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QUANTIFICATION OF INDIAN RESERVED WATER RIGHTS IN MONTANA: *STATE EX REL. GREELY* IN THE FOOTSTEPS OF *SAN CARLOS APACHE TRIBE*

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I. INTRODUCTION

Federal involvement in water law and water rights has its most significant influence in the western United States as a result of federal reserved water and Indian reserved water.[1] By enacting the Water Rights Act of 1866,[2] the Desert Land Act of 1877,[3] and similar legislation, the United States Congress passed control of water on the public lands to the jurisdiction of the states and invited the public to appropriate and use the

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1. In addition to federal and Indian reserved rights, federal involvement in water law and water rights is significantly evidenced in the distribution of water from federal projects and in the abatement of pollution.

2. Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251, 253 (codified as amended at 30 U.S.C. § 51 and 43 U.S.C. § 661).

3. Act of March 3, 1877, ch. 107, § 1, 19 Stat. 377 (codified as amended at 43 U.S.C. § 321).

water in accordance with state law. At the same time that western settlers were being encouraged to develop the arid West, the federal government was engaged in the establishment of Indian reservations, military reservations and other federal reserves on the public lands in the West.

In 1908, in a case arising out of the Fort Belknap Reservation in Montana,[4] the United States Supreme Court held that in creating an Indian reservation the United States reserved water for the Indians on the reservation from appropriation under state law.[5] This so-called *Winters* Doctrine was extended in *Arizona v. California*[6] to include non-Indian federal enclaves. In *Arizona v. California* the United States Supreme Court held that when the federal government creates a reservation for any purpose on the public lands it simultaneously reserves water sufficient to satisfy the needs of the reservation as created.[7]

From the perspective of western states like Montana, which recognize the *Winters* rights held by the various Indian tribes,[8] the situation of undefined federal and Indian reserved water leaves great uncertainties: in the amount of water available for allocation under state permitting systems; in the security of present and future uses by non-Indian water users;[9] and in the limits, if any, on federal and Indian use of the reserved

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4. Winters v. United States, 207 U.S. 564 (1908).

5. The suit in *Winters*, where the doctrine of Indian reserved water rights was first enunciated, was initiated by the United States on behalf of the Indian tribes against a water user who wanted to appropriate and divert water from the Milk River before it flowed through the reservation. The Supreme Court held the treaty creating the reservation implied a reservation of water rights sufficient to accomplish the purpose of allowing the Indians to become a pastoral and civilized people. *Id.* at 575-77.

6. 373 U.S. 546 (1963).

7. The Court stated enough water must be reserved to irrigate all the "practicably irrigable acreage" on the reservation to satisfy the future as well as the present needs of the reservation. *Id.* at 600-01.

8. *See* State *ex rel.* Greely v. Confederated Salish and Kootenai Tribes, ___Mont.___, 712 P.2d 754 (1985). The Montana Reserved Rights Compact Commission and the Fort Peck Tribes negotiated the Fort Peck-Montana Water Compact on the basis of tribal claims to water asserted under the *Winters* Doctrine.

In Montana there are seven Indian reservations: the Confederated Salish and Kootenai Tribes of the Flathead Reservation; the Crow Tribe of Indians of the Crow Reservation; the Northern Cheyenne Tribe of the Northern Cheyenne Reservation; the Blackfeet Indian Nation of the Blackfeet Reservation; the Chippewa-Cree Tribes of the Rocky Boy's Reservation; and the Gros Ventre, Sioux and Assiniboine Tribes of the Fort Belknap and Fort Peck Reservations.

9. The term security as it relates to water use concerns certainty in the development of a water resource. Certainty is based on knowledge of the priority of rights in the water source. Priority is an essential element of the doctrine of prior appropriation. The person whose appropriation is first in time has the highest priority and hence a right to use the water superior to all those who appropriate water thereafter. This doctrine of "first in time, first in right" provides incentive for water users to invest in expensive diversion works by assuring a water supply in times of shortage. The security of the right to use water by prior appropriation gives assurance of water supply to investors. Because the senior water right is strictly enforceable against future diverters, the certainty regarding relative rights is guaranteed. Farmers and ranchers have built their families, homes and operations on water rights they

water.[10] The uncertainty results from not having the water rights clearly quantified. Therefore, states generally favor quantification of reserved rights.

Fortunately, from the view of the states, the United States Supreme Court has adopted a theme of "certainty" in its recent disposition of water cases. For example, the Court has limited the scope of federal reserved rights for a national forest by narrowly defining the purposes for which the federal enclave was created.[11] The Court has refused to increase the quantity of Indian rights due to previously omitted lands.[12] It has refused to reconsider an earlier settlement of water rights even though the Indian tribe had not participated directly in the agreement.[13] Finally, the Supreme Court has dismissed federal suits in favor of concurrent state water rights proceedings in both "non-disclaimer" and "disclaimer" states.[14]

From the Indian tribes' perspective, "uncertainty" is of less concern. Indian tribes are more concerned with the economic development of their

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believed to be certain. These and other water users who had previously been encouraged to appropriate water in accordance with state law are discovering that the federal government and the Indian tribes have a right prior to the state water right. In other cases water that can be beneficially used is either not used at all or is not put to its highest and best use because the potential users are reluctant to invest necessary capital until the uncertain federal and Indian rights are established.

10. For example, questions arise as to the scope of uses of water on an Indian reservation or whether reserved water may be used off the reservation. A concern of many non-Indian water users was stated at a water right institute conducted by the State Bar of Montana in October, 1980, by Maurice R. Colberg, Jr., a Montana attorney representing non-Indian clients:

> The significant factor may be whether water is reserved for the Indian tribes for industrial or energy development purposes. This is the danger anticipated by our clients. For instance, can a coal gasification plant be placed on the Big Horn River by the Crow Tribe or on the Tongue River by the Northern Cheyenne tribe [sic] which would consume all of the water in the river, leaving none for downstream users? Such a result could occur if the position of the Indian tribes is sustained.

M. Colberg, Federal and Indian Water Cases—Status and Impact Upon Other Users (Oct. 1980).

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

12. Arizona v. California, 460 U.S. 605 (1983).

13. Nevada v. United States, 463 U.S. 110 (1983).

14. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) (non-disclaimer states); Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983) (disclaimer states). The "disclaimer" states are states with disclaimer language in their state constitutions that is similar to the language contained in the enabling acts passed by Congress admitting the states to the Union. The disclaimer states include: Alaska, Arizona, Idaho, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington and Wyoming.

Montana's constitutional disclaimer reads:

> All provisions of the enabling act of Congress (approved February 22, 1889, 25 Stat. 676), as amended and of Ordinance No. 1, appended to the Constitution of the state of Montana and approved February 22, 1889, including 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, continue in full force and effect until revoked by the consent of the United States and the people of Montana.

MONT. CONST. art. 1 (1972).

reservations.[15] Water is crucial to that development. Because water availability is a critical problem in the West, the tribes, who hold the rights to yet unquantified water, perceive quantification as a limitation on future economic development.[16] To most Indian leaders, quantification means a limitation of water rights, negotiation of water rights means a denial of rights, and both quantification and negotiation mean the opening of the doors to an outright theft of Indian water.[17] Nevertheless, Indian water rights are in the process of being quantified to remove the uncertainties that shroud the waters of the West. The tribes must now decide whether their rights will be quantified by the courts or through negotiation.

This article addresses the quantification of Indian reserved rights in Montana state courts. Part II examines the Montana cases that were consolidated in the United States Supreme Court's decision in *Arizona v. San Carlos Apache Tribe*.[18] Part III examines the Montana Supreme Court's handling of questions concerning state jurisdiction and the adequacy of state statutory proceedings to quantify Indian reserved water rights.[19] Part IV takes a look at the role of the Montana Department of Natural Resources and Conservation (DNRC) as it bears upon the issue of whether the Montana statutory proceedings are adequate to adjudicate the water rights claimed by the various tribes.

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15. AMERICAN INDIAN POLICY REVIEW COMM'N, FINAL REPORT 355 (1977).

16. For an understanding of Indian perspectives on quantification and the adjudication of Indian water rights, see Comment, *The Adjudication of Indian Water Rights in State Courts*, 19 U.S.F.L. REV. 27 (1984) [hereinafter Comment, *Adjudication*]; Note, *Resolving Indian Reserved Water Rights in the Wake of San Carlos Apache Tribe*, 15 ENVTL. L. 181 (1984).

17. Comment, *Adjudication, supra* note 16, at 39 n.79.

18. 463 U.S. 545 (1983). The petitions on certiorari decided by the United States Supreme Court in *San Carlos Apache Tribe* arose out of three separate consolidated actions decided within three days of each other by the same panel of the Court of Appeals for the Ninth Circuit. The cases included: Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982); San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982); Navajo Nation v. United States, 668 F.2d 1100 (9th Cir. 1982). In each of these cases, either the United States as trustee or the Indian tribes on their own behalf asserted the right to have Indian water rights in Arizona or Montana adjudicated in federal court. *Adsit* arose out of Montana.

19. In *San Carlos Apache Tribe*, the Supreme Court stated:

> In a number of these cases, respondents have raised challenges, not yet addressed either by the Court of Appeals or in this opinion, to the jurisdiction or adequacy of the particular state proceeding at issue to adjudicate some or all of the rights asserted in the federal suit. These challenges remain open for consideration on remand. Moreover, the courts below should, if the need arises, allow whatever amendment of pleadings not prejudicial to other parties may be necessary to preserve in federal court those issues as to which the state forum lacks jurisdiction or is inadequate.

San Carlos Apache Tribe, 463 U.S. at 570 n.20.

II. THE MONTANA CASES AT ISSUE IN SAN CARLOS APACHE TRIBE

A. *Procedural History*

Efforts to adjudicate water rights in Montana began in the last century. However, prior to 1973, an adjudication system had never been established to adjudicate all water rights in a proceeding that had finality. In 1973 the Montana Water Use Act[20] was enacted. The Act established a judicial procedure to determine water rights on a drainage by drainage basis. The process was invoked by the issuance of an order of the Montana DNRC requiring holders of existing water rights to file verified declarations of their water rights.[21] In 1975 the Montana legislature amended the statute to provide that the district courts would issue the order to file declarations rather than the DNRC.[22] Aware of the pending legislation, the Northern Cheyenne Tribe brought suit in the federal district court for the District of Montana in January, 1975.[23] In March, 1975, the United States filed a federal suit in its own right and as fiduciary on behalf of the Northern Cheyenne Tribe.[24]

In July, 1975, the DNRC filed petitions in state court for a determination of all existing rights in accordance with state law. These petitions involved the reserved water rights of tribes of both the Northern Cheyenne Indian Reservation and the Crow Indian Reservation. The United States subsequently filed suit in federal district court on behalf of the Crow Tribe.[25] The three federal cases were consolidated and stayed in February, 1976, pending the United States Supreme Court's decision in *Colorado River Water Conservation District v. United States*.[26]

The federal district court took no action on the pending cases until 1979. Prior to the district court's decision, however, the Montana legisla-

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20. Montana Water Use Act of 1973, ch. 452, 1973 Mont. Laws 1121 [codified as amended in various sections of MONT. CODE ANN. §§ 85-2-101 to -807 (1987)].

21. R.C.M. 1947 §§ 89-870 to -879, *repealed by* Act of May 11, 1979, ch. 697, § 37, 1979 Mont. Laws 1901, 1917.

22. *Id.*

23. Northern Cheyenne Tribe v. Tongue River Water Users Ass'n, 484 F. Supp. 31 (D. Mont. 1979). The suit sought to adjudicate water rights in the Tongue River and Rosebud Creek in Montana.

24. United States v. Tongue River Water Users Ass'n, No. CV-75-20 (D. Mont. filed March 7, 1975).

25. United States v. Big Horn Low Line Canal, No. CV-75-34 (D. Mont. filed April 17, 1975).

26. 424 U.S. 800 (1976). This case is commonly referred to as the "*Akin* case" rather than *Colorado River* because Mary Akin was the first listed defendant in the original federal filing. Akin lost her position in the title of the case when she did not join in the appeal. In *Akin*, the United States filed an Indian reserved water rights suit in federal district court, while a concurrent suit over the same water rights was filed in Colorado state court. The United States Supreme Court eventually held the state court had jurisdiction over Indian reserved rights. *Id.* at 811-12. The Supreme Court also dismissed the federal government's claim that submission of Indian reserved rights to state court jurisdiction would violate the government's fiduciary duty to the tribes. *Id.* at 812; *see also infra* notes 51-55 and accompanying text.

ture amended the state adjudication process. After nearly six years' experience with the 1973 system, the legislature determined that this costly process was not proceeding rapidly enough. The legislature therefore decided to revamp the system into a statewide adjudication process.[27] Representatives of the federal government and various Indian tribes attended the legislative hearings regarding Senate Bill (SB) 76, the water adjudication legislation. These representatives supported amending the proposed legislation to exclude reserved water rights from the state adjudication process. It became apparent to all involved in the legislative process, however, that the legislature favored a state-wide adjudication which included Indian reserved water rights. Aware of the legislature's intention to enact a general adjudication statute, the United States filed more adjudication actions in federal district court in the early spring of 1979, seeking a declaration of water rights on behalf of the United States and the tribes of the various Indian reservations in Montana.[28] These seven law suits involving approximately 9,000 defendants put at issue the quantification of Indian water rights in the state of Montana, albeit in federal court.

In June, 1979, the Montana Supreme Court issued an order implementing the state mechanism for the adjudication of all claims, including federal and Indian reserved water rights, in a systematic general adjudication.[29] This action put at issue the quantification of all existing rights in the state of Montana, including Indian reserved rights, in state court proceedings. In November, 1979, two federal district court judges[30] issued a joint

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27. Act of May 11, 1979, ch. 647, 1979 Mont. Laws 1901.

28. United States v. Aasheim, No. CV-79-40 (D. Mont. filed April 5, 1979); United States v. Aageson, No. CV-79-21 (D. Mont. filed April 5, 1979); United States v. AMS Ranc, No. CV-79-22 (D. Mont. filed April 5, 1979); United States v. Abell, No. CV-79-33 (D. Mont. filed April 5, 1979).

29. Section 16 of SB 76 provides that:

> (1) The Montana supreme court shall within 10 days of the filing of the petition by the attorney general issue an order to file a statement of a claim of an existing water right in substantially the following form:
>
> "WATER RIGHTS ORDER
>
> 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 and of the requirement to file a claim for certain 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 of 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 the right with the department no later than June 30, 1983. . . ."

MONT. CODE ANN. § 85-2-212(1) (1987).

30. Chief District Judge James Battin and District Judge Paul Hatfield.

opinion dismissing all the federal actions "on the basis of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation"[31] as outlined in *Akin*.[32]

The Indian tribes and the federal government appealed to the Court of Appeals for the Ninth Circuit, arguing that because the Montana constitution and enabling act contained disclaimers of jurisdiction over Indian tribes, the litigation in Montana differed from that in Colorado.[33] The tribes and the federal government further argued that the factors which compelled state court jurisdiction in *Akin* were not present in the Montana cases.[34] The Ninth Circuit agreed, concluding that

> The circumstances of the Montana litigation are sufficiently distinct from the factors warranting exceptional treatment in *Akin*. The conflicts of interest present, the embryonic stage of state and federal proceedings, and the procedural status of the Montana case favor retention of federal jurisdiction.[35]

B. *The* San Carlos Apache Tribe *Decision*

On certiorari the United States Supreme Court decided the Montana case together with the two Arizona cases.[36] In reversing the Ninth Circuit decisions, the Supreme Court assumed that, insofar as state law was concerned, the state courts had taken jurisdiction over the Indian water rights at issue.[37] The Court turned its attention to the federal enabling acts and other federal legislation to determine whether there was a federal bar to the assertion of state jurisdiction.

The Supreme Court in *San Carlos Apache Tribe* addressed two major issues. The Court determined that the McCarran Amendment[38] removed

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31. *Northern Cheyenne Tribe*, 484 F. Supp. at 36.

32. *See supra* note 26.

33. *Adsit*, 668 F.2d at 1083.

34. *Id.* The Ninth Circuit noted that the Montana adjudication cases had not proceeded beyond the notice stage, that concurrent federal and state jurisdiction would not result in piecemeal litigation, that the federal proceeding was the predecessor in the race to the court, that the factor of *forum non conveniens* was not present, and there was a conflict of interest which prevented the United States from representing the tribes adequately. *Id.* at 1088-90.

35. *Id.* at 1090.

36. *See supra* note 18.

37. *San Carlos Apache Tribe*, 463 U.S. at 561.

38. Prior to enactment of the McCarran Amendment in 1952, water rights claimed by or through the United States were not bound by a state adjudication because the United States was immune from suit. With the passage of the McCarran Amendment, Congress consented to join the United States as a defendant in any suit for adjudication of water rights under state law. Congress provided that all water users, including those claiming through the federal government, would be bound by state adjudication. The Supreme Court has defined the scope of the Amendment to include Indian reserved water rights. The full text of the McCarran Amendment is found at 43 U.S.C. § 666 (1982):

(a) Consent is given to join the United States as a defendant in any suit (1) for the

any limitation placed on state jurisdiction over Indian water rights by the enabling acts and by federal policy.[39] Additionally, the Court concluded that Indian water rights, held directly by the Indians, may be adjudicated in state courts.[40]

Concerning the disclaimer issue, the Supreme Court noted that the presence or absence of specific jurisdictional disclaimers was rarely dispositive of the issue of state jurisdiction over Indian affairs or activities on Indian lands.[41] The Court reasoned that Congress had the right to distinguish between disclaimer and nondisclaimer states in the passage of the McCarran Amendment. But Congress drew no distinction, thereby indicating that Congress did not intend the "efficacy of the remedy to differ from one State to another."[42] The Court further pointed out that

> Moreover, we stated in *Colorado River* that "bearing in mind the ubiquitous nature of Indian water rights in the Southwest, it is clear that a construction of the Amendment excluding those rights from its coverage would enervate the Amendment's objective." . . . The "ubiquitous nature of Indian water rights" is most apparent in the very States to which Congress attached jurisdictional reservation. . . . To declare now that our holding in *Colorado River* applies only to the minority of Indian water claims located in States without jurisdictional reservations would constitute a curious and unwarranted retreat from the rationale behind our previous holding, and would work the very mischief that our decision in *Colorado River* sought to avoid.[43]

The result of the Court's holding is the equal application of the law throughout the West, thereby giving vitality to the McCarran Amendment. As the Court concluded, " '[e]quality of statehood' is sensible,

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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 be entered against the United States in any such suit.

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

(c) 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 water of any interstate stream.

39. *San Carlos Apache Tribe*, 463 U.S. at 564.

40. *Id.* at 570.

41. *Id.* at 562.

42. *Id.* at 564.

43. *Id.* (citation omitted).

necessary, and, most important, consistent with the will of Congress."[44]

The second critical issue decided by the Court was whether Indian water rights may be litigated in state court. On this issue the Court acknowledged that the McCarran Amendment, as interpreted in *Akin*, encouraged the quantification of Indian water rights in the course of state proceedings to adjudicate comprehensively the waters of a state.[45] The Supreme Court relied heavily on the policy underlying the McCarran Amendment to the exclusion of "strong arguments" raised by the Indian tribes.[46] The Court stated that the policy underlying the McCarren Amendment was the most important consideration in any federal water suit concurrent to a comprehensive state proceeding.[47] Additionally, the Court considered the expertise and administrative machinery available to the state courts, the infancy of the federal suits, the general judicial bias against piecemeal litigation, and the convenience to the parties. Based upon the unique nature of a water rights adjudication[48] and the unique character of the McCarran Amendment as a federal statute the Supreme Court refused to be bound by the general proposition of the virtually unflagging obligation of federal courts to exercise the jurisdiction given them.[49] In so doing the Court determined that Indian water rights, held by the Indians, may be adjudicated in state courts. However, the Supreme Court left open the state law questions of whether a bar to state jurisdiction premised on the Montana Constitution existed, and whether the Montana statute was adequate to adjudicate Indian reserved water rights.[50]

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44. *Id.* at 565.

45. *Id.* at 569.

46. The United States and the tribes raised a number of arguments as to why dismissal or stay of the federal suit was inappropriate: (1) the Indian water rights were held directly by the Indians; (2) it would be inequitable to intervene in the state proceedings; (3) Indian tribes could not rely on the United States adequately to represent their interests in state proceedings; (4) Indian water rights are generally based on federal rather than state law; and, (5) because Indian water claims are based on the doctrine of "reserved rights," and take priority over most water rights created by state law, they need not as a practical matter be adjudicated *inter sese* with other water rights, and could simply be incorporated into the comprehensive state decree at the conclusion of the state proceedings. *Id.* at 566-67. Similar arguments were presented and rejected by the Supreme Court in United States v. Dist. Court for Eagle County, 401 U.S. 520 (1971).

47. *San Carlos Apache Tribe*, 463 U.S. at 570.

48. The unique nature of water rights adjudication was emphasized by the dissent in *Adsit*:

> Water adjudication is essentially a local concern, and in every western state water scarcity poses a problem not just to Indians but everyone. In my views, it is highly important that each state be accorded room for an effort to solve its water scarcity problem in the manner it regards as most appropriate. Here so long as Montana gives recognition to Indian water rights and their establishment pursuant to federal law, I see no good reason why Indians should not be joined with all other water users in the state in order to achieve a comprehensive state adjudication.

Adsit, 668 F.2d at 1092 (Merrill, J., dissenting).

49. *San Carlos Apache Tribe*, 463 U.S. at 571.

50. *Id.* at 570 n.20.

Throughout the litigation which culminated in the *San Carlos Apache Tribe* decision, the Indian tribes had good reason to argue that the dismissal factors in *Akin* were not completely parallel to those in the Montana cases. There was a clear contrast between the Colorado and Montana situations. Specifically, Colorado had a well-established system of water rights adjudication which had been in working order since 1879; Montana's first comprehensive stream adjudication was enacted in 1973 and was progressing at a slow pace.[51] Colorado utilized its state engineer to administer and manage the adjudication. Montana on the other hand entrusted its adjudication to state district judges.[52] The federal district court in Denver was some 300 miles away from Durango where the state suit had been filed and is on the other side of the Continental Divide.[53] The federal suits in Montana were divided among the federal district courts in Billings, Great Falls and Missoula, all more readily accessible throughout the year than Denver is to Durango.[54] Finally, the federal government had no prior experience in state water proceedings in Montana whereas the United States was already participating in other Colorado state water proceedings.[55]

Despite these factual contrasts, the critical factor that the tribes and the federal government could not ignore in *San Carlos Apache Tribe* was that the federal suits were not comprehensive adjudications. Although the Montana federal suits involved some 9,000 Montanans as parties, the suits only related to those waters bounding on or flowing through federal reservations, rather than all the water users in the state, and thus affected only the 9,000 users named as parties in the federal suits.[56] The rights of those Montanans who were not named in the federal suits could not be affected in the federal courts without affording the water users the opportunity to assert their claims and be heard in court.[57] Any adjudication that omitted so many persons whose water rights were disregarded would have been inconclusive and wasteful.[58]

In contrast, the Montana adjudication process implemented under SB

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51. A. STONE, MONTANA WATER LAW FOR THE 1980's 10-11 (1981).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. The 9,000 water users named as parties did not include all the parties who needed to be included because Montana has recognized "use rights" that are unrecorded and unlitigated. Consequently, because there were unknown parties the federal suits were incomplete.

57. As a result of Montana's claim registration program under SB 76, see *supra* note 29, over 200,000 water claims were filed.

58. *See* Stone, *Are There Any Adjudicated Streams In Montana?*, 19 MONT. L. REV. 19 (1957); Stone, *The Long Count On Dempsey: No Final Decision In Water Right Adjudication*, 31 MONT. L. REV. 1 (1979).

76 includes *all* claimants, affording them due process and an opportunity to be heard based on a well defined notice procedure. Deadlines for the filing of water use claims were established.[59] The notice requirements include publication of the deadline in all daily newspapers in the state and in at least one newspaper in each county;[60] posting of notice in each county courthouse;[61] inclusion of the notice with each statement of property taxes;[62] annual releases of the Montana Supreme Court Order initiating the adjudication process to the press services;[63] and, service of notice upon the United States attorney general or his designated representative.[64] Consequently, the decree resulting from the state process would be all-encompassing, conclusive and effective. The conclusive nature of the state adjudication mechanism compared to the abortive and inconclusive nature of the federal suits formed a powerful underpinning for the United States Supreme Court to expand the *Akin* rationale even though the Colorado and Montana circumstances were not parallel.

C. *The* San Carlos Apache Tribe *Dissents*

Justices Stevens and Marshall dissented from the Majority's decision. Justice Stevens' dissent focused on a number of areas where he believed the Majority's reasoning was flawed. He found no affirmative policy of federal judicial abdication in the McCarran Amendment.[65] His review of the legislation and its history led him to conclude in both *Akin* and *San Carlos Apache Tribe* that there was no support for the limiting of the jurisdiction of the federal courts. Moreover, he pointed out that the Amendment "is a waiver, not a command."[66] In other words, the McCarran Amendment allowed the United States to be joined as a defendant in state adjudication proceedings, but such permission did not diminish the right of the federal government to litigate in a federal forum. More offensive to Stevens was the Majority's conclusion that, despite the McCarren Amendment's silence on the issue of the tribes' right to litigate anywhere, the Amendment commanded courts to defer to state court proceedings when Indian water rights were at issue.[67]

The dissents of both Marshall and Stevens centered on the congres-

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59. The statutory deadline was June 30, 1983 but was changed by order of the Montana Supreme Court to April 30, 1982, pursuant to MONT. CODE ANN. § 85-2-212(2) (1987).
60. *Id.* § 85-2-213(1).
61. *Id.* § 85-2-213(2).
62. *Id.* § 85-2-213(3).
63. *Id.* § 85-2-213(4); *see supra* note 29.
64. *Id.* § 85-2-213(5).
65. *San Carlos Apache Tribe*, 463 U.S. at 575 (Stevens, J., dissenting).
66. *Id.* at 573.
67. *Id.* at 578.

sional policy embodied in the jurisdictional statute giving federal courts original jurisdiction of civil actions brought by tribes.[68] Stevens and Marshall argued that the jurisdictional statute was intended to reflect and strenghten the federal government's fiduciary duty to Indian tribes.[69] The statute evinced a Congressional recognition of tribal reluctance to submit to state court jurisdiction.[70] Stevens and Marshall viewed the jurisdictional statute as embracing a federal promise to the tribes that they could invoke federal court jurisdiction to resolve issues arising under federal law.[71] Given such a strong congressional policy, and the McCarren Amendment's silence on the issue, the dissenting Justices were hard pressed to read the McCarran Amendment as a command to defer the adjudication of Indian reserved water rights to state proceedings.

Justice Stevens' dissent also seized on the Majority's statement that any prejudices exhibited by a state court could be corrected by the United States Supreme Court.[72] Justice Stevens noted that review by the Supreme Court could result in massive readjustment of the entire adjudication should the state court err in interpreting federal law.[73] However, if quantification of Indian water rights was decided in a federal forum (which Stevens presumed could be concluded "long before the mammoth, conglomerate state adjudication comes to an end"),[74] the state judgment would rest on a solid basis thereby diminishing any need for Supreme Court review.[75] The concern of the tribes that Stevens recognized was that if the factual determinations made by the state courts were not complete or not clearly erroneous, a case submitted for review to the Supreme Court might not adequately reflect the situation. This would mean that ultimate review by the Supreme Court would be of little use to the Indians, and thus the Supreme Court's assurance that cases presented to it would receive "a particularized and exacting scrutiny" would be of little practical importance.[76]

Finally, Stevens rebuked the Majority's analysis as "virtually unique" in that it was a direct affront to the "virtually unflagging obligation" of federal courts to exercise jurisdiction.[77] Justice Stevens expressed dismay that the Supreme Court would carve out an exception to federal court

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68. *Id.* at 572; *see also* 28 U.S.C. § 1362 (1982).

69. *San Carlos Apache Tribe*, 463 U.S. at 572 (Marshal, J., dissenting) and 463 U.S. at 476-78 (Stevens, J., dissenting).

70. S. REP. NO. 1507, 89th Cong., 2d Sess. 2 (1966).

71. *San Carlos Apache Tribe*, 463 U.S. at 576-77 (Stevens, J., dissenting).

72. *Id.* at 579 (Stevens, J. dissenting).

73. *Id.*

74. *Id.*

75. *Id.*

76. *See* Comment, *Adjudication*, *supra* note 16, at 48-49.

77. *San Carlos Apache Tribe*, 463 U.S. at 580-81 (Stevens, J., dissenting).

jurisdiction on the basis of congressional intent that had never been articulated in statutory language or legislative history—in his words, carved out by the "phantom command of the McCarran Amendment."[78]

D. *An Adherence to Prior Supreme Court Decisions*

The opinions of the dissenting Justices exhibit a failure to perceive the unique character of water and a water adjudication process. The Majority's decision in *San Carlos Apache Tribe* represents a logical development in water law as it merges with federal Indian law. The immediate judicial roots of *San Carlos Apache Tribe* are found in *United States v. District Court for Eagle County*[79] and *United States v. District Court for Water Division No. 5*.[80] In these companion cases the United States Supreme Court initially addressed the question of the appropriate forum to adjudicate federal reserved water rights. In each case a suit was commenced in Colorado state court and the United States was served with notice pursuant to the McCarran Amendment.[81] In each instance the federal government filed a motion to dismiss. The United States argued the McCarran Amendment did not constitute consent to the adjudication of federal reserved rights in state court proceedings. On certiorari the United States Supreme Court held the United States was subject to the jurisdiction and adjudications of state courts in adjudications of water rights that included non-Indian federal reserved water rights.

The *Akin* case followed five years later.[82] It involved two adjudications proceeding simultaneously in federal and state court. The federal water suit had been dismissed in deference to the adjudication pending in Colorado state court. Viewing the federal government's trusteeship of Indian rights as ownership, the United States Supreme Court extended the logic of *Eagle County* and *Water Division No. 5* to reserved rights on Indian reservations.[83] The Court's holding was based on the McCarren Amendment's language and legislative history. The Court found that in the Senate hearings clear representations had been made that the McCarran Amendment would include water rights on behalf of Indians. Further, it found that the Senate report noted but rejected a recommendation by the Department of Interior that no consent to suit in state court be given as to Indian federal reserved rights.[84]

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78. *Id.* at 580.
79. 401 U.S. 520 (1971).
80. 401 U.S. 527 (1971).
81. 43 U.S.C. § 666(b) (1982); *see supra* note 38.
82. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).
83. *Id.* at 809-13.
84. *Id.*

Clearly, the Court was unwilling to retreat from its decision in *Eagle County* and *Water Division No. 5*. Indeed, had the Court held that Indian rights were not subject to the McCarran Amendment, conflicts between Indian and non-Indian rights might have arisen. Such conflicts would have required federal district court adjudication of non-Indian rights and Indian rights together, thereby emasculating the holdings in *Eagle County* and *Water Division No. 5*.[85]

It is helpful in understanding the Court's decisions in *Akin* and *San Carlos Apache Tribe* to put into perspective water rights quantification over which the states have assumed jurisdiction. A quantification proceeding involves a truly unique resource—water. Unlike many other natural resources, water is subject to use and reuse. Any one molecule of water is used repeatedly throughout the hydrologic cycle. Unlike land, timber or minerals, water cannot be permanently owned. Yet the actions of one water user have an immediate and direct effect on other users because a water system is a unitary resource. This interaction among water users is especially important in the arid and semi-arid regions of the West where "water is the lifeblood of the [Indian] communit[ies]"[86] and the seventeen western states. Because water rights are highly interdependent, all users of a water resource must be joined in an adjudication proceeding to effect a comprehensive and binding quantification of rights.[87] A determination of rights in multiple forums could result in multiple litigation and foster inconsistent decisions. Finally, and perhaps most importantly, the exercise of state jurisdiction is not an exercise of state regulatory authority that unlawfully infringes on the right of Indian tribes to self-government.

Why there is no unlawful infringement may be seen from the following perspective. Tribal courts of course have no power to determine water rights off an Indian reservation. It is clear no comprehensive adjudication of the water rights of a state could be decided in tribal court. And federal courts have jurisdiction to determine federal water rights.[88] Moreover, Congress has acted sufficiently to place the quantification of Indian reserved water rights in federal courts.[89] The bottom line is that federal court jurisdiction is appropriate to determine all federal reserved rights, including Indian reserved rights. The question is whether concurrent jurisdiction has been established in state courts as a result of the McCarran Amendment. The United States Supreme Court answered this

85. *Id.* at n.17.

86. Colville Confederated Tribes v. Walton, 647 F.2d 42, 52 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981).

87. *See supra* note 59.

88. 28 U.S.C. § 1345.

89. *Id.* § 1362; *supra* notes 68-71 and accompanying text.

question in the affirmative in *Eagle County, Water Division No. 5* and *Akin*. But these cases also make it clear that federal substantive law must be applied in state court proceedings. The door therefore was open for the Supreme Court in *San Carlos Apache Tribe* to reaffirm its commitment to the quantification of water rights in single forum, comprehensive adjudications.

A state court applying substantive federal Indian law is not imposing substantive state regulatory authority over Indian tribes. The law a state court must apply is no different than that applied by a federal court. The Supreme Court recognizes that Indian reserved rights are not abridged by allowing state courts to apply substantive federal Indian law in comprehensive state adjudications. In the special case of water quantification the Court is willing to allow the exercise of state jurisdiction where it is controlled by substantive federal law and does not vest administrative control over the use of the Indian water right in the state.[90]

Consequently, the major issue facing the United States Supreme Court in *San Carlos Apache Tribe* was whether the Court's analysis in *Akin* should differ because the Indian tribes brought the federal suits to adjudicate their claimed rights rather than the federal government bringing the suits on behalf of the tribes. Since the uniqueness of water adjudications had permeated the Court's holdings in *Eagle County, Water Division No. 5* and *Akin*, it was not a quantum leap for the Court to follow suit in *San Carlos Apache Tribe*. Indeed, the Court recognized the apparent validity of the tribe's arguments for federal court jurisdiction.[91] But the Court held steadfast in its deference to the more comprehensive state processes, unwilling to sanction the potentially inconsistent dispositions of property resulting from duplicative state and federal water adjudications.

Although the *San Carlos Apache Tribe* decision deals with federal Indian law issues, the Majority's opinion is rooted primarily in water law, specifically, the judicial precedent concerning federal reserved rights. Water is unique in that it is a unitary resource; rights to its use are interrelated rather than independent. Efficient and fair quantification of water rights requires a unique process in which all affected users must be parties to the proceedings. In *San Carlos Apache Tribe*, only the state proceedings offered comprehensive adjudications of all rights in one forum.

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90. *See Colville Confederated Tribes*, 647 F.2d at 52.

91. *San Carlos Apache Tribe*, 463 U.S. at 567.

III. STATE EX REL. GREELY

A. *The Writ of Supervisory Control*

The *San Carlos Apache Tribe* decision was the culmination of a nine-year legal battle by Montana authorities to secure a state court forum for the adjudication of all water rights, including federal and Indian reserved water rights. On remand the Ninth Circuit stayed all proceedings in the Montana federal actions pending the outcome of the state court proceedings.[92] The following questions were reserved for consideration on remand in *San Carlos Apache Tribe* and were left open for state determination by the Ninth Circuit: (1) the question of jurisdiction under state law, and (2) the question of the adequacy of the Montana proceeding to adjudicate the reserved water rights.[93]

Montana officials assessing the state's options after *San Carlos Apache Tribe* did not want to risk wasting enormous amounts of time, resources and money by generating appealable decrees through a state adjudication system that might ultimately be found deficient under state law to adjudicate federal and Indian reserved water rights. Therefore, in August, 1984, the Montana Attorney General filed with the Montana Supreme Court an application for writ of supervisory control of the Montana Water Court.[94] In view of the "profound and far-reaching effects on all of the water rights in the state of Montana,"[95] the court accepted original jurisdiction.[96] The court then realigned the parties, making the Attorney General and Water Court co-petitioners and naming the United States and the tribes as respondents. However, the court granted the tribes an opportunity to request dismissal.[97] All the Montana tribes decided to withdraw as parties. However, every tribe except the Confederated Salish and Kootenai Tribes, the Crow Tribe and the Northern Cheyenne Tribe decided to participate as amici curiae. These three tribes later petitioned to be reinstated as respondents. The United States appeared individually and as trustee for all the tribes with land in Montana.[98]

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92. Northern Cheyenne Tribe v. Adsit, 721 F.2d 1187 (9th Cir. 1983).

93. *Id.* at 1188.

94. The writ of supervisory control, under that name, is not in general use in any jurisdiction except Montana. The rule is based on Rule 17 of the Montana Rules of Appellate Civil Procedure and the Montana Constitution. MONT. CONST. art. VII, § 2(1) (1972). For an understanding of the nature of the writ of supervisory control, see Morris, *The Writ of Supervisory Control*, 8 MONT. L. REV. 14 (1947); Grossman v. Dept. of Natural Resources and Conservation, ___Mont.___, 682 P.2d 1319 (1984).

95. State *ex rel.* Greely v. Water Court of the State of Mont., ___Mont.___, 691 P.2d 833, 840 (1984).

96. *Id.* at ___, 691 P.2d at 840.

97. *Id.* at ___, 691 P.2d at 840.

98. State *ex rel.* Greely v. Confederated Salish and Kootenai Tribes, ___Mont.___, 712 P.2d

B. *The State Constitutional Disclaimer*

In *State ex rel. Greely* the Montana Supreme Court resolved the two state law questions left unanswered by the United States Supreme Court in *San Carlos Apache Tribe* in favor of state jurisdiction.[99] The court held first that the disclaimer language in the Montana Constitution[100] did not bar state jurisdiction to adjudicate Indian reserved water rights in Montana.[101]

The various Indian tribes argued that the constitutional disclaimer could not be repealed by implication and that at most the McCarran Amendment gave federal consent to the people of Montana to amend their constitution.[102] The tribes further argued that, in enacting the general stream adjudication legislation, Montana had only secured the consent of the legislature, which was not tantamount to the consent of the people.[103] In other words, the requisite consent of the people to Congress' revocation of absolute federal jurisdiction over Indian water rights could not be granted by legislative enactment. Until properly amended by the people, the Montana constitutional disclaimer remained a separate and independent barrier to state jurisdiction over Indian land and Indian water on the reservations.[104] In construing the constitutional language stating that all Indian lands "shall remain under the absolute jurisdiction and control of the Congress. . . until revoked by the consent of the United States and the people of Montana," the court noted that the term "the people" was a shorthand reference to the citizens of the entire state.[105] Here the court was following its analysis in a prior decision, *State ex rel. McDonald v. District Court of the Fourth Judicial District*,[106] to hold that the "consent of the people of the state" did not require a constitutional amendment; rather, a legislative enactment of a session law was a valid and binding exercise of

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754, 757 (1985).

99. The Montana Supreme Court actually addressed three questions in *State ex rel. Greely*: (1) whether the Montana Water Court was prohibited from exercising jurisdiction over Indian reserved water rights based on the Montana Constitution; (2) whether the Montana Water Use Act was adequate to adjudicate Indian reserved water rights; and (3) whether the Water Use Act was adequate to adjudicate federal reserved water rights. *Id.* at ___, 712 P.2d at 757. The first two questions are the focus of this article. The third question demonstrates that Montana courts recognize the distinction between Indian reserved water rights and other federal reserved water rights. This recognition answers those who criticize the *San Carlos Apache Tribe* decision on the basis that the United States Supreme Court's failure to draw the distinction might result in the state courts viewing Indian water rights as no different than other federal reserved rights. *See, e.g.*, Comment, *Adjudication*, *supra* note 16, at 44.

100. MONT. CONST. art. I (1972); *see supra* note 14.

101. *State ex rel. Greely*, ___Mont. at ___, 712 P.2d at 762.

102. *Id.* at ___, 712 P.2d at 760.

103. *Id.* at ___, 712 P.2d at 760.

104. *Id.* at ___, 712 P.2d at 760.

105. *Id.* at ___, 712 P.2d at 760.

106. 159 Mont. 156, 496 P.2d 78 (1972).

the "consent of the people."[107]

McDonald involved a tribe's challenge to Montana's assumption of criminal jurisdiction over an Indian reservation under Public Law 280.[108] In construing Public Law 280 and Montana's constitutional disclaimer,[109] the Montana Supreme Court found that no amendment to Montana's constitution was necessary or required for Montana to assert criminal jurisdiction under Public Law 280. The court held that a legislative enactment of a session law constituted the binding consent of the people of Montana.[110]

Public Law 280 specifically withheld jurisdiction from the state courts to adjudicate ownership or a right to possession of "any water rights."[111] The court in *State ex rel. Greely* clearly recognized that the state's assertion of criminal jurisdiction on an Indian reservation under Public Law 280 had no bearing on the issue of state jurisdiction over Indian water rights.[112] The court explained that the precedential value of *McDonald* was not in the assertion of state jurisdiction per se but rather in the court's interpretation of the phrase "consent of the people."[113] The court concluded the consent of the people could be expressed by legislative enactment rather than by popular vote of the people on a constitutional amendment as urged by the tribes.

In reviewing the constitutional and legislative history pertaining to water rights in Montana, the Montana Supreme Court noted the direct relationship between the adoption of a comprehensive water code in 1973 and the adoption of a new constitution in Montana in 1972.[114] The new water code established a permit system as the exclusive means of acquiring a water right, and more importantly for purposes of the court's analysis, it established a system of final stream adjudication.[115] The court concluded that the legislature's enactment of the Montana Water Use Act constituted the necessary consent of the people of Montana to Congress' grant of state jurisdiction over Indian reserved water rights.[116] Having found that

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107. *State ex rel. Greely*, ___Mont. at ___, 712 P.2d at 760-61.

108. 18 U.S.C. § 1162 (1982).

109. In *McDonald*, the court was construing ordinance I, Section 2 of the 1889 Montana Constitution, which is incorporated into the 1972 Constitution.

110. *McDonald*, 159 Mont. at 163-64, 496 P.2d at 81-82.

111. 25 U.S.C. § 1322(b) (1982).

112. *State ex rel. Greely*, ___Mont. at ___, 712 P.2d at 761.

113. *Id.* at ___, 712 P.2d at 762.

114. *Id.* at ___, 712 P.2d at 759-60. The Montana Water Use Act, ch. 452, 1973 Mont. Laws 1121, was enacted pursuant to the constitutional mandate to the legislature to "provide for the administration, control, and regulation of water rights . . . ." MONT. CONST. art. IX, § 3(4) (1972).

115. *See supra* notes 20-22 and accompanying text.

116. *State ex rel. Greely*, ___Mont. at ___, 712 P.2d at 762. The Montana Supreme Court agreed with the contention of the United States that the McCarran Amendment removed all federal

the consent of the people had been exercised, the court held there was no state constitutional barrier to the exercise of state jurisdiction over Indian reserved water rights.[117]

C. *Adequacy of the Montana Water Use Act*

1. *Application of Federal Indian Law Under the Montana Water Use Act*

The second critical issue left open by the United States Supreme Court in *San Carlos Apache Tribe* and addressed by the Montana Supreme Court in *State ex rel. Greely* was whether the Montana Water Use Act provided an adequate proceeding to adjudicate Indian reserved water rights. In its analysis, the Montana Supreme Court meticulously discussed the differences, both in origin and definition, between state appropriative rights and Indian reserved water rights.[118] The court also instructed the state water judges adjudicating Indian reserved water rights to follow the canons of construction for Indian treaties that had been developed by the federal judiciary.[119] The Montana Supreme Court's detailed discussion of substantive federal Indian law concerning treaty construction clearly put the water court judges on notice that the special canons of construction were to be strictly applied to Indian water rights claims asserted in the water courts. The court warned that the water courts' failure to apply properly these federal rules of construction would result in the abridgment of Indian reserved rights.

The Indian tribes argued that the Montana Water Use Act was inadequate because it was premised on a system of appropriative rights for beneficial use under state law which did not take into account Indian reserved water rights based on federal law.[120] As a result, Indian water rights could not be adequately adjudicated under the statute. Essentially, the Indian tribes argued that the procedure for adjudicating water rights in

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obstacles to state jurisdiction and that the people of Montana manifested their consent by enacting the Water Use Act. *Id.* at ____, 712 P.2d at 760.

117. *Id.* at ____, 712 P.2d at 762.

118. *Id.* at ____, 712 P.2d at 762-65.

119. *Id.* at ____, 712 P.2d at 765-66. The court specifically enumerated the following canons of construction: any ambiguity in a treaty must be resolved in favor of the Indians; treaties were to be interpreted as the Indians themselves would have understood them; Indian treaties were to be liberally construed in favor of the Indians; treaties were not grants of rights to the Indians, but grants from them; an Indian reservation was to be defined to protect any pre-existing possessory rights of the Indians unless a contrary intent clearly appeared in the document or statute that created the reservation; and statutes passed for the benefit of the Indians were to be liberally construed and all doubts were to be resolved in their favor. *Id.* at ____, 712 P.2d at 765-66.

120. *See* Brief of the Assiniboine and Sioux Tribes of the Fort Peck Reservation, the Crow Tribe of Indians of the Crow Reservation, and the Northern Cheyenne Tribe of the Northern Cheyenne Reservation at 46, State *ex rel.* Greely v. United States, ____Mont.____, 712 P.2d 754 (1985).

Montana did not "fit" reserved Indian rights and thus it was inadequate to adjudicate those rights.

In response, the Montana Supreme Court cited recent legislative changes that permitted the water judges to treat Indian reserved water rights differently from state appropriative rights.[121] These changes included a provision for a statement of claim based exclusively on a claim of a reserved right;[122] a provision requiring that the preliminary decree issued by a water judge be based on the contents of a compact entered into between the tribe and the state[123] or, lacking an approved compact, the filings for Indian reserved rights;[124] a similar provision for inclusion of Indian reserved water rights in a final decree;[125] and the provisions for compacting of Indian reserved water rights for inclusion into the adjudication process.[126]

The Montana Supreme Court recognized the unique character of Indian reserved water rights in comparison to state created rights.[127] However, the court found nothing in the state water code that prevented the water judges from implementing federal law to accommodate the claims of the Indian tribes. The court demonstrated the capacity for accommodation in the Montana Water Use Act in its discussion of the "future use" aspect of Indian reserved water rights (as opposed to the typical "abandonment" concept applied to state created water rights), which is explicitly recognized in the statute.

The court recognized that Indian reserved water rights included future uses[128] and that the "practically irrigable acreage" standard applied

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121. *State ex rel. Greely*, ___Mont. at ___, 712 P.2d at 763.

122. MONT. CODE ANN. § 85-2-224(3) (1987). The full text of the provision provides:

(3) Any statement of claim for rights reserved under the laws of the United States which have not yet been put to use shall include substantially the following:

(a) the name and mailing address of the claimant;

(b) the name of the watercourse or water source from which the right to divert to make use of water is claimed, if available;

(c) the quantities of water claimed;

(d) the priority date claimed;

(e) the laws of the United States on which the claim is based; and

(f) the sworn statement that the claim set forth is true and correct to the best of claimant's knowledge and belief.

123. As an alternative to litigation Montana has enacted a procedure for negotiating compacts for the equitable division and apportionment of waters between the state and the several Indian tribes claiming reserved water rights within the state. *Id.* §§ 85-2-701 to -705. A compact has been entered into between the state of Montana and the tribes of the Fort Peck Reservation pursuant to the statute.

124. *Id.* § 85-2-231(1)(c).

125. *Id.* § 85-2-234(4) and (6).

126. *See supra* note 123.

127. *State ex rel. Greely*, ___Mont. at ___, 712 P.2d 762-65.

128. *State ex rel. Greely*, ___Mont. at ___, 712 P.2d at 765 [citing Arizona v. California, 373 U.S. 546, 600-01 (1963)].

to future irrigation of reservation land, not present irrigation practices and current consumptive uses.[129] Turning to the Montana Water Use Act, the court noted that the state law permitted a "statement of claim for rights reserved under the laws of the United States which have not yet been put to use," and also permitted "Indian reserved rights to be decreed without a current use."[130]

The court acknowledged that the Montana Water Use Act included "extensive provisions which are to be applied in the event of a proposed change in use or in appropriation right" and sets forth "a standard under which an appropriator may abandon a water right."[131] On this point the court concluded:

> It may be argued that these statutes might allow an improper limitation on Indian reserved rights or result in abandonment for nonuse. We presume that the Water Court will not apply these code sections in an improper manner to the claimants of Indian reserved water rights. Federal Indian law must be applied in these areas as well.[132]

The court clearly recognized that even though the Montana Water Use Act did not explicitly state that water judges must apply federal law in adjudicating Indian reserved water rights, state courts were required to follow substantive federal Indian law with regard to those rights. The court concluded that the lack of explicit statutory language was not fatal to the adequacy of the Montana Water Use Act on its face.[133]The Montana Supreme Court echoed the warning of the United States Supreme Court in *San Carlos Apache Tribe* that the state courts' failure properly to apply federal substantive law in the adjudication of Indian reserved rights would be subject to the "particularized and exacting scrutiny" of both the Montana and United States Supreme Courts.[134] Indian tribes may perceive this warning as a hollow gesture that does little to assuage the tribes' fears that Indian water rights will be lost in state court,[135] but tribes should be somewhat comforted by the fact the statement came from the Montana Supreme Court. Unlike the United States Supreme Court in *San*

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129. *Id.* at ____, 712 P.2d at 765.
130. *Id.* at ____, 712 P.2d at 765.
131. *Id.* at ____, 712 P.2d at 765.
132. *Id.* at ____, 712 P.2d at 765.
133. *Id.* at ____, 712 P.2d at 766.
134. *Id.* at ____, 712 P.2d at 766.
135. Proponents of federal jurisdiction for the adjudication of Indian reserved water rights generally argue that the adjudication of Indian water rights by state courts threatens full realization of those rights granted Indians through their reservations, and ultimately jeopardizes the existence of the Indian culture. The argument is that, to the Indians, land and water are deemed essential to Indian livelihood and future survival and, therefore, threats to eliminate land and water rights constitute threats to the very existence of Indian culture. *See* Comment, *Adjudication, supra* note 16, at 28.

Carlos Apache Tribe, the Montana Supreme Court specifically acknowledged and thus affirmed several important differences between federal and Indian reserved water rights, and between state created and Indian water rights. The Montana Supreme Court's decision in *State ex rel. Greely* exhibits an understanding of the intricate and delicate issues involved in Indian water rights.[136]

2. *Involvement of the Montana Department of Natural Resources and Conservation*

The tribes also challenged the adequacy of the state system to adjudicate Indian reserved water rights by arguing that the Montana DNRC's involvement in the adjudication did not comport with the requirements of due process.[137] The tribes claimed the varied functions statutorily assigned to the DNRC violated the procedural due process guarantees of both the federal and state constitutions.[138] The DNRC is viewed as an institutional adversary of Indian tribes claiming reserved water rights. The tribes argued that by involving the agency in the adjudication, the Montana legislature created an inevitable conflict of interest which violated fundamental fairness, thereby transgressing the constitutional due process guarantee.

Recognizing the limited nature of the writ of supervisory control under the circumstances surrounding *State ex rel. Greely*, at least one tribe commented that since "these issues are fact dependent, it appears that they should be reserved for a subsequent trial in an appropriate forum."[139] Accordingly, the Montana Supreme Court concluded:

> Section 85-2-243, MCA, authorizes the Department to assist the Water Court, including collecting information and conducting field investigations of questionable claims. While we recognize that the Act places no limits on the manner in which the Water Court utilizes the information furnished by the Department, we will not presume any improper application of the Act on the part of the Water Court. Actual violations of procedural due process and other issues regarding the Act as applied are reviewable on

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136. The United States Supreme Court's failure to distinguish between federal reserved rights and Indian reserved rights is criticized in Comment, *Adjudication, supra* note 16, at 42-44.

137. Brief of the Assiniboine and Sioux Tribes of the Fort Peck Reservation, the Crow Tribe of Indians of the Crow Reservation, and the Northern Cheyenne Tribe of the Northern Cheyenne Reservation at 37, State *ex rel.* Greely v. United States, ___Mont.___, 712 P.2d 754 (1985); Brief of the Confederated Salish and Kootenai Tribes of the Flathead Reservation at 87, *id.*

138. The statutory roles of the Montana DNRC are set forth at MONT. CODE ANN. §§ 85-2-221, -231 to -233, -243 (1987). *See infra* notes 145-51 and accompanying text.

139. Brief of the Confederated Salish and Kootenai Tribes of the Flathead Reservation at 90, State *ex rel.* Greely v. United States, ___Mont.___, 712 P.2d 754 (1985).

appeal after a factual record is established.[140]

The court's conclusion lays the groundwork for the inevitable lawsuit that will challenge the Montana Water Use Act as applied. Nevertheless, the court correctly treated the allegation as not ripe for judicial review and thus was able to conclude that on its face the Montana Water Use Act was adequate to adjudicate Indian reserved water rights.[141]

IV. THE UNRESOLVED ISSUE AFTER STATE EX REL. GREELY

Even before the decision in *State ex rel. Greely* was issued numerous parties were positioning themselves for legal challenges to the adjudication process on an "as applied" basis.[142] Central to each of the challenges was the role of the DNRC in the adjudication process and the question of whether as a result of the statutorily imposed role there existed procedural due process violations.

A final determination on any challenge to the functioning of the DNRC in the adjudication process is fact dependent.[143] Nevertheless, the Montana Supreme Court did not adequately identify the varied roles of the state natural resource agency in its discussion of the issue in *State ex rel. Greely*. A more thorough examination may lend insight into the ultimate results to be expected.

Under Montana's general adjudication scheme the DNRC was initially responsible for establishing an information and assistance program for the filing of claims.[144] In this role the agency helped the water judges design claim statements and instruction forms, and presented seminars and workshops throughout the state to make water users aware of the process and to give them assistance in filling out and submitting claims. The DNRC was also the clearinghouse for the filing of claims.[145] In this capacity the department was designated to receive all statements of claim and appropriate filing fees. Once received, the statements of claim were transmitted to the appropriate clerk of the district court of the judicial district in which the use occurred.

The next major role assigned to the DNRC was to provide technical assistance to the water judges, subject to the direction of the water

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140. *Id.* at ____, 712 P.2d at 765.

141. *Id.* at ____, 712 P.2d at 768.

142. For example, three petitions for writ of supervisory control were filed with the Montana Supreme Court prior to the issuance of *State ex rel. Greely*.

143. It is beyond the scope of this article to discuss the various possible factual scenarios that could arise. Therefore, the analysis is limited to potential problems inherent in the Montana Water Use Act.

144. MONT. CODE ANN. § 85-2-243 (1987).

145. *Id.* § 85-2-243.

judges.[146] In addition to providing this assistance, the agency is assigned an independent investigative role. The information derived in this role may be used by the water judges in the issuance of a preliminary decree.[147]

The DNRC is also a claimant in the adjudication process.[148] As a claimant it has the corollary rights and duties to make objections to preliminary decrees in the defense of its water rights.[149] Finally, the agency is authorized to object to any preliminary decree for any reason.[150] This latter role is independent of its role as a claimant in the adjudication proceeding and is not limited to rights claimed by the state of Montana.

It is the placement of all these statutorily defined roles under one executive agency that has given rise to the due process objections by the tribes and others. The final disposition of the issue will undoubtedly be resolved in the context of the similarities and distinctions to be drawn to the Arizona Supreme Court's decision in *United States v. Superior Court In & For Maricopa County*.[151]

In *Maricopa County*, the Arizona Department of Water Resources was assigned the following functions in Arizona's adjudication scheme: it helped determine the scope of the adjudication;[152] it aided the development of statement of claim forms;[153] it served process on all potential claimants;[154] it provided a list of potential water masters to the state court (the statute did not require that an appointment be made from the names on the list);[155] and, it provided "technical assistance" to the court or master "with respect to which the director possesses hydrological or other expertise."[156] These functions are virtually analogous to those assigned to the Montana DNRC. But unlike the Montana system, a separate agency assumes the role of claimant to water rights on behalf of the state,[157] and the attorney

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146. *Id.*

147. *Id.* § 85-2-231.

148. As a holder of water rights pursuant to MONT. CODE ANN. § 85-1-204, the DNRC has water rights which are subject to the claims registration requirements of the Montana Water Use Act.

149. *Id.* § 85-2-233.

150. *Id.*

151. ___Ariz.___, 697 P.2d 658 (1985). In Arizona, the other state with Montana in *San Carlos Apache Tribe*, the state supreme court held that no amendment to the Arizona Constitution was required to eliminate the disclaimer language and that as a matter of state law the Arizona Constitution was not an impediment to a general adjudication of water rights in state court. *Id.* at ___, 697 P.2d at 670. It further held that the roles assigned to the Arizona Department of Water Resources did not violate due process guarantees. *Id.* at ___, 697 P.2d at 674.

152. ARIZ. REV. STAT. ANN. § 45-253(A)(2) (Supp. 1984-85).

153. *Id.*

154. *Id.*

155. *Id.* § 45-255(A).

156. *Id.* § 45-256.

157. The Arizona State Land Department's sole involvement with the adjudicatory proceeding is that of a claimant. *Maricopa County*, ___Ariz. at ___, 697 P.2d at 572.

general of the state of Arizona represents the state with respect to claims asserted on the state's behalf.[158]

The Arizona Supreme Court stated that the examination of facts, the making of factual findings and the determination of factual disputes were the adjudicatory functions by which it would judge whether the Arizona Department of Water Resources was a participant in the adjudicatory process.[159] Participation in the adjudicatory process by an "institutionally biased" agency would transgress the due process guarantees of the Arizona and federal constitutions.[160] Upon its review of the roles assigned to the Arizona Department of Water Resources, the Arizona Supreme Court found that the agency had no statutory duty to decide any contested fact or issue of law, nor any legal issue of any kind.[161] Because the state water resource agency was an "investigator, a provider of expert and administrative assistance, and an identifier of issues"[162] the Arizona Supreme Court concluded that "all of these roles fall far short of participation in the actual adjudicatory process—the resolution of contested issues of fact or law."[163] Therefore, there was no violation of due process.

Maricopa County established the benchmark by which the Montana statute will be judged. The test to be applied, assuming the Montana DNRC is by its nature "institutionally biased" against the tribes,[164] is whether the executive agency is involved in the resolution of contested issues of fact or law. A facial examination of the Montana Water Use Act under the *Maricopa County* test favors the adequacy of the statute. None of the roles exercise by the DNRC[165] includes the agency in the adjudication of any factual or legal issues of any kind. This result should be expected even though the separation of roles in Montana is not as "thorough" as that in Arizona.[166] Whether as claimant or advocate, the DNRC makes no determination of fact or law in the adjudication proceeding. Thus, it is likely that no due process violation will be found in the statutory assignment of those roles. Nevertheless, caution must be exercised by the

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158. ARIZ. REV. STAT. ANN. § 45-252(B) (Supp. 1984-85).

159. *Maricopa County*, ___Ariz. at ___, 697 P.2d at 672-73.

160. *See id.* at ___, 697 P.2d at 672-73.

161. *Id.* at ___, 697 P.2d at 673.

162. *Id.* at ___, 697 P.2d at 674.

163. *Id.* at ___, 697 P.2d at 674.

164. For a general description of the assertion of "institutional bias," see Brief of the Assiniboine and Sioux Tribes of the Fort Peck Reservation, the Crow Tribe of Indians of the Crow Reservation, and the Northern Cheyenne Tribe of the Northern Cheyenne Reservation at 38-40, State *ex rel.* Greely v. United States, ___Mont. ___, 712 P.2d 754 (1985).

165. *See supra* notes 145-51 and accompanying text.

166. In Arizona the executive agency providing technical assistance to the water court is not the same agency that files claims for water rights and advocates those rights in the adversary hearings. *Maricopa County*, ___ Ariz. at ___, 697 P.2d at 672.

DNRC and the water judges to protect against drawing the agency into a role reserved for the adjudicator.[167]

V. CONCLUSION

After more than a decade of litigation[168] it is now clear that the state of Montana, a "disclaimer" state,[169] has jurisdiction to adjudicate Indian reserved water rights in state court proceedings. Although *State ex rel. Greely* has resolved that the disclaimer language in the Montana Constitution does not prohibit state courts in Montana from exercising jurisdiction over reserved water rights, the question as to the adequacy of the Montana Water Use Act to allow for the adjudication remains unsettled. Despite the Arizona precedent favoring the constitutionality of the roles undertaken by the Montana DNRC, logically the litigation is not at an end. The Montana Supreme Court has properly left the door open to all fact based challenges to the Montana Water Use Act.[170]

In addition to challenges to the roles of the DNRC, further challenges to the Montana Water Use Act might include the following: the adjudicatory procedures are not designed to address the problem of inflated claims; the procedure as applied by the water judges is an elaborate claims cataloging procedure with little true adjudication; application of the Montana Water Use Act is applied to Indian reserved water in a manner inconsistent with federal law or as a limitation on the scope of reserved rights;[171] the state courts fail to recognize the different nature of reserved right claims and thereby deny the tribes sufficient time to develop and present their claims; and a negotiated compact is not properly incorporated into a final decree under the adjudication. This list does not exhaust the potential fact based challenges, but it shows that *State ex rel. Greely* is not the final word on the adequacy question left open by *San Carlos Apache Tribe*. Nevertheless, from the perspective of the state of Montana, the corner has been turned. Quantification of all water rights, including Indian reserved water rights, can now be adjudicated in one comprehensive state proceeding.

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167. For example, in its role of verification of claims the DNRC must be careful in reporting its findings to the water judges not to recommend a decree to the court. Such a recommendation would be inappropriate. *See Maricopa County*, ____Ariz. at ____, 697 P.2d at 673.

168. The initial lawsuit that culminated in the United States Supreme Court's holding in *San Carlos Apache Tribe* was filed January, 1975, by the Northern Cheyenne Tribe in the United States district court for the District of Montana. *See supra* note 23.

169. *See supra* note 14.

170. *State ex rel. Greely*, ____Mont. at ____, 712 P.2d at 768.

171. For example, the Montana Water Use Act would arguably be inadequate under the Supremacy Clause of the United States Constitution if state law requirements in conflict with the federal common law governing Indian reserved water rights were imposed on the tribes.

The *San Carlos Apache Tribe* and *State ex rel. Greely* decisions represent major advances for those advocating quantification of reserved rights in state courts. However, all is not lost for the Indian tribes. The Montana Supreme Court demonstrated a good working knowledge of Indian water law and in addition has sent a clear message to the water judges that it will not sanction a decree of Indian reserved water rights that is fashioned in a haphazard manner.[172] Certainly the tribes will remain apprehensive about the adjudication of their water rights in state court, but the supreme court's decision in *State ex rel. Greely* does not signal a hostile forum.

The state court advocates must also remain vigilante against the "as applied" procedural due process claims.[173] It is extremely important that the Montana Supreme Court remain cognizant of these procedural due process concerns as it forges the adjudication process with its judicial interpretations.[174]

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172. *See State ex rel. Greely*, ___Mont. at ___, 712 P.2d at 762-66.

173. *See supra* text accompanying notes 138-42.

174. Potential procedural due process concerns were raised in a recent case by the state, In Re the Matter of the Activities of the Dept. of Natural Resources and Conservation, ___Mont.___, ___ P.2d___, 44 St. Rptr. 604 (1987). As in *State ex rel. Greely*, the Montana Supreme Court determined that the due process claims were not ripe for review. The court warned, however, "[o]ur water courts are aware, we trust, that the United States Supreme Court reserved the right to review state court adjudications of federal reserve water rights . . . ." *Id.* at ___, ___ P.2d at ___, 44 St. Rptr. at 615.