:

> They [the Indians] owe no allegiance to the States, and receive from them no protection. Because of local ill feeling, the people of the states where they are found are often their deadliest enemies.

United States v. Kagama, 118 U.S. 375, 384 (1886). The presence of at least a vestige of this problem is demonstrated by a recent statement issued on behalf of the Fort Belknap Indian Community. This statement, issued at a public hearing held August 24, 1979, in Billings, Montana, provides in part that before negotiations over water rights can begin, the McCarran Amendment, 28 U.S.C. § 666 (1976), must be repealed. It is the McCarran Amendment which has been construed as granting concurrent jurisdiction to states to adjudicate Indian water rights. Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) [hereinafter cited as Akin].

7. A. Stone, Selected Aspects of Montana Water Law 27 (1978), citing Murray v. Tingley, 20 Mont. 260, 50 P. 723 (1897).

8. Thorp v. Woolman, 1 Mont. 168 (1870). *See also* Murray v. Tingley, 20 Mont. 260, 50 P. 723 (1897), *codified at* MCA § 85-2-401 (1979).

9. Codified at MCA § 85-2-404 (1979).

10. 1979 Mont. Laws, ch. 697 § 38 provides the Act is effective upon approval. The Act was approved May 11, 1979.

into four water districts[11] and provides the adjudicatory machinery to implement the act. Generally, the procedure outlined in the act for establishing a water right requires the following:

1. Issuance of an order by the Montana Supreme Court requiring the filing by all claimants of statements of each claim.[12]
2. Submission of all filed claims[13] to the water judge in the division in which the claimed water has been diverted.[14]
3. Issuance of preliminary decrees of water rights by water judges[15] based upon reports of water masters.[16]
4. Entry of a final decree of wager right binding all parties after the passage of a reasonable time without objection to the preliminary decree.[17]
5. If objection is taken by a claimant to the preliminary decree, a hearing will be held for the purpose of adjudicating the right.[18]

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11. MCA §§ 3-7-101, -102 (1979). The four divisions are designated the Yellowstone River Basin, the Lower Missouri River Basin, the Upper Missouri River Basin, and the Clark Fork River Basin.

12. The Order issued from the Montana Supreme Court on June 8, 1979, and provides: FAILURE TO FILE A CLAIM AS REQUIRED BY LAW WILL RESULT IN A CONCLUSIVE PRESUMPTION THAT THE WATER RIGHT OR CLAIMED WATER RIGHT HAS BEEN ABANDONED. This order is notice of commencement of procedures for the general adjudication of existing rights to the use of water. Every person, including but not limited to an individual, partnership, association, public or private corporation, city or other municipality, county, state agency or the State of Montana, and federal agency of the United States of America on its own behalf or as trustee for any Indian or Indian tribe, asserting a claim to an existing right to the use of water arising prior to July 1, 1973, is ordered to file a statement of claim to that right with the Department of Natural Resources and Conservation of the State of Montana no later than January 1, 1982. Claims for stock and individual as opposed to municipal domestic uses based upon instream flow or groundwater sources are exempt from this requirement; however, claims for such uses may be voluntarily filed. Claims filed with the department in the Powder River Basin in a declaration filed pursuant to the Order of the Department of Natural Resources and Conservation or a district court issued pursuant to sections 8 and 9 of Chapter 452, Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws of 1975, are also exempt.

13. MCA § 85-2-221 (1979). Claimants have until January 1, 1982, to file a statement of claim with the Department of Natural Resources and Conservation.

14. MCA § 3-7-201 (1979) provides for the designation of water judges. Judge Bernard W. Thomas (Lower Missouri River Basin), Judge Robert M. 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.

15. MCA § 85-2-231 (1979).

16. MCA §§ 3-7-301 to -311 (1979) provide for the appointment, terms and conditions of appointment, and duties of water masters.

17. MCA § 85-2-234 (1979).

18. MCA § 85-2-233 (1979).

The 1979 amendments to the Montana Water Use Act are designed to give it the comprehensive nature it must have if it is to provide a solution to the unsettled area of Montana water rights.[19] However, before state courts can proceed with meaningful adjudication, it must be determined how much water found within the state is available for distribution to Montanans, in other words, how much is not reserved to the federal reservations within the state. This question, and the question of where that decision will be made, are the preeminent water rights issues presently facing Montana.

III. THE FORUM FOR ADJUDICATION

The question of the proper forum for Indian reserved water rights adjudication has been the subject of a large amount of current legal literature. Many of the more significant issues related to the question were apparently resolved by the recent companion cases of *Colorado River Water Conservation District v. United States* and *Akin v. United States*.[20] *Akin*, as the consolidated cases will be referred to here, recognized the power of the state to adjudicate Indian water rights in limited circumstances pursuant to 28 U.S.C. § 666 (the McCarran Amendment).[21] The Court's rationale has been applied by the federal district courts in Montana, resulting in the dismissal of seven federal suits brought to adjudicate Indian water rights.[22] The question on appeal is the applicability of the *Akin* rationale to the peculiar facts surrounding Indian reserved water rights adjudication in Montana.

A. *The Indian Position*

Montana Indian tribes assert that the federal courts are the

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19. Each claim filed must be accompanied by a $40.00 filing fee. MCA § 85-2-225 (1979). However, the total fee to be paid by a single claimant in one water division is limited to $480.00. MCA § 85-2-225(1) (1979). No filing fee is required to accompany a claim which is evidenced by a decree issued by a state court. MCA § 85-2-225(2) (1979). Claims for livestock and individual domestic uses based on instream flow or groundwater sources are exempt from the filing requirements of the Act, as are claims for rights in the Powder River Basin included in a Department Declaration or Court Order issued pursuant to the 1973 Water Use Act and its 1975 amendments. MCA § 85-2-222 (1979). All water rights not exempted from the Act's application must be filed with the Department of Natural Resources and Conservation by January 1, 1982. Failure to do so by that date gives rise to a conclusive presumption of abandonment of that right. MCA § 85-2-226 (1979).

20. 424 U.S. 800 (1976).

21. *Id.* at 809.

22. Order dated November 26, 1979, issued jointly by United States District Court Judges James F. Battin and Paul G. Hatfield.

proper forum for any water rights adjudication.[23] Two arguments militate in favor of maintaining tribal immunity from state jurisdiction: 1) the necessity of providing the tribes with an unbiased forum, and 2) the historical concept of Indian tribes as sovereign entities not subject to state control.

The first consideration "stems from the long-standing power struggle between tribes and states—the states' jealousy of Indian tribal sovereignty and the often vehement opposition of tribes to state jurisdiction over their persons and property."[24] This mutual animosity may adversely affect Indian water rights if those rights are settled (pursuant to the McCarran Amendment) in state rather than in federal courts. Senator Edward Kennedy recently summarized the tribes' dilemma:

> Indian water rights no matter how critical to a tribe's future, no matter how well inventoried, no matter how brilliantly defended by government attorneys, cannot receive full protection in state court forums, for the security of Indian water rights rests not only upon a full committment from the Executive and the complete support of Congress, but also upon the availability of an independent and dispassionate federal judiciary to adjudicate these rights.[25]

In sum, "state courts . . . have been generally hostile to the assertion of Indian rights."[26] The tribes merely desire to avoid having this hostility translated into an undesirable final quantification of their water rights. Absent a negotiated settlement the only alternative is to seek adjudication in federal court.[27]

In support of their demand for a federal forum the tribes urge that allowing adjudication in a state forum is a breach of the trust

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23. The United States filed seven actions on behalf of the Montana Indian tribes for the purpose of adjudicating Indian water rights within the state. *See* note 5 *supra.*

24. Taylor and Birdbear, *State Jurisdiction to Adjudicate Indian Reserved Water Rights,* 18 NAT. RES. J. 221, 230 (1978).

25. Indian Water Rights: Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, 94th Cong., 2d Sess. 2 (1976).

26. M. PRICE, LAW AND THE AMERICAN INDIAN 322 (1973).

27. The relative attractiveness of the federal courts as a forum for resolution of Indian related legal issues has received some limited investigation in Montana. Erik Thueson, in an unpublished federal Indian law thesis, *Indian Treaty Rights as Viewed by Three Montana Judges* (1979), analyzed decisions of Montana Federal District Court Judges Jameson, Battin, and Smith, and concluded:

> Viewed in their entirety, the opinions researched showed no definite leaning toward either a liberal federal or restrictive state viewpoint on Indian rights. Individually, however, the judges may show [a] tendency to take a certain stance. Judge Jameson's opinions have definitely been consistent with the protective viewpoint generally associated with the United States Supreme Court. On the other hand, Judge Battin's opinions may appear to favor restrictive state viewpoints, and Judge Smith's opinions seemed to place him somewhere in the middle.

obligation owed them by the United States.[28] The basis upon which this trust obligation rests is illustrated by the following excerpt from the final report of the National Water Commission:

> 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 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 Indian tribes who are beneficiaries of the trust.[29]

Though this argument was given short shrift in *Akin,* the Court finding that to allow state adjudication of Indian water rights pursuant to the McCarran Amendment did not breach "the special obligation of the federal government to protect Indians,"[30] it nonetheless provides support for an argument that Indian reserved water rights should be treated differently from other federal reserved water rights.[31] Regardless of the practical basis for distinguishing Indian and non-Indian reserved rights, however, the Supreme Court has given no indication that it will do so, either for the purpose of deciding upon a forum for their determination[32] or a standard for quantification.[33]

The second basis for demanding federal adjudication is that the tribes are sovereign entities and should not be subjected to state control. The United States Supreme Court has on several occasions recognized that "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history."[34] Tribal immunity from state jurisdiction was recognized as early as 1832 in *Worcester v. Georgia*[35] and has continued vitality today.[36] This proposition also finds support in language from many

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28. The Supreme Court has recognized the existence and nature of this trust obligation on several occasions. *See* Seminole Nation v. United States, 316 U.S. 286 (1942); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Choctaw Nation v. United States, 119 U.S. 1 (1886); United States v. Creek Nation, 295 U.S. 103 (1935).

29. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 477 (1973).

30. Akin, 424 U.S. at 812.

31. The Supreme Court recognized, in Arizona v. California, 373 U.S. 546, 601 (1963) that federal reserved rights will be implied for all federal reservations. Besides Indian reservations, this would include national parks, national forests, national monuments, etc.

32. *See* Akin, 424 U.S. 800.

33. *See* Arizona v. California, 373 U.S. 546 (1963).

34. McClanahan v. Arizona Tax Commission, 411 U.S. 164, 168 (1973), *quoting* Rice v. Olson, 324 U.S. 786, 789 (1945).

35. 31 U.S. (6 Pet.) 515 (1832).

36. *See* Bryan v. Itasca County, 426 U.S. 373 (1976); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975).

of the treaties creating the reservations.[37] For example, the 1855 Treaty between the United States and the Flathead, Kootenay, and Upper Pend D'Oreilles Indians provides:

> Article I. The said confederated tribes of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them, bounded and described as follows. . . .
> Article II. There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation. . . .
> Article IV. In consideration of the above cession, the United States agree to pay to the said confederated tribes of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of one hundred and twenty thousand dollars, in the following manner. . . .[38]

The import of the above language is that the Indians are the beneficial holders of all the land described, and in their capacity as sovereign tribes have ceded a portion of land to the United States for "just compensation." The ramifications of such a construction are significant. If the Indians are treated as having aboriginal title (from time immemorial) their priority date for water rights is superior to all other water users; the tribes could make any use they desire of the streams they control and would not be limited by the purposes for which the reservation was established.[39]

It is this construction of the treaties, gained from a superficial inspection of their provisions and made in total disregard of the political realities extant at the time of their making, which is most flattering to the principle of tribal sovereignty, and the construc-

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37. Of the seven Indian reservations in Montana, all but the Northern Cheyenne Indian reservation and the Rocky Boy's Indian reservation were established by treaty. The boundaries of the three northern reservations (Blackfeet, Fort Belknap, Fort Peck) were subsequently modified by agreements later ratified by Congress. J. HAMILTON, HISTORY OF MONTANA, FROM WILDERNESS TO STATEHOOD 194-95 (1970).

38. Treaty with Flathead, Kootenay, and Upper Pend D'Oreilles, July 16, 1855, 12 Stat. 975.

39. F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 163 (National Water Commission 1971); Palma, *Indian Water Rights: A State Perspective After Akin*, 57 NEB. L. REV. 295, 302 (1978). This view is presently advanced by at least one Montana tribe. Charles Plumage, in a statement issued on behalf of the Fort Belknap tribe, declared: "Indian tribes have been considered sovereign entities dependent only upon the United States in its role as guardian of their interest." Then, focusing on water rights, he continued, "based upon the view that title to water rests upon aboriginal title and existed from time immemorial which was recognized by the federal government via treaty, agreement or executive order, there should be no question as to the ownership of Indian water rights. This title is superior to either state or federal created right[s]." Statement by Charles (Jack) Plumage, President of the Fort Belknap Indian Community Tribal Government at a public hearing before Senator Melcher in Billings, Montana, August 24, 1979 [hereinafter cited as Plumage] at 2, 5.

tion to be urged on behalf of the Indians. However, the above quoted treaty language is misleading when read in isolation. The treaty also provides that the Indians will have no control over amounts paid to them. The President could apply the sums paid for any beneficial objects he deemed appropriate.[40]

Though this theory of Indian sovereignty finds some support in case law[41] and has been advanced by legal scholars,[42] it is not an accurate picture of how Indian "sovereign" rights have been characterized by the courts. It is not a question of whether Indian tribes are sovereign, but to what extent they are allowed to exercise that sovereignty:

> Perhaps the most basic principle of Indian law . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a *limited sovereignty* which has never been extinguished.[43]

The Supreme Court has acknowledged that Indian nations are "distinct, independent political communities"[44] and recognized their "right to self government."[45] However, the right of Indians to define and exercise their sovereign power is limited. Boilerplate language in many of the treaties creating Montana reservations expressly provides that the tribes "acknowledge their dependence upon the government of the United States."[46] Similar language appears in *Cherokee Nation v. Georgia,*[47] where the same tribe described in *Worcester* as a "distinct, independent political communit[y]" was characterized by the Court as a "domestic dependent nation," its "relation to the United States resembl[ing]

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40. Treaty with Flathead, Kootenay, and Upper Pend D'Oreilles, *supra* note 38, at art. IV.

41. Advocates of the "aboriginal theory" rely upon United States v. Winans, 198 U.S. 371, 381 (1905), where the Court stated that the treaty creating the Yakima tribal reservation involved a grant of rights from the tribe to the federal government. Some lower court decisions also support this argument. *See* United States v. Hibner, 27 F.2d 909 (9th Cir. 1928); United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied,* 352 U.S. 988 (1957), *on remand,* 330 F.2d 897, *reh. denied,* 338 F.2d 307 (1964), *cert. denied,* 381 U.S. 964 (1965).

42. The most outspoken advocate of this position is William Veeder. *See* Veeder, *Indian Prior and Paramount Rights Versus State Rights,* 51 N.D. L. REV. 107 (1974).

43. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1971)(emphasis added).

44. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

45. *Id.* at 561.

46. *See, e.g.,* The Treaty with the Blackfeet and other Tribes of Indians, October 17, 1855, art. XI, 11 Stat. 657; also the Treaty with the Flathead, Kootenay, and Upper Pend D'Oreilles, July 16, 1855, art. VIII, 12 Stat. 975.

47. 30 U.S. (5 Pet.) 1 (1831).

that of a ward to his guardian."[48]

The concepts of dependence and independence are not inconsistent in this context. Two recent Supreme Court decisions, *Oliphant v. Suquamish Indian Tribe*[49] and *United States v. Wheeler*,[50] clarify their relationship. Specifically, in *Oliphant* the Court stated:

> Indian tribes do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the Federal Government . . . . But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments . . . . Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status.'[51]

More precisely, an Indian tribe is sovereign to the extent that the United States permits it to be sovereign—neither more nor less.[52] This definition of tribal sovereignty provides little to support a legal argument that Indians must remain free of state control in water rights adjudication.

B. *The State Position*

Section 27 of Senate Bill 76 outlines the state's position relative to Indian water rights adjudication. It provides that the state adjudication must include "all claimants of reserved Indian water rights as necessary and indispensable parties under authority granted the state by 43 U.S.C. 666 [the McCarran Amendment]."[53] Relying on the McCarran Amendment, the state of Montana moved to dismiss the seven cases brought in federal court on behalf of the Montana Indians by the United States,[54] cases originally brought to avoid a state court adjudication of Indian water rights.[55]

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48. *Id.* at 17 (emphasis added).

49. 435 U.S. 191 (1978).

50. 435 U.S. 313 (1978).

51. 435 U.S. at 208.

52. *Id.* at 209. The explains that "[u]pon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereign."

53. MCA § 85-2-701 (1979).

54. The federal actions were brought pursuant to 28 U.S.C. § 1345 (1976), which grants original jurisdiction to the federal district courts to hear all suits brought by the United States, "except as otherwise provided by Act of Congress."

55. Four of the seven actions were brought in the Billings Division of the United States District Court for the District of Montana, one in the Missoula Division, and two in the Great Falls Division. *See* note 5 *supra*.

The motions to dismiss were granted by joint order on November 26, 1979.[56]

The dismissal by the district courts has been appealed. If the state is to ultimately succeed in asserting its right to adjudicate Indian water rights it must prevail on two points. First, Montana must defend its contention that it has jurisdiction to adjudicate Indian water rights. Second, it must establish that the dismissed federal actions fall within that limited area where the federal courts may properly refuse to exercise jurisdiction.

Absent a grant of power from the federal government, states are without authority to assert jurisdiction over Indian tribes.[57] In the present situation, state jurisdiction to adjudicate Indian water rights is based on the McCarran Amendment.[58] This statute allows the United States to be joined in a suit whenever joinder is necessary to adjudicate all of the rights of various owners on a given stream.[59] This statute was construed in *Akin,* despite the superficially contrary provisions of Public Law 280,[60] as granting jurisdiction to state courts to determine federal reserved rights held on behalf of Indians.[61]

The decision in *Akin* was based on the fact that the state court in Colorado had jurisdiction to decide water rights claims.[62] In Montana, the question of whether the state has jurisdiction is complicated by facts not present in the *Akin* decision. Article I of the Montana Constitution recognizes the absolute power of Congress to control all lands held by any Indian or Indian tribe, and disclaims any jurisdiction over these *lands* except as otherwise provided by the "consent of the United States and the people of Montana."[63]

Whether this provision applies to water rights or will be deter-

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56. The order, finding all seven cases presented common questions, was issued by Judge Hatfield and Judge Battin, and filed November 29, 1979.

57. Worcester, 31 U.S. (6 Pet.) at 561.

58. 28 U.S.C. § 666 (1976).

59. 28 U.S.C. § 666(a) (1976).

60. Public Law 280, 28 U.S.C. § 1360(b) (1976) provides for expanded state jurisdiction over Indian tribes whenever both parties consent, but specifically denies any intent to confer jurisdiction on the state to adjudicate Indian water rights. The Court in Akin, 424 U.S. at 812-13 n.20, found this general provision did not control the specific grant of jurisdiction provided for by the McCarran Amendment.

61. 424 U.S. at 809. The rule is not limited to the peculiar facts of the *Akin* case. *See* Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979).

62. Akin, 424 U.S. at 809.

63. MONT. CONST. art. I (emphasis added). This provision carries forward "the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States . . . until revoked by the consent of the United States and the people of Montana."

minative of the issue of jurisdiction remains to be seen. Assuming the provision, which makes reference only to "lands," applies to water rights, the two conditions for allowing states to exercise jurisdiction over Indian water rights seem to have been satisfied. First, the *Akin* case held that the McCarran Amendment granted states the right to adjudicate Indian reserved water rights.[64] Second, the people of Montana demonstrated their consent to exercise this power by passing the 1979 amendments to the Montana Water Use Act.[65]

Case law supports the conclusion that Montana's constitutional disclaimer does not prevent the state from adjudicating Indian water rights. In *Draper v. United States,*[66] the Supreme Court construed the Montana Enabling Act which contained the same disclaimer now found in Article I of the Montana Constitution. The Court concluded that nothing therein could be construed as constituting exclusive federal jurisdiction.[67] *Draper* was cited and relied upon in the 1973 decision of *Mescalero Apache Tribe v. Jones,*[68] where the Supreme Court, describing the significance of jurisdictional disclaimers, stated:

> The upshot ([of] more individualized treatment of . . . *statehood enabling legislation* as [it] . . . affect[s] the respective rights of states, Indians and the Federal Government) has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or served by federal law.[69]

Though the federal courts in Montana have not addressed the possible effects of state constitutional disclaimers of authority to adjudicate Indian reserved water rights,[70] other courts have. New Mexico, with a substantially equivalent constitutional disclaimer,[71] has concluded that it does not prohibit state adjudication of Indian reserved water rights.[72] More recently, in June of 1979, the Tenth Circuit Court of Appeals held, in *Jicarilla Apache Tribe v. United*

64. Akin, 424 U.S. at 809.

65. Arguably, only a referendum vote by the people of Montana would constitute the consent contemplated by MONT. CONST. art. I. But, assuming this is correct, the disclaimer would probably be preserved only until a referendum could be called.

66. 164 U.S. 240 (1896).

67. *Id.* at 246-47.

68. 411 U.S. 145 (1973).

69. *Id.* at 148 (citations omitted)(emphasis added).

70. The order issued by Judges Hatfield and Battin dismissing the seven federal water rights suits does not mention the disclaimer.

71. N.M. CONST. art. XXI § 2.

72. Reynolds v. Lewis, 88 N.M. 636, 637, 545 P.2d 1014, 1015 (1976).

States,[73] that notwithstanding the disclaimer clauses in the state enabling act and the state constitution, the New Mexico state courts have jurisdiction pursuant to the McCarran Amendment to adjudicate all federally reserved water rights, including those set aside for use by Indian tribes.[74] In light of these decisions and the mutual consent of the United States and the people of Montana, it is probably safe to assume that Montana's constitutional disclaimer will not deprive the state of jurisdiction to adjudicate Indian reserved water rights.

The question still remains as to whether the Montana federal district courts can properly refuse to exercise jurisdiction in this case. As noted earlier, the actions brought in federal court on behalf of the Montana Indian tribes for adjudication of their water rights were filed prior to enactment of the 1979 amendments to the Montana Water Use Act. Nonetheless, upon motion of the state of Montana, those suits were dismissed. This action was taken in reliance on *Akin,* where the court, fully cognizant of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them,"[75] nonetheless found an exception based on various considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."[76] In light of the primary reliance upon *Akin* by the federal district courts of Montana in dismissing the Indian water rights cases, this case merits closer examination.

In *Akin,* the Supreme Court, by a six to three majority, found that the McCarran Amendment did not limit the scope of federal court jurisdiction to adjudicate civil actions brought pursuant to 28 U.S.C. § 1345.[77] However, the Court found that the amendment did grant state courts the right to adjudicate federal reserved water rights, including those held on behalf of Indians.[78] The Court then approved its prior decisions, thereby indicating that no distinction exists between Indian and non-Indian reserved rights for purposes of the amendment.[79]

Finding the state court had jurisdiction to adjudicate Indian reserved water rights the Court next considered whether the federal district court had acted properly in dismissing the federal suit

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73. Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979).

74. *Id.* at 1135.

75. Akin, 424 U.S. at 817.

76. *Id.* (citations omitted).

77. *Id.* at 809.

78. *Id.*

79. *Id.* at 810. The Court placed primary reliance on language from United States v. Eagle County, 401 U.S. 520 (1971).

brought to adjudicate those same rights. The district court had dismissed the action in favor of the subsequently filed state case on the basis of the doctrine of abstention.[80] The circuit court found abstention inapplicable and reversed.[81] The Supreme Court agreed that the doctrine of abstention was inapplicable, but upheld dismissal on the basis of the previously noted standard of "wise judicial administration."[82] The Court outlined the reasons for allowing dismissal:

(1) it would avoid piecemeal adjudication of interdependent water rights in the water system,[83]

(2) Colorado had a continuous system of water rights adjudication which antedated the filing of the federal suits,[84]

(3) the federal court proceedings had not passed the pleading stage,[85]

(4) state water rights were extensively involved (1000 named defendants),[86]

(5) the federal forum was inconvenient,[87] and

(6) the federal government was already participating in other state actions adjudicating water rights.[88]

The Court specifically refrained from deciding whether the result would be the same if the federal proceedings had been further advanced, if the state were less involved, or if the state proceedings were inadequate to resolve the federal claims.[89] If these are the criteria for applying the *Akin* exception to federal jurisdiction Montana seems to have met them. The federal cases filed in Montana had not advanced beyond the pleading stage at the time of dismissal, state involvement in the federal suits was even greater than that in *Akin*, and Montana had just enacted a statutory scheme designed to adjudicate *all* water rights claimed within the state.

The similarities between *Akin* and the present situation in

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80. Akin, 424 U.S. at 806.

81. *Id.*

82. *Id.* at 817. The Court indicated that "[i]n assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum, . . . the desirability of avoiding piecemeal litigation, . . . and the order in which jurisdiction was obtained by the concurrent forums. . . ." *Id.* at 818 (citations omitted).

83. *Id.* at 819.

84. *Id.* Montana has no such ongoing system of comprehensive water adjudication antedating the filing of the federal suits.

85. *Id.* at 820.

86. *Id.* The order dismissing the federal district court cases filed in Montana indicated that approximately 9000 defendants were named in those actions.

87. *Id.* at 820.

88. *Id.*

89. *Id.*

Montana are obvious. Many of the same considerations of "wise judicial administration" apply. However, the determinative issue is whether the differences between the facts in *Akin* and the Montana situation make dismissal of the federal suits appropriate.[90] Apparently Judge Hatfield and Judge Battin feel the Montana situation falls within the narrow exception to "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."[91] Their order dismissing the federal actions and its impact upon the pending adjudication is considered next.

C. *Status of the "Appropriate Forum" Issue*

As indicated above, the question to be resolved in Montana's ongoing attempt to adjudicate Indian water rights is whether the order dismissing the federal suits can withstand appellate review. In other words, was dismissal of the federal actions appropriate under the rule handed down by the Supreme Court in *Akin*?

The order dismissing the federal cases closely follows the format of the *Akin* decision. The federal courts found they had jurisdiction pursuant to 28 U.S.C. § 1345[92] and held the doctrine of abstention inapplicable.[93] The order borrows language from *Akin* defining the parameters of the "wise judicial administration" rule which permits nonexercise of federal jurisdiction, and the judges found it applicable to the facts before them.[94] The order then outlines the state water adjudication procedures provided for by Senate Bill 76, describing the bill as "comprehensive and efficient."[95] The general state adjudication having been initiated, the judges concluded that "it would seem the greater wisdom lies in following *Colorado River [Akin]*, and, on the basis of wise judicial administration, deferring to the comprehensive state proceedings."[96]

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90. *Id.* In *Akin* the Supreme Court noted the limited scope of the exception allowing dismissal of federal cases on grounds other than abstention.

91. *Id.* at 817.

92. Joint order issued November 26, 1979, by Judges Battin and Hatfield, filed November 29, 1979, at 2-3.

93. *Id.* at 3-4.

94. *Id.* at 4-5.

95. *Id.* at 5-6.

96. *Id.* at 6-7. The courts supported their conclusion with the following:

> The federal proceedings are all in their infancy; service of process has been but recently completed. The state adjudication is thorough, as opposed to the piecemeal proceedings initiated by the Government. There is no jurisdictional question preliminarily attending the state adjudication; all such questions have been eliminated by the McCarran amendment. The state forum will likely be more convenient, geographically, than the federal forum. The amount of time contemplated for completion of the state adjudication is significantly less than would be necessary for federal adjudication, insofar as the state has provided a special court sys-

In addition to the reasons enumerated in the order, another important factor militates strongly in favor of proceeding to adjudicate Indian water rights in state courts. While state adjudication will define all state water rights as of the date of the final decree and bind all water claimants within each water division,[97] the federal courts can guarantee no such final solution. The federal actions are *in personam* and bind only the persons made parties to the actions. In light of the unavailability of records indicating who are water rights claimants, it is highly unlikely all interested parties will be joined. The federal suits thus have limited utility: "They cannot bind, they cannot be *res judicata,* and they cannot settle the relative water rights of persons not named, not served, and not having had their day in court."[98]

Whether the reasons given by Judges Battin and Hatfield for federal deference to state adjudication will ultimately be found adequate under the rule of *Akin* is speculative. In any event, *Akin* is at present the controlling guideline for courts to follow in determining the appropriate forum for adjudication of Indian water rights. It indicates that little if any weight will be given to assertions that state courts, due to their susceptibility to pressure from state interests, are unfit forums for adjudication of those rights.[99] As a corollary, *Akin* concludes that to allow states to define reserved rights is no breach of the federal government's trust obligation to the tribes.[100]

By concluding that the McCarran Amendment gives states the power to adjudicate Indian water rights the Supreme Court in *Akin* implicitly recognized the bounds of Indian sovereignty in the area of water rights. These rules may be summarized as follows. The United States reserved the water rights for the Indians.[101]

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tem solely devoted to water rights adjudication. The federal judicial resources in Montana are limited; continued exercise of federal jurisdiction over the pending adjudications would either exhaust or severely deplete those resources for a substantial number of years, just by virtue of the number of parties involved. (In these cases, there are approximately 9,000 defendants.) The possibility of conflicting adjudications by the concurrent forums also looms large and could be partially avoided only by staying the pending state adjudication, an action *Colorado River* has intimated is distinctly repugnant to a clear state policy and purpose.

Id. at 7.

97. See MCA §§ 85-2-226, -234(2) (1979).

98. Stone, *Impliedly Reserved Federal Water Rights: A Status Report,* 1 MONT. PUB. LAND L. REV. (1980). This poses a practical problem in Montana, as water rights are personal property capable of being transferred separately from the land to which they are appurtenant. Brady Irr. Co. v. Teton County, 107 Mont. 330, 85 P.2d 350 (1938); Osnes Livestock Co. v. Warren, 103 Mont. 284, 62 P.2d 206 (1936). This right of severance is now limited by MCA § 85-2-403(3) (1979).

99. Akin, 424 U.S. at 812.

100. *Id.*

101. Winters v. United States, 207 U.S. 564, 577 (1908); Arizona v. California, 373 U.S.

Thus, the date of appropriation is the date the reservation was created,[102] and water rights are limited by whatever standard the Court ultimately imposes. Generally, the amount of water reserved is that which is necessary to fulfill the purposes of the reservation.[103] The issue of quantification will be further developed in part V.

IV. Negotiation v. Litigation

Before turning to the most significant point of contention in adjudicating Indian water rights, the issue of exactly what amount of water the tribes are entitled to, a passing reference must be made to the available modes for resolving the conflict. There are two alternatives: litigation in either a state or federal forum, or settlement through negotiation.

While at present the probability of reaching a negotiated compromise is slight,[104] it is an alternative that should not be overlooked. Senate Bill 76 established a reserved water rights compact commission of nine members[105] to negotiate a water rights compact with each Montana Indian tribe.[106] Each compact would declare the reserved water rights of the tribe involved and would become effective upon ratification by the Montana legislature, any affected tribal governing body, and the Congress of the United States.[107]

The compact commission has made little progress in negotiating a settlement with any of the tribes. The reluctance of the tribes to negotiate may be a function of reliance on the assumption that Indian water rights would be settled in federal court. The position of one Montana Indian reservation with respect to a negotiated settlement has been more clearly enunciated.[108] The President of the Fort Belknap Tribal Government has stated that before serious negotiations over Indian water rights can begin:

> 1. Indian tribes must be recognized as sovereign with governments and who are fully capable of managing their own

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at 600.

102. Winters, 207 U.S. at 577; Arizona v. California, 373 U.S. at 600.

103. Cappaert v. United States, 426 U.S. 128, 138 (1976).

104. Correspondence from Thomas (Bearhead) Swaney, member of the Tribal Council of the Confederated Salish and Kootenai Tribes, January 14, 1980, states this sentiment in stronger terms. He writes, "The likelihood of the Compact Commission succeeding is nonexistent, at least in my opinion."

105. MCA § 2-15-212 (1979).

106. MCA § 85-2-702 (1979). Note that MCA § 85-2-703 (1979) authorizes the compact commission to negotiate similar compacts with the United States for non-Indian federal reservations within Montana.

107. MCA § 85-2-702(2) (1979).

108. *See* Plumage, *supra* note 39, at 6-7.

water. . . .

2. The protection of Indian water rights must be removed from the Department of Interior and the Department of Justice and vested in a separate agency which would have full authority to take action and adjudicate disagreements between Indians and non-Indians. . . .

3. A national water policy must first take into account the need for hydrological studies upon Indian reservations. . . .

4. A plan must be developed for present and future use of Indian waters[109]. . . .

5. The McCarran Amendment must be repealed[110]. . . .

Some softening of this position can reasonably be expected in light of the recent dismissal of the federal water right adjudication suits, and the tribes may show renewed interest in the prospect of a cooperative settlement.

Negotiated settlement is an attractive option for several reasons.[111] It allows the tribes substantial input into any final solution and the opportunity to tailor it to the extent possible to their present and anticipated needs. Additionally, a compromise settlement avoids the uncertainty which attends any judicial determination, a determination which might adopt a more limited standard for quantification of water rights than would be acceptable to the commission. Finally, a negotiated settlement avoids the ill will produced by an adversarial proceeding. Montana water users, Indian and non-Indian, have a common economic interest in ascertaining the amount of their relative rights and protecting those rights from external claims. Negotiation allows cooperative efforts toward these goals.

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109. *Id.* at 7. He explains that "[f]unds must be made available for tribes to plan for future use of water, which would be more in conformity to the idea of Indian self-determination. Also, state government must agree not to oppose proposals by Indian tribes for funds to develop and implement plans for the construction of projects for Indian reservations."

110. *Id.* at 7. He explains. "This amendment has effectively allowed state courts to adjudicate federal reserved rights. In view of the Akin case which held that Indian water rights suits may be litigated in state courts, it now becomes a foot race to the courthouse. In effect this puts Indian water rights at the mercy of state courts which we think is not a proper forum to adjudicate aboriginal and federal reserved rights which existed even before some states entered the union. State courts have traditionally ignored the sovereign status of Indian tribes and the Winters Doctrine would no doubt get the same treatment."

111. President Carter, in his 1978 Water Policy Statement, expressed a preference for negotiated settlements of Indian Water Rights. *See* PRESIDENT'S WATER POLICY STATEMENT ON FEDERAL AND INDIAN RESERVED WATER RIGHTS, app. II, at 70.

V. QUANTIFICATION

A. *The Reserved Water Rights Doctrine*

As a general rule the various treaties, statutes, and executive orders creating Indian reservations or federal reservations of any type make no specific provision reserving water rights. This is the situation in Montana. Nevertheless, the Supreme Court has recognized an "implied-reservation-of-water-doctrine" or "*Winters*" right[112] which attaches to the reservation as of the date the reservation was set aside.[113]

The Supreme Court acknowledged the federal government's power to reserve water in *Winters v. United States.*[114] *Winters* was an action brought by the United States in federal district court on behalf of the Indian tribes of the Fort Belknap reservation to enjoin upstream non-Indian defendants from diverting water from the Milk River. The water was needed to irrigate reservation pasture and farmland. The Court rejected the non-Indian defendants' argument that they were entitled to the water under the state law doctrine of prior appropriation,[115] and concluded the federal government had reserved the water for the Indians as of the date the reservation was created.[116]

As the *Winters* case illustrates, "the 'reserved rights doctrine' is a doctrine built on implication and is an exception to Congress' [sic] explicit deference to state water law in other areas."[117] Thus, no definitive standard originally existed for quantifying reserved rights and the guidelines provided by the Supreme Court to date are inconclusive. The relevant interpretive case law is limited.

The *Winters* opinion provides little guidance as the Court's de-

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112. Winters, 207 U.S. at 577; Arizona v. California, 373 U.S. at 597-98; Cappaert v. United States, 426 U.S. at 138; United States v. New Mexico, 438 U.S. 696, 699-700 (1978).

113. Winters, 207 U.S. at 577; Arizona v. California, 373 U.S. at 599-600. The Supreme Court has thus far failed to indicate that any special preference will be given to tribes having aboriginal title. This issue is nonetheless the topic of ongoing debate. *See, e.g.*, Veeder, *Indian Prior and Paramount Rights for the Use of Water*, 16 ROCKY MTN. MINERAL L. INST. 631 (1971). Mr. Veeder advocates that the relevant treaties, executive orders, and congressional acts establishing reservations had the effect of confirming the Indians' pre-existing rights. This position has ostensibly been adopted by the Supreme Court in other contexts. *See* Antoine v. Washington, 420 U.S. 194, 196-97 (1975); Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974).

114. 207 U.S. 564 (1908).

115. The doctrine of prior appropriation or a hybrid thereof is the law in 17 western states: Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming. *See* A. STONE, SELECTED ASPECTS OF MONTANA WATER LAW 5-7 (1978).

116. Winters, 207 U.S. at 577.

117. United States v. New Mexico, 438 U.S. 696, 715 (1978).

cree merely enjoined the defendants from "interfering in any manner with the use by the reservation of 5,000 inches of the water of the [Milk] [R]iver,"[118] the amount needed by the tribe to irrigate its pasture and farmland. Nevertheless, proponents of the Indian position rely on language from the case describing the purpose of establishing the reservation (to change the habits of a "nomadic and uncivilized people" into those of a "pastoral and civilized people") to advance arguments that *Winters* rights must be expansive enough to meet any potential future needs of the reservation.[119]

The next significant development in the area of Indian water rights quantification was *Arizona v. California,* decided in 1963.[120] The case involved allocation of the waters of the Colorado River. The Court concluded that water rights were reserved for federal non-Indian as well as Indian reservations.[121] As to Indian water rights, the Court concluded that "the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage."[122] In the final decree issued a year later, the Court allocated to each federal reservation (Indian and non-Indian) the water necessary to fulfill the purpose of the reservation. In the case of Indian reservations, that amount was dependent upon the amount of "practicably irrigable acreage."[123]

The magnitude of the water rights reserved on the Indian reservations involved in *Arizona v. California* was determined by calculating the reservation's need for water for agricultural purposes. This standard would probably apply in Montana where individual reservations were established to implement a government policy of changing a nomadic and uncivilized people into a pastoral and civilized people.[124] "Accordingly, most Montana reservations would be allowed that quantity [of water] necessary 'to enable them [the Indians] to become self-supporting, as a pastoral and agricultural people, and to educate their children in the paths of civilization.' "[125]

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118. Winters, 207 U.S. at 565, 578.

119. *E.g.,* Plumage, *supra* note 39, at 3, where he states:

> Paramount and most important, Indian tribes have long been recognized as having, against all others, rights to water, sufficient to serve our agricultural needs as well as other economic and industrial needs. Winters v. United States, *supra.*

120. 373 U.S. 546 (1963).

121. *Id.* at 600-01.

122. *Id.* at 601.

123. Arizona v. California, 376 U.S. 340, 343-45 (1964).

124. Winters, 207 U.S. at 576; Pelcyger, *The Winters Doctrine and The Greening of the Reservations,* 4 J. CONTEMP. L. 19, 25 (1977).

125. Morrison, *Comments on Indian Water Rights,* unpublished thesis in Montana School of Law Library 52 (1978). Quoted passage was taken from the Preamble of the Treaty Between the United States and the Gros Ventre, Piegan, Blood, Blackfeet and River Crow

The result of *Arizona v. California* may not apply to all Montana Indian reservations. None of the reservations involved in the Colorado River adjudication were created by treaty. The majority of Montana Indian reservations were.[126] Nothing in the case suggests, however, that the distinction is determinative. By citing and relying on *Winters,* a case which involved a reservation created by treaty, the *Arizona* court implied that the distinction is irrelevant.[127] This analysis is supported by the conclusion of several authorities that *Arizona v. California* "settled once and for all the previously open question of the proper definition of the scope of such [*Winters*] rights."[128]

In *Cappaert v. United States,* a 1976 non-Indian federal reservation case, the Supreme Court again indicated that the "purpose rule" for quantifying the amount of water reserved on federal reservations is equally applicable to Indian and non-Indian reservations.[129] The Court found that the water reserved is the amount "necessary to fulfill the purposes of the reservation, no more."[130] Chief Justice Burger, writing for a unanimous Court, described the *Winters* doctrine as follows:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. . . .
>
> 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 available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.[131]

The question of what date would be used to determine the pur-

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Indians, May 1, 1888, 25 Stat. 113.

126. *See* note 37 *supra.*

127. Stone, *Impliedly Reserved Federal Water Rights: A Status Report,* 1 MONT. PUB. LAND L. REV. (1980).

128. Palma, *Indian Water Rights: A State Perspective After Akin,* 57 NEB. L. REV. 295, 305-06 (1978); Bloom, *Indian "Paramount" Rights to Water Use,* 16 ROCKY MTN. MINERAL L. INST. 669, 683 (1971). *See also* Moses, *The Federal Reserved Rights Doctrine—From 1866 through Eagle Country,* 8 NAT. RES. LAW. 221, 232 (1975).

129. 426 U.S. at 138.

130. *Id.* at 141.

131. *Id.* at 138-39.

poses of federal reservations was ostensibly settled in the most recent federal reserved water rights case to reach the Court, *United States v. New Mexico.*[132] The Court found that the amount of water reserved for the federal reservation involved was to be gauged as of the date of its creation.[133] It also indicated that only the amount necessary to fulfill the specific contemplated purposes of the reservation was reserved.[134] That amount necessary to fulfill secondary or evolving water needs could be obtained under state law.[135]

While the *New Mexico* case involved a non-Indian federal reservation, its rationale should be equally applicable to an Indian reservation. The Court relied upon both *Winters* and *Arizona v. California,*[136] and referred to federal reservations collectively:

> Substantial portions of the public domain[137] have been withdrawn and reserved by the United States for use as Indian reservations, forest reserves, national parks, and national monuments. And water is frequently necessary to achieve the purposes for which these reservations are made.[138]

B. *Applying the Reserved Water Rights Doctrine*

Winters v. United States, Arizona v. California, Cappaert v. United States, and *United States v. New Mexico* represent the most significant decisions defining standards for quantification of federal reserved water rights. They provide guidelines for quantifying reserved water rights claimed by Montana Indians. At the risk of erring too far on the side of simplicity, those guidelines can be summarized as follows:

1) Indian water rights were reserved by the federal government for the benefit of the Indian tribes.[139]

2) Those rights were reserved on the date the reservations were created.[140]

3) The amount of water reserved is the amount necessary

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132. 438 U.S. 696 (1978).

133. *Id.* at 698, 718. The federal reservation involved was the Gila National Forest.

134. *Id.* at 700, 705-17.

135. *Id.* at 702.

136. *Id.* at 698, 700.

137. The percentage of federally owned land in the eleven contiguous western states ranges from twenty-nine percent in Washington to eighty-six percent in Nevada, with an average of approximately forty-eight percent. Montana is approximately thirty percent federally owned land. ONE-THIRD OF THE NATIONS LAND, A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION 22-23 (1970).

138. United States v. New Mexico, 438 U.S. at 699.

139. Winters, 207 U.S. at 577; Arizona v. California, 373 U.S. at 600.

140. Winters, 207 U.S. at 577; Arizona v. California, 373 U.S. at 600.

to fulfill the purpose of the reservation.[141]

4) The purpose of the reservation will be strictly construed.[142]

5) The purpose of the reservation is a question of intent as of the time it was established.[143]

6) All water claims relating to nonprimary purposes must be acquired in accordance with state law.[144]

Application of these principles in Montana may provide the state with a solution to its reserved water rights problem. They do not lock the Indian tribes into an agrarian economy forever; rather, they merely place a limit on the water rights for which the tribes may claim special privileges. Specifically, once the amount of water necessary to fulfill the purposes of each reservation is identified and set aside, the reserved water rights of Montana Indians have been quantified. The right to use that amount of water cannot be lost through nonuse or abandonment[145] and may be used to satisfy the future needs of the tribe.[146] In addition, the reserved waters need not be applied to the use originally contemplated by the agreement or act creating the reservation.[147] This ostensibly opens the door to the sale and lease of Indian water rights.[148]

Identifying the amount of water necessary to fulfill the purposes of a given Indian reservation is no small task. Studies must be undertaken and completed to assess what those quantities might be. Absent a negotiated settlement between the state and the various tribes, final adjudication will await completion of those studies. Only when the state has identified rights held by the Indian tribes and private individuals within its own borders will it be able to assess the threat posed by claims of out-of-state (downstream) water users. Specifically, Montana water rights are subordinate to all downstream federal claims, and Montana has obligations under the Yellowstone River Compact.[149]

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141. Cappaert, 426 U.S. at 138.

142. United States v. New Mexico, 438 U.S. at 700, 702, 716-18.

143. *Id.* at 698, 716-18. For example, if a reservation was created for agricultural purposes (to change a nomadic people to a pastoral people) the amount of water reserved is that necessary to irrigate all of the "practicably irrigable acreage." Arizona v. California, 373 U.S. at 601.

144. 438 U.S. at 702, 716-18.

145. United States v. Hibner, 27 F.2d 909, 911-12 (9th Cir. 1928).

146. Arizona v. California, 373 U.S. at 600-01.

147. Arizona v. California, supplemental decree, 439 U.S. 419, 421 (1979).

148. *See* Leaphart, *Sale and Lease of Indian Water Rights,* 33 MONT. L. REV. 266 (1972).

149. Montana is a member of the Yellowstone River Compact, MCA §§ 85-20-101 to -121. Montana, Wyoming, and North Dakota are the member states.

VI. CONCLUSION

With the growing demand for western energy, states are becoming increasingly aware of the problems posed by water scarcity and correspondingly jealous of their control over water.[150] The struggle over water is especially pronounced in states like Montana where large amounts of land are owned by Indian tribes.[151]

> Under the reservation doctrine, Indian tribes potentially control large quantities of water in the West. Since most Indian lands were set aside in the nineteenth century, Indian rights are sometimes referred to as 'prior and paramount' . . . . If Indians are ultimately found to hold 'prior and paramount' rights, existing allocations and appropriations among and within western states could be seriously affected. . . .[152]

Thus the stage is set for the battle over Indian water rights in Montana. From an economic standpoint the importance of water rights adjudication cannot be overemphasized. Application of the reserved rights doctrine may disrupt Montana's established water right priority system and destroy, without compensation, water rights considered to have vested under state law.[153] In addition, until reserved rights are settled, the doctrine is an effective "impediment to sound coordinated planning for future water resources development."[154]

In light of the economic necessity for an expedited quantification of federal reserved water rights, the question of where that adjudication should occur pales by comparison. If possible, the forum should be the negotiating table. Absent that, recourse must be had to the only forum practicably available—the state courts.[155] No matter how it occurs, it is in the best interest of all parties that water rights finally be settled. Only then can sound economic development be undertaken in reliance upon established rights to this limited natural resource.

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150. Note, *State Jurisdiction to Adjudicate Indian Water Rights*, 18 NAT. RES. J. 221, 226 (1978).

151. *Id.* at 221.

152. III ENERGY FROM THE WEST: A PROGRESS REPORT OF A TECHNOLOGY ASSESSMENT OF WESTERN ENERGY RESOURCE DEVELOPMENT, ENVIRONMENTAL PROTECTION AGENCY 998, 1000 (1977).

153. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATIONS LANDS 144 (1970).

154. *Id.*

155. The federal in personam actions are incapable of providing a complete remedy to the water rights problem in Montana. Stone, *Impliedly Reserved Federal Water Rights: A Status Report*, 1 MONT. PUB. LAND L. REV. (1980). Also, Judges Battin and Hatfield noted in their order dismissing the federal actions (*see* note 22, *supra*) that federal courts in Montana are physically incapable of efficiently processing the water rights suits due to the number of parties involved and the vast amounts of time the suits would require.