THE McCARRAN AMENDMENT AND THE ADMINISTRATION OF TRIBAL RESERVED WATER RIGHTS

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INTRODUCTION

This paper surveys developing issues in the administration of tribal reserved water rights. At the center of the issues is the McCarran Amendment, 43 U.S.C. § 666 (1988). The McCarran Amendment was enacted to waive federal sovereign immunity for the adjudication and administration of federal water rights. The sponsors believed that administration should be undertaken by state administrative bodies.

Historically, there has been tension between rights acquired under the state law of prior appropriation and federal tribal water rights. The tension arises from the fact that tribal claims are being quantified in stream systems that are fully appropriated under state law. Administrative issues will develop under that tension.

Administrative issues may be divided into two categories: priority enforcement and changes in use of tribal water rights. This paper shall address issues in the latter category, focusing on the extent to which state substantive law is applicable to tribal water rights which are changed in purpose or place of use from primary reservation purposes. Specific questions include:

- Can an adjudicated *Winters* right be changed in purpose or place of use?
- Does a change in use to a secondary purpose subject a *Winters* right to state jurisdiction and state law?
- What administrative issues arise if a "change in use," "transfer," or "lease" takes the form of tribal forbearance from developing its reserved rights, leaving non-Indian development in place?

Underlying these issues is the waiver of sovereign immunity brought about by the McCarran Amendment, and the extent to which the procedures and principals of state law are applicable to federal tribal water rights.

Only one case, *In Re Big Horn River System*, 835 P.2d 273 (Wyo. 1992), has directly addressed the transfer of adjudicated tribal water rights to other purposes. Some administrative questions are being resolved through negotiated settlements for tribal claims, although the use of imported water in settlements is deferring decision on difficult issues.

Settlements with marketing provisions reflect an interest in tribal water by state parties. While not governed by the McCarran Amendment, this dynamic will continue. The leasing or marketing of tribal rights off-reservation is increasingly desirable to industry and other state entities as:

- a source of water;
- a source of water with an early priority date; and
- freedom from elements of state regulation.

STATE AND TRIBAL WATER RIGHTS

Prior to 1866 rights to the use of water on the public domain were retained by the United States. However, "[t]he rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a beneficial use was entitled to protection . . .."[1] *See California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154 (1935). Between 1850-1875 the appropriation doctrine was recognized in Arizona, California, Colorado, Montana, Nevada, New Mexico, and Wyoming.

As a result of the Public Land Acts of 1866 and 1870, and the Desert Land Act of 1877, ownership of the United States in the non-navigable waters was severed from the public domain. Rights which had developed under appropriation practice and custom were confirmed.[2] *See United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 702-09 (1899). The Desert Land Act of 1877, 19 Stat. 377, expressly relinquished plenary control over water resources on the public domain to the states. It provided that " . . . all surplus water over and above such actual appropriation and use, together with the water of

all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public ... ." *See California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935):

> What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. 295 U.S. at 163-64.

The severance of the non-navigable waters from the public domain contained an important omission. No provision had been made for the use of water in federal enclaves. This issue was not addressed until 1908 when the Supreme Court decided *Winters v. United States*, 207 U.S. 564 (1908), holding that when the United States withdrew lands from the public domain in order to establish the Ft. Belknap Indian Reservation, it also impliedly withdrew from the then unappropriated waters of the Milk River sufficient water to satisfy the purposes for which the lands were withdrawn. 207 U.S. at 577.

The consequence of the *Winters* doctrine was two-fold. First, federal law impliedly reserved unappropriated water from appropriation under state and territorial law upon the withdrawal of lands from the public domain by the United States. The reservation was "implied" because federal documents creating the reservation of land were silent as to water.[3] Second, in many stream systems two distinct bodies of law governing water use have developed, complicating the administrative issues.

The quantification of federal reserved rights is undertaken according to federal law. Nevertheless, the Supreme Court is cognizant of the impact of large reservations of water "[i]n the arid parts of the West ...[where] claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams." *See United States v. New Mexico*, 438 U.S. 696, 699 (1978).

Moreover, the Supreme Court has established the principle that quantification of federal reserved rights is limited to the primary purposes of the reservation. In *United States v. New Mexico, supra*, Justice Rehnquist stated: "Each time this Court has applied the `implied-reservation-of-water doctrine,' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated." *See United States v. New Mexico*, 438 U.S. at 700. The Court held that any secondary uses were subject to state law: "Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator." 438 U.S. at 702. *See California v. United States*, 438 U.S. 645 (1978).

The scope of the *Winters* doctrine was summarized in *Cappaert v. United States*, 426 U.S. 128, 138 (1976) 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. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

Tribal reserved rights and water rights arising under state law differ in fundamental respects. Water rights arising under state law are usufructuary rights subject to administrative regulation that requires, as a condition for ownership, application to beneficial use. A typical provision of state law reads: "Beneficial use shall be the basis, the measure and the limit of the right to the use of water." *See, e.g.*, N.M. Const. art. XVI, § 3; Nev. Rev. Stat. § 533.035; Ariz. Rev. Stat. Ann. § 45-141(B). The requirement of continuous beneficial use is enforced by forfeiture and abandonment law.[4] Tribal reserved water rights arise from federal law. Reserved rights used on reservations do not require actual use to be maintained.[5]

THE McCARRAN AMENDMENT

The McCarran Amendment, 43 U.S.C. § 666 (1988), was enacted in 1952 to integrate federal water rights with state rights through the adjudication process and in subsequent administration under state law. The rationale for the McCarran Amendment was set forth in S. Rep. No. 755, 82nd Cong., 1st Sess. (1951). The Statement of Purpose clearly provides for a waiver of sovereign immunity for the dual purposes of adjudication and administration:

> The purpose of the proposed legislation, as amended, is to permit the joinder of the United States as a party defendant in any suit for the adjudication of rights to the use of water of a river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water rights by appropriation under State law, by purchase, exchange, or otherwise and that the United States is a necessary party to such suit.

In S. Rep. No. 755, 82nd Cong., 1st Sess. 2 (1951), the Senate Judiciary Committee outlined the need for the waiver on the basis of the requirement for state jurisdiction over both federal rights and rights acquired under the prior appropriation doctrine. The Committee Report begins with the distinction between water rights acquired under the state law of prior appropriation and water rights owned by the United States. It reviews the congressional history of federal deference to state water law. The Committee observed that "[i]n the administration of and the adjudication of water rights under State law the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings." *Id*. at 4-5. The Committee went on to conclude that "[i]t is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States . . . is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water . . . by the other water users who are amenable to and bound by the decrees and order of the State courts." *Id*. at 5. The Committee described this situation as one that "cannot help but result in a chaotic condition." *Id*. Accordingly, the Committee sought the waiver of federal sovereign immunity for joinder of the United States to state court and administrative proceedings:

> Since it is clear that the States have the control of the water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.

S. Rep. No. 755, 82nd Cong., 1st Sess. 6 (1951).

This point was emphasized in the congressional debate.

> The Government has long recognized and conceded, particularly in the Desert Land Act of 1877, the supremacy of State law in respect to the acquisition of water. It has been under these State laws that the water rights of the owners on a given stream have been adjudicated. Under the laws of many States, in order that an adjudication of the water rights of a stream may be had, it is necessary to join all the parties owning or claiming to own any rights to the stream. If one or the other of the owners of the rights cannot be joined, the effect of the decree is obvious. Since the United States has not waived its immunity in cases of this nature, suits for the adjudication of water rights necessarily come to a standstill, and confusion results.

97 CONG. REC. 12947-48 (1951). A proposed amendment to permit the United States to remove an adjudication brought in state court to federal court was stricken. 97 CONG. REC. 7817 (1951).

Judicial constructions of the McCarran Amendment have enforced the federal waiver of sovereign immunity. The policy for state adjudication of federal water rights was enunciated by the Supreme Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). At issue were proceedings brought by the United States in federal court on behalf of Indian claimants pursuant to 28 U.S.C. § 1345. The Court acknowledged the "highly interdependent" nature of rights to water, and that "actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings." 424 U.S. at 819. The Court concluded that "[t]he consent to

jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals." *Id.* The Court held that the suit brought by the United States in federal court was properly dismissed in favor of the concurrent adjudication addressing the same issues in state court.

In *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983), the Supreme Court decided the effect of the McCarran Amendment on proceedings in states which were admitted to the Union subject to legislation that reserved absolute jurisdiction and control over Indian lands to the Congress. The Court considered the consolidated *San Carlos* cases to be a sequel to the decision in *Colorado River Water Conservation District, supra*. At issue was the contention that the McCarran Amendment did not effect a waiver of federal sovereign immunity with respect to Arizona's Enabling Act, 36 Stat. 557, and the Arizona Constitution, Art. 20, ¶ 4. The Court held that limitations imposed on state court jurisdiction by the Enabling Acts were removed by the McCarran Amendment which was intended to address the problem that federal sovereign immunity placed on a state's ability to adjudicate water rights. The Court concluded that where state courts have jurisdiction to adjudicate Indian water rights, concurrent suits brought by Indian tribes seeking the adjudication of their rights are subject to dismissal under the *Colorado River* doctrine. 463 U.S. at 565-570.

ADMINISTRATION

Under the law of most western states, the administration of water rights is conducted by the office of the State Engineer with enforcement in the state courts when necessary. In a majority of western states, "the water rights statutes provide for making changes in both place and purpose of use of appropriated water." *See* 1 W. A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 633 (1971). "In most instances, approval of the State administrative agency is required." *Id.* Transactions with state rights are subject to a body of administrative law containing criteria designed to prevent the impairment of other water rights, and to protect the state interest in public welfare and the conservation of water.[6]

In the ordinary circumstance, administrative issues arise when a water right owner seeks to change the point of diversion, purpose or place of use of a perfected water right. Unperfected or inchoate rights are generally not transferrable under state law because a "transfer" of an inchoate right would effectuate a new appropriation in the guise of the transfer. The usual circumstance with respect to a transfer of an Indian water right, however, may prove to be different if what is "leased" is the right of non-federal water users to develop an inchoate reserved right, or a covenant by a tribe not to develop the right.

There has been consensus on the need for unified principles of administration. In *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984), the Ninth Circuit cautioned against the "legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." 736 F.2d at 1365, citing *FPC v. Oregon*, 349 U.S. 435, 448 (1955). However, what constitutes unified administration, particularly in terms of the application of state substantive law to tribal rights, has never been fully explored, and is only now being addressed.

DEVELOPING ADMINISTRATIVE ISSUES

Two cases have addressed the administration of federal reserved rights under the McCarran Amendment. In *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1983), the Colorado Supreme Court decided appeals from decrees entered in Colorado water courts with respect to federal reserved rights incident to lands for forests and national monuments. The Court held that the McCarran Amendment recognized "the primacy of the western states' interests in regulating and administering water rights." 656 P.2d at 9. The Court upheld the United States' stipulation that if a change of use or change in point of diversion was sought, Colorado law was to be followed, and that the Colorado State Engineer had administrative jurisdiction over the rights. 656 P.2d at 35. The issue of whether a change could be made only to another valid reservation purpose was deferred.

The issue of whether a tribe has administrative jurisdiction to change the purpose of use of tribal reserved rights was reached for the first and only time by a court in the Big Horn adjudication. Reserved water rights were quantified for the existing and future agricultural purposes of the Shoshone and Arapaho Tribes in *In Re Rights to Use Water in Big Horn River*, 753 P. 2d 76 (Wyo. 1988). The Court utilized the standard of practicably irrigable acres, adopted from *Arizona v. California*, 373 U.S. 546 (1963).[7] On April 12, 1990, the Wind River Water Resources Control Board issued Instream Flow Permit 90-001 which authorized the Joint

Business Council "to dedicate 252 c.f.s. (well, surface, spring) water in the Wind River for the purpose(s) of fisheries, restoration and enhancement, recreational uses, ground water recharge, downstream benefits to irrigators and other water users." At issue was the transfer of an unperfected award of water for future irrigation purposes into a present instream flow, posing the issue of principal concern to users of water based on state permits.

Following a district court's decision that the Tribes were entitled to change their reserved water right without regard to Wyoming water law, the decision was appealed to the Wyoming Supreme Court. In *In Re Big Horn River System*, 835 P.2d 273 (Wyo. 1992), the Wyoming Supreme Court addressed the issue of whether "the Tribes may change their right to divert future project water for agricultural purposes to a right to maintain an instream flow for fishery purposes without regard to Wyoming water law . . .." 835 P.2d at 275. The Court employed the case of *United States v. New Mexico*, 438 U.S. 696 (1978), to hold:

> We are persuaded by *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978), wherein the United States Supreme Court held that water is impliedly reserved only to the extent necessary to meet the primary purpose(s) for which a reservation is made and that, where water is valuable for a secondary purpose, the inference arises that Congress intended for water to be acquired in the same manner as is employed by any other private or public appropriation.
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> We see no reason why this rationale should not apply to a change of use of the future project water acquired by the Tribes solely for agricultural purposes. We hold that the Tribes, like any other appropriator, must comply with Wyoming water law to change the use of their reserved future project water from agricultural purposes to any other beneficial use. We leave for another day the question of whether the Tribes may dedicate their historically used water to instream flow, as that issue is not directly presented for our review by the facts of this case. 835 P.2d at 278-279.

Implicit in the decision is the state law principle that an inchoate or unperfected right cannot be changed in purpose or place of use. This was the basis for a concurring opinion by Justice Cardine who stated "that future water may not be transferred to instream flow without first being put to beneficial use for irrigation purposes." 835 P.2d at 285-86. His primary concern was "that the change of use must be orderly and gradual so as to minimize the devastating effect of an enormous dedication to instream flow of water that has never before, and is not now, being used for beneficial purposes." *Id*. at 287.

Accordingly, the *Big Horn* Court affirmed three principles: (i) that *Winters* rights may be changed in purpose and place of use; (ii) that the change be made under state administration; and (iii) employ certain principles of state law. The concern for dislocation to existing economies based on state permits was shown in Justice Cardine's opinion.

Apart from the McCarran Amendment, settlement agreements with marketing provisions have provided a means of establishing administration through negotiation, although they vary with respect to administrative provisions.[8] The Arizona model provides the most comprehensive statewide system. The principal administrative issue will be challenges to the restriction as to place of use of leased water. This is presently at issue in the Gila River negotiations. Several examples follow.

The Southern Arizona Water Rights Settlement Act, 96 Stat. 1274, 1280 provides for off-reservation uses of water including (for the Papago Tribe, now the Tohono O'Odham Tribe): "agricultural, municipal, industrial, commercial, mining, or recreational use whether within or outside the Papago Reservation so long as such use is within the Tucson Active Management Area . . .." The limitation of use to the Tucson Active Management Area conforms to an agreement to diminish groundwater pumping in the Tucson Active Management area in return for supply by the Tribe. Administration is addressed at § 303 (a) (3) where the tribe is to develop a water management plan which " . . . will have the same effect as any management plan developed under Arizona law." Some 40,000-60,000 acre-feet of CAP water have been made available to the Tribe. No leases of water have been made as yet.

The Ak-Chin Settlement Act as amended, 106 Stat. 3258, contains a similar leasing provision, and a place of use limitation to the Pinal, Phoenix, and Tucson Active Management Areas. This is the CAP service area. Some 75,000 acre-feet of CAP water was made available to the

Ak-Chin Tribe. 10,000 acre-feet have been leased to a developer.

The Fort McDowell Settlement Act, 104 Stat. 4480, provides for a lease of water to the City of Phoenix utilizing 10,000-15,000 acre-feet of CAP water. There is a place of use limitation in § 407 (f) to Pima, Pinal, and Maricopa Counties, the CAP service area. The Yavapai-Prescott Indian Tribe Water Rights Settlement, 108 Stat. 4526, is similar, and provides for a lease of water to Prescott of some 3,000-4,000 acre-feet of water.

Finally, an important issue will develop with respect to tribal forbearance or "deferral agreements." There is a distinction between "legally" undeveloped water and water that is in fact undeveloped. For example, by the middle 1950s, the surface and interrelated ground water supplies of the Rio Grande were fully appropriated. The *Winters* doctrine, however, allows a shift in the point in time when water is theoretically available to be appropriated. If an Indian reservation was reserved from the public domain in 1873, the water needed to fill the Indian right would derive in legal theory from the waters unappropriated as of 1873. Given the fact that the waters of the Rio Grande were fully appropriated under state law by the middle 1950s, any use of an Indian right to Rio Grande waters, quantified now, is a right to use already appropriated waters.

As a result, in a fully appropriated stream system, and from the tribal perspective, the leasable commodity is the forbearance to develop the right, thus facilitating neighboring non-Indian use. Some tribes take even a stronger territorial position, arguing that existing non-Indian use is in reality a use of unperfected Indian water, and the saleable commodity becomes the agreement not to seek to enjoin the non-Indian use. In either case, the thing being "leased" is not an existing use of wet water, but the right to use legally undeveloped tribal water. Depending on the facts, the parties to a lease agreement could fashion a lease to preclude administration, or employ negotiated administrative criteria.

CONCLUSIONS

The McCarran Amendment waived federal sovereign immunity for the adjudication of federal water rights. It provided for a unified administration of federal rights, including tribal reserved water rights, under state administrative authority. The greatest uncertainty is the applicable substantive law, particularly the extent to which the substantive law of the states, *i.e.* prior appropriation law, will be applied to adjudicated tribal rights which are changed in purpose or place of use from the primary reservation purpose. The scanty case law to date suggests the application of some state law concepts.

Two policies are at work in this developing area of law. The principal policy issue is the dislocation of economies based on permits and licenses granted under state law which fosters resistance to tribal claims. A countervailing trend exists in the increased interest of some state parties in tribal water. Settlement agreements are responding to this need with marketing provisions which enable administrative issues to be determined in negotiations.

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ENDNOTES

1.. The territories of Arizona and New Mexico, ceded by Mexico following the War of 1848, recognized the doctrine of prior appropriation on the basis of Spanish and Mexican precedent. *See Tattersfield v. Putnam*, 45 Ariz. 156, 41 P. 2d 228 (1935); *United States v. Rio Grande Dam & Irr. Co.*, 9 N.M. 292, 51 P. 674 (1898); *see also* C.S. KINNEY, A TREATISE ON THE LAW OF IRRIGATION AND WATER RIGHTS at 988-1001 (2d ed. 1912). In the territories of the public domain which had not been acquired from Mexico, prior appropriation arose from custom and practical necessity.

2. *See* 1 W.A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 172-175 (1971); *see generally California Oregon Power Co. v. Beaver Portland Cement Co. 295, U.S. 142 (1935).* In the Act of July 9, 1870, 16 Stat. 217, 218, Congress provided that ". . . all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights . . ." *See also Gutierres v. Albuquerque Land & Irrig. Co.*, 188 U.S. 545, 552-53 (1903); *Jennison v. Kirk*, 98 U.S. 453, 459-461 (1979).

3. *See Arizona v. California*, 373 U.S. 546, 598-99 (1963).

4. New Mexico law is characteristic of prior appropriation doctrine. *See, e.g.*, N.M.S.A. 1978, § 72-5-28 (1985 Repl. Pamp.); N.M.S. A. 1978 § 72-12-8 (1985 Repl. Pamp.); *State ex rel. Reynolds v. South Springs Co.*, 80 N.M. 144, 452 P.2D 478 (1969).

5. *See Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (E.D. Wash. 1978).

6. *See, e.g.*, N.M.S.A. 1978, § 72-5-24 (1985 Repl. Pamp.); N.M.S.A. 1978, § 72-5-23 (1985 Repl. Pamp.); N.M.S.A. 1978, § 72-12-7 (1985 Repl. Pamp.).

7. In *In Re Rights To Use Water in Big Horn River,* 753 P. 2d 76, 103 (Wyo. 1988), the Wyoming Supreme Court recognized an award of 188,937 acre-feet per year on 48,520 acres of land as a reserved right for future irrigation purposes.

After reviewing the district court's finding that the primary purpose of the reservation was agricutural, pursuant to the Treaty of Ft. Bridger with the Shoshone and Bannock dated July 3, 1968, the Court rejected the Tribes' claim for an instream flow.

8. The Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, 106 Stat. 1186, provides for the United States to administer the tribal water right. Certain settlement agreements provide for a dual administration. The Ft. Hall Settlement Act provides for the United States to "administer the distribution of the Fort Hall Indian Irrigation Project water rights. . . ." The State shall administer rights acquired under state law. In New Mexico, the Jicarilla Settlement draft language provides for state jurisdiction over transfers to off-reservation uses, and contains a non-diminishment provision for transfers back to the reservation.

The Ute Indian Rights Settlement Act, 106 Stat. 4650, provides for state administration. For off-reservation uses, the tribal right is converted to a state right. See § 503(d).