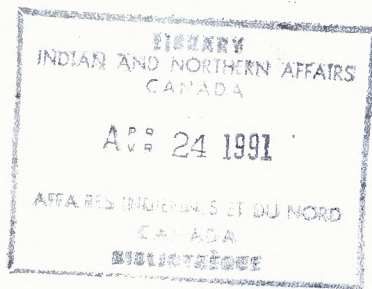


INDIAN WATER RIGHTS IN THE  
WESTERN UNITED STATES

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INDIAN WATER RIGHTS IN THE WESTERN UNITED STATES:  
An Historical Overview and Discussion of Some Current Issues

by

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for

Research Branch

Corporate Policy

Indian and Northern Affairs Canada

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## PREFACE

This is the second in a series of five papers dealing with various aspects of the relationship between Indian peoples and the government of the United States. The information in the papers was compiled from a variety of sources, all of which are listed in the bibliography.

The papers contain very little analysis, as the purpose of the series was descriptive rather than analytical. Varying points of view are expressed on some subjects in the text. These are a reflection of the perspectives taken by individuals or organizations on a particular issue. Future researchers may wish to undertake comparative analyses of these differing opinions, but for the purposes of this paper they have been presented uncritically.

These papers were prepared to assist government and aboriginal representatives who, in the course of their involvement in the resolution of constitutional issues affecting Canada's native peoples, may wish to consider the relationship between American Indian tribes and the United States federal government. The series is a reference tool for comparative study and a base from which further research could proceed. While the various historical and legal events that characterize the relationship between American Indian tribes and the United States federal government differ from those events which shaped the relationship of native peoples and government in Canada, there are

Notable in this regard were the following: the Institute for the Development of Indian Law (Washington, D.C.); the Indian Law Resource Center (Washington, D.C.); and the Native American Rights Fund (Boulder, Colorado). The Native American Rights Fund (NARF) maintains perhaps the most extensive collection of Indian law materials in the United States. This collection is updated annually. Access to this information is available through the Indian and Northern Affairs departmental library as well as through the library of the Faculty of Law, University of Ottawa. It may also be available at similar facilities elsewhere in Canada.

The assistance of those organizations mentioned earlier, as well as others consulted, is gratefully acknowledged, as is that of the staff of the Treaties and Historical Research Centre and the library at Indian and Northern Affairs Canada. Any errors or omissions in the text are the responsibility of the author.

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## INTRODUCTION

Indian water rights ... will perhaps be the most important issue for Indians throughout the 1980's. Nearly all western tribes are involved in litigation or negotiations to protect their water rights.... From at least the time when the U.S. Supreme Court first declared in 1908 that Indian tribes possess special reserved water rights which place them outside the scope of state water laws, Indian water rights have seldom been protected by the federal government or respected by the states and other water users. Consequently, many western tribes have lost or are losing their water resources through illegal takings. The Indian water issues being contested today involve not only the nature and quantity of Indian reserved water rights, but also whether Indian water rights are to be adjudicated in state or federal courts. This issue is critical to tribes since states have historically been hostile to Indian rights....'

Indian water rights are inextricably linked to questions of law, history and jurisdiction which are particularly unique to the relationship between Indian tribes and the federal and state governments of the United States. To understand the controversy surrounding Indian water rights, one must initially comprehend the legal, historical and jurisdictional factors which bear so significantly upon it. Therefore, this paper will describe these factors as well as discussing several of the most current issues or conflicts in the field of Indian water rights.

I

HISTORICAL, JURISDICTIONAL AND LEGAL ASPECTS  
OF INDIAN WATER RIGHTS

A. Origins of Conflict Between Indian and Non-Indian Water Rights

Generally speaking, the origins of the conflict between Indian and non-Indian interests in the western United States over water rights may be found in that period of United States history characterized by westward expansion and settlement. At the same time that they were establishing communities and prospecting for mineral resources, settlers were claiming rights to waters on or near Indian reservations. These claims were based upon the doctrine of prior appropriation, which, simply speaking, postulated that the right to use water in the future is recognized in those who have made beneficial use of water in the past. This doctrine grew out of the customary practices and usages developed by those first settlers and miners who ventured westward and was eventually recognized in congressional mining and land legislation.<sup>2</sup> It fell to the United States courts to attempt to resolve the question of who has rights to water in the western states. The focal point of this resolution was a case involving the Fort Belknap Indian Reservation in the state of Montana.

B. Judicial Resolution: The Winters Decision:

In its resolution of the Fort Belknap case<sup>3</sup>, the Court looked to an earlier decision, the Winans case.<sup>4</sup> In this case, the "reserved rights doctrine" was applied by the Court. Winans concerned fishing rights retained under a treaty, and the Court held that the treaty in question reserved to the tribe any rights which had not been expressly granted away. Relying upon the reserved rights doctrine, the Court stated in the Winters decision (the Fort Belknap case) that the treaty in question had impliedly reserved to the Indians that amount of water necessary to the maintenance and development of their reservation. Thus, in the guise of the "reserved rights doctrine," the "Winters rights doctrine" was born.

The reserved rights doctrine has been applied mostly in the realm of water rights and is therefore more commonly referred to as the Winters rights doctrine. The implications of the reserved rights doctrine may go far beyond water rights, extending to protection of all resources -- and limitation of non-Indian activities and uses -- as necessary to fulfill the purposes of the reservations.<sup>5</sup> One author has concluded that the reserved rights doctrine protects:



not only the waters that traverse, border upon or underlie federal and Indian reservations, but all of the assets and resources that are necessary to fulfill reservation purposes. It is, in reality, a substantive National Environmental Policy Act that serves to preserve the reservations' environmental integrity. But it does more than simply preserve and protect. It effectuates, implements and enforces Indian rights even to the extent of limiting non-Indians' uses of their lands. And that is not all. Its impact is not limited to physical resources. It is one basis for the Indians' immunity from many state and federal laws. Perhaps most importantly, it stands as a symbol of, and a vehicle for fulfilling, our Nation's unbroken string of broken promises.<sup>6</sup>

As a result of its decision in Winters, the United States Supreme Court thrust upon the scene the Indian-federal reserved water right, with the claim to an early priority and a right to expand the use of water in the future as the need arose (but with no known means of establishing the amount of use or allowable types of uses). The states objected vigorously to this decision. Their protest was understandable, considering that the states had established their own schemes of water usage. Notwithstanding the fact that early state water legislation was incomplete, the resulting water law systems had developed into elaborate and detailed schemes. These schemes erected an order of priorities, establishing the measure and extent of each right, the place and nature of its use, the manner in which rights could be acquired and used, and the method of giving notice to the public of each use. Prior to Winters decision, no one had considered what right

the federal government had to make use of the unappropriated water for its own purposes. Further, no one had considered how such a right might be established and recorded. The negative response to the Winters decision on the part of the states resulted in part from a failure to recognize the already established principle that the source of the authority to administer the use of water was the federal sovereign.<sup>7</sup>

C. Significant Principles and Effects of Winans and Winters:

1. The Winans case is significant as an authority for holding that any rights and interests which were not specifically granted by Indian tribes in their treaties with the United States government, were reserved onto or maintained by the Indian tribes. Furthermore, the Court recognized that a treaty was not a grant of rights to the Indians by the United States.<sup>8</sup> The importance of this principle in relation to the Winters case is reflected in the following statement of the Ninth Circuit Court of Appeals:

In conclusion, we are of the opinion that the court below did not err in holding that, 'when the Indians made the treaty granting rights to the United States, they reserved the right to use the waters of the Milk River' at least to the extent reasonably necessary to irrigate their lands. The right so reserved continues to exist against the United States and its grantees as well as against the state and its grantee<sup>9</sup>

In other words, the Indians were granting rights to the United States and reserving for themselves what they were not granting, that is, the right to use the water to the extent required for their properties, the Fort Belknap Indian Reservation.<sup>10</sup>

2. The fundamental legal questions underlying the Winters decision concerned (a) the rights to the use of the water of the Milk River reserved for the Fort Belknap Indian land,<sup>11</sup> and (b) the question of whether or not Indian water rights could be divested, upon Montana's entry into the union, assuming that these water rights were reserved along with Indian land rights.<sup>12</sup>

The significance of the Winters decision lies in the fact that it is authority for holding that rights to the use of water were reserved by Indians when they ceded large tracts of land to the United States, even though no mention of a reservation of water rights was made in the treaty. In terms of the Winans decision, the fact that water rights were not mentioned means that they were not granted to the United States. Furthermore, the court in Winters held that the entrance of a state into the union did not divest tribes of their rights. Consequently, "Winters doctrine rights" to the use of water have been recognized as interests in real property. Therefore, as interests in real property, they are entitled to the same protection from abridgements and loss by the Federal Government as those obligations respecting the land itself.<sup>13</sup>

3. Apart from holding that Indian water rights remained reserved onto the Indians unless otherwise indicated, the Winans and the Winters decisions are important as judicial pronouncements on the nature of Indian title to land. The Court stated in Winans that "... the treaty was not a grant of rights to the Indians, but a grant of rights from them [to the United States], a reservation of those [rights] not granted."<sup>14</sup>

This concept -- that the Indians granted title to the United States, and not the converse -- is significant in regard to the nature of the Indians' title, for it is thereby properly construed in relation to the treaties between the Indian tribes and the United States. Indian title is therefore not seen as stemming from a conveyance to the Indians, but rather as actually residing in the Indians themselves. This residual title to their lands, their rights to the use of water, their rights of fishery and their timber -- in short, all interests in real property and natural resources--is therefore describable as having been retained by them when they granted title to vast areas which had once been theirs.<sup>15</sup>

D. Comparison and Discussion of the Winters Doctrine and the Doctrine of Prior Appropriation as to their Origins

1. As a result of the Winters decision and several subsequent rulings, Indian water rights have received significant judicial recognition. These rights are characterized by several general aspects. First, the creation of an Indian reservation implies a right to an amount of water sufficient to support the purposes of the reservation, that is, agricultural irrigation. Second, Indian water rights, or as they are more commonly referred to, Indian Winters rights, are deemed to be superior to any contrary state water rights legislation. Third, Indian Winters rights have been described as being immemorial in character, prior and paramount, or in similar terms, according to the Indians' preferential status on streams.<sup>16</sup>
2. Western water law is generally the outgrowth of experience, not logic. Where logic has purported to override experience in states where there has been some adherence to greatly modified principles of riparian rights, together with the doctrine of prior appropriation,<sup>17</sup> confusion has ensued. Title to most of the western United States -- land, water, minerals, timber and all natural resources -- originally resided in the national government. When miners came to the west exploring for precious minerals, water was the key.

Consequently, water was diverted out of the streams to the mine locations, frequently over long distances at great cost. The mining and water diversions were accomplished with the knowledge and acquiescence of the United States government. Eventually, there developed in the mining districts the precept that "first in time" was "first in right" on the streams of the public domain. This precept eventually crystallized into the doctrine of prior appropriation, or the appropriative rights doctrine, and has been defined by the courts as follows:

To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the state where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations.<sup>18</sup>

3. Winters doctrine rights are unique in the field of western water law. They differ drastically from, and by reason of their nature are vastly superior to, those water rights acquired privately through compliance with state laws. Vast areas of lands were ceded by the Indian tribes to the United States. Each of the cessions passed title, subject to then-vested rights, to all of the lands and rights to the use of water which were part and parcel of them. By those

cessions, not only the title but complete jurisdiction in the fullest legal sense passed to the central government. These means of acquiring title differ drastically from the requirements for obtaining title to appropriative rights; these rights were acquired by cession and not by appropriation. Other variances are made manifest when it is considered that, unlike appropriative rights, Winters doctrine rights are reserved for uses "which would be necessarily continued through the years." A "future use," as such, is entirely foreign to the doctrine of appropriative rights.<sup>19</sup>

4. The date of investiture of title is the prime element in the value of any right to the use of water in the semi-arid west, whether acquired by the sovereign pursuant to a treaty or by an individual pursuant to the local laws. For where the demand so greatly exceeds the supply, the ownership or control of the legal right first to divert and use water, or to allow others to use it, is of transcendent importance. It is likewise axiomatic that whoever controls the rights to the use of water also controls utilization of the land. As a consequence, it is essential to consider the source of the title and the date of investiture of that title to Winters doctrine rights.<sup>20</sup>



5. Winters doctrine rights have a date of acquisition (by cession) and not a "priority date" as that term has been applied to the appropriative rights doctrine. That date, when the Winters doctrine rights were ceded to the United States, is the date of their acquisition. There is no basis in law for claiming a priority date for them as is asserted in connection with an appropriative right privately acquired pursuant to state law. As previously mentioned, the national government is the source of title to those rights and it is therefore not an appropriator of rights to the use of water. Winters doctrine rights cannot be acquired by use nor lost by disuse. There is no limitation applied to them as to when, where and in what manner they should be exercised.<sup>21</sup>

E. Summary of the Characteristics of Winters Doctrine Rights and Prior Appropriation Doctrine Rights

1. The rights to use of water reserved by the treaties are immemorial and unimpaired in character since they have always resided in the Indians.<sup>22</sup>
2. Winters doctrine rights may be invoked whenever the tribes possessing these rights have an increased need for water.<sup>23</sup>



3. The courts have recognized that Indian tribes would of necessity need additional quantities of water to meet their future needs. Therefore, other claims (non-tribal) to water would be subject to modification by the tribes when conditions on the reservation "at any time require such modification." Any useful or beneficial purpose which makes a reservation more livable would be grounds for modification. The power to modify and divert water from non-Indian uses is inherent in the private right to water.<sup>24</sup>
4. The quantities of water reserved for the Indian tribes must be sufficient "to make those reservations livable."<sup>25</sup>
5. Water usage under the Winters doctrine is not limited to farming or agricultural uses exclusively.<sup>26</sup>
6. Winters doctrine rights are immune from state interference and seizure but they are not immune from seizure by the federal government. This principle holds notwithstanding the following statement made by the Court in the course of its decision in the Winters case.

When the Indians made the treaty granting rights to the United States, they reserved the right to use the waters, at lease [sic] to the extent reasonably necessary to irrigate their lands. The right so reserved continues to exist against the United States and its grantees as well as against the state and its grantees.<sup>27</sup>

7. General principles of state water law have limited application to Winters doctrine rights, for whenever Indian tribes have asserted their "Winters rights" against the states, they have prevailed.<sup>28</sup>
8. Even though Winters rights may prevail over state claims in the courts, these victories are somewhat hollow. What has actually taken place is a delayed political victory in favour of the states, as the federal government may simply step in and appropriate the water required by the particular state or states due to the plenary power of Congress to expropriate property. Even though the federal government may respect "Winters rights" as they are reserved to the tribes, this recognition does not prevent Congress from doing politically what they can't do judicially. The only constraint on the federal government in this regard is the fifth amendment to the Constitution, which prohibits the federal government from taking property without the due process of law and compensation. Effectively, they may appropriate Indian property (that is, water rights) if just compensation is provided. Various federal legislation provides for the due process of law which allows for such taking. Even though the tribes receive compensation, they will not get their water back.<sup>29</sup>
9. Winters doctrine rights need not be limited to streams arising upon reservations.<sup>30</sup>

10. Rights of prior appropriation are acquired by compliance with and are subject to state law. Those rights may be used only at the places and for the purposes prescribed by state law.<sup>31</sup>

F. Federal, State and Tribal Conflicts Concerning the Adjudication of Water Rights: Which Courts Have Jurisdiction?

1. The focal point of this aspect of the western water rights debate was a particular federal enactment known as the McCarran Water Rights Suit Act (1952, State 549, 43 U.S.C. 666). This legislation effectively conferred jurisdiction upon state courts to adjudicate disputes arising as a result of competing federal and state claims to water rights. This jurisdiction would be concurrent with federal jurisdiction in such disputes. The authority of the states in this regard was confirmed by the courts in two decisions: United States v. District Court for Eagle County,<sup>32</sup> and United States v. District Court for Water Division No. 5.<sup>33</sup> However, the question remained, "Did the state courts have jurisdiction to hear litigation concerning Indian water rights as well as the above-mentioned claims?" In other words, where should Indian tribes be sued for the adjudication of their water rights -- in the state courts or in the federal courts? This question turned upon the interpretation of the McCarran Act, and the question to be

answered then became, "Did the McCarran Act impliedly embrace Indian water rights when it spoke of federal water rights?" This question was answered by the Supreme Court in Colorado River Water Conservation v. United States and Akin v. United States,<sup>34</sup>. The Court held that the McCarran Act does allow for the adjudication of reserved rights held on behalf of Indians by the federal government (that is, tribal Winters rights) in state courts. In the course of its decision, the Court stated that, notwithstanding the exposure of Indian water rights to traditionally hostile state interests, "... the exercise of state jurisdiction does not imperil those rights or breach the solemn obligation of the Government to protect the Indian's rights."

The tribes took a decidedly different position from the Court's in this regard. Following the Akin decision, the tribes sought to have the McCarran Act amended in order to restore their immunity from state jurisdiction, control and administration of their Winters rights to the use of water. The reasons for the Akin decision were seen by the tribes as arising out of the inherent conflict of interest between the federal departments of Justice and Interior. It was, according to the tribes, because of these conflicts that the federal government had failed to distinguish between the Indian Winters rights to the use of water and federal rights to undertake reclamation projects and the development of national parks and services.<sup>35</sup>

In their submissions to the courts in the Eagle River case, and the Akin case, attorneys for the Justice Department and the Interior Department stated that Indian Winters rights to the use of water were identical with and could not be separated from the federal right to the use of water. Not only was there a failure to distinguish between Indian water rights and federal rights, but the Justice Department refused to differentiate between Indian rights held in trust for Indians and rights administered for non-Indian purposes and projects. This led one tribal spokesman to conclude that, "... severe losses are now and have been experienced due to the refusal of the Department of Justice and the Department of the Interior to distinguish administratively and before the courts the non-federal rights and the Indian Winters Doctrine rights to the use of water."<sup>36</sup>

The fact that the necessary distinctions between Indian and federal rights were not made by the Department of Justice before the courts led to what could be termed disregard on the part of the Court in Eagle River and Akin of the unique nature of the Indians' water rights. However, this seems to fly in the face of what had been held in earlier cases such as Winters.

The Ute Indians (whose rights were involved in the Akin decision), by their treaty of 1868, had reserved their

Winters rights to the use of water. These rights were therefore not federal rights. The necessity of realizing this fact should have been readily apparent to the departments of Justice and Interior because

It is the Indians, having Treaties, who reserved to themselves their Indian Winters Doctrine Rights to the use of water. The courts have declared that the Indian Treaties retained these rights for the Indians and these rights were not derived from the Federal government. Thus it is that the Ute Indians, whose rights were involved in the Akin decision, retained for themselves those rights by the Treaty of March 2, 1868.<sup>37</sup>

In their submission to the courts in both the Akin decision and the Eagle River cases, the Department of Justice did not in fact declare that Indians by their treaties retained their water rights and that those rights were not granted by the United States to the Indians. The effect of this was the co-mingling of Indian treaty rights with federal forest service rights in the Akin case.<sup>38</sup>

As construed in the Akin case, the McCarran Act subjects western Indian reservations to state control. The effect of this control of water on Indian reservations is to encroach upon Indian sovereignty in the western United States.<sup>39</sup>

Furthermore, the interpretation of the McCarran Act in Akin is viewed as violating the federal government's trust responsibility. It is not possible for Congress to delegate its trust responsibility for Indian water rights or, for that matter, any other rights. This prohibition has a

constitutional basis. However, the Akin decision seems to effect such a delegation. Accordingly, it has been argued that if the Akin decision is permitted to stand, full power and control over the administration and distribution of the waters to which Indians are legally entitled would be vested in the office of the state engineer. It would be that officer, and not federal officials, who would control tribal water rights.<sup>40</sup>

State-tribal conflicts such as those described above are compounded by various federal-tribal conflicts as well. A particular federal-tribal conflict arises out of the competition by certain agencies of the Department of Interior with Indians for water. These supplies of water are, in themselves, inadequate to meet both present and future demands. This inadequacy is made more critical by competition. The chief competitor of the tribes is the Bureau of Reclamation, which has massive projects involving water use.

The nature of this conflict may best be described as one of interest. When Indian rights to the use of water are being adjudicated on streams upon which the Bureau of Reclamation

is likewise asserting claims, Justice Department attorneys become engaged in preparing to defend against claims asserted by Indians. At the same time, another group of attorneys in the same division is preparing to protect those same Indian rights.<sup>41</sup>



## II

### CURRENT ISSUES IN WESTERN WATER LAW INVOLVING FEDERAL, STATE AND TRIBAL INTERESTS

This section of the paper will present an overview of some of the current issues and conflicts in United States western water law involving federal, state and tribal interests. The sources of information upon which this overview is based, are, for the most part, recent judicial decisions and scholarly articles and/or studies.

#### A. Judicial Decisions

In seeking to resolve the numerous legal and jurisdictional conflicts and questions associated with western water law, the courts may from time to time, as a result of their decision making, create new conflicts and give rise to new questions. The litigation of western water rights appears to be an ongoing, albeit reluctantly accepted, method of determining who has what right to which water. A negotiated settlement of water rights claims is usually preferred by all interests (federal, tribal, state) whenever possible. However, notwithstanding the cost both in time and money, the courts continue to play a major role in solving or attempting to solve the problems associated with water use and ownership in the western United States.

The following are examples of recent judicial decisions affecting Indian water rights in the western United States. While ownership and use habitually appear as issues in water rights litigation, many cases are in fact decided on other points of law, be they procedural or substantial in nature.

B. Recent Supreme Court Decisions

1. Arizona v. California<sup>42</sup>

In this case, the Supreme Court ruled that five Colorado River tribes (the Fort Mohave, Colorado River, Chemehuevi, Cocopha and Fort Yuma) were precluded from claiming water for lands which were not considered in the initial determination of the tribes' rights. (These rights were described in the initial hearing of this matter by the Supreme Court: Arizona v. California, 1963.) In the instant case, the five tribes had sought to modify the 1964 decree (which was a consequence of the 1963 decision) in order to claim water for additional lands.

This case was initially filed in 1952 in the Supreme Court as an original action between Arizona and California in order to apportion water between the two states. Other

states intervened or became parties, and the United States intervened to protect its own rights and the rights of the five tribes. In its 1963 decision in the case, the Supreme Court held that the tribes were entitled to sufficient water for their present and future needs with reference to the purposes of the reservations. The Court went on to determine the quantity of the tribes' rights, based on the amount of practicably irrigable acreage on each reservation.

In 1977 and 1978, the five tribes moved to intervene in the case in order to oppose the entry of a supplemental decree and to seek additional water for omitted lands - lands which were irrigable but for which the United States never made a claim - and boundary lands - lands which were or could have been within the boundaries of the reservations but for which no water right had been claimed. The tribes were later joined by the United States in making these claims.

Even though modification of the 1964 decree was technically possible under the terms of the decree itself, the Supreme Court held that the determination of Indian water rights in the earlier proceeding (1963) precluded additional claims for water for the omitted lands. Modification of the

decree, the Court said, would conflict with the "rule of finality" and the necessity of providing assurance to the southwest states and private litigants of the amounts of water they could expect to receive from the Colorado River. As to the boundary lands, the Court adopted recommendations to award additional water where the reservation boundaries had been judicially determined and directed that any unresolved boundary issues be decided.<sup>43</sup>

2. Nevada v. United States<sup>44</sup>

This case saw the rejection of an action brought by the Pyramid Lake Paiute Tribe of Nevada. The tribe had attempted to bring a claim for water for the maintenance and preservation of the Pyramid Lake fishery. In refusing the tribe's demand, the Court relied on the doctrine of res judicata.<sup>45</sup> The tribe was precluded from claiming additional water because their rights had already been determined in an earlier case.

The original proceeding had been brought in 1913 by the United States to adjudicate water rights in the Truckee River. A final decree was entered in 1944. The tribe was

awarded water based on the irrigable acreage of the reservation, but no water right was awarded. In fact, no such right was claimed for the maintenance and preservation of the Pyramid Lake fishery - a fishery which was essential to the tribe's livelihood.

In succeeding years, the lake declined due to the drawing off of water by an upstream diversion dam. As a consequence of this decline, the federal government initiated a new suit in 1973. The tribe intervened, seeking additional water rights for the maintenance and preservation of Pyramid Lake and the lower reaches of the Truckee River.

The defendants claimed res judicata in response to the claims of the United States and the tribe. Defendants contended that the tribe's rights had already been determined by the 1944 decree and therefore no further claims could be brought by the tribe. However, this was a questionable claim in view of the usual rules of res judicata, and the effects of the application of these rules to the Pyramid Lake situation. There are two fundamental rules of this doctrine. Firstly, only parties to the original action are bound by the court's judgement. Second, res judicata does not ban further claims between parties

unless the same claims were previously litigated between the same adversary parties. When these rules are applied to the Pyramid Lake case, it is actually difficult to preserve the doctrine of res judicata as having the determinative influence the Court accorded it, because (a) neither the tribe nor the Truckee - Carson Irrigation District (formerly the Newlands Reclamation project, which was also involved in the 1913 action), were parties to the original action, as both had been represented by the United States and (2) if the tribe's and the District's interests were adverse, then by definition the United States had a conflict in representing both interests.

Notwithstanding these difficulties, especially the conflict of interest question, the Court managed to sidestep them. The Court established a new rule for situations where the United States, in its trustee capacity, represents the interests of Indians and at the same time is obligated by Congress to represent other federal interests such as reclamation projects. In these situations, the Court held, the government need not follow "the fastidious standards of a private fiduciary who would breach his duties to his single beneficiary solely by representing potentially

conflicting interests without the beneficiary's consent." The Court went on to say that, "the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests."<sup>46</sup>

3. Arizona et al v. San Carlos Apache Tribe et al<sup>47</sup>

The issue to be decided in this case was whether the several Arizona and Montana tribes in question (there were twelve in all) should have their water rights determined in federal court or in state court. In reversing the decision of the Ninth Circuit Court of Appeals, the Supreme Court agreed with the decisions of the lower district courts in holding that federal courts should defer to state courts in this instance. The Supreme Court clearly articulated its preference for state courts to hear and decide Indian water rights claims, even if the case is brought by an Indian tribe and the suit seeks only to determine the Indians' rights.

In reaching this decision, the Court proceeded through several stages of analysis. The initial stage concerned the enabling acts and constitutions of Arizona and Montana. The Court had to address the effects of this legislation, which

specifically disclaimed jurisdiction over Indians and Indian property. The Court concluded that it was not necessary to decide the exact meaning and significance of the disclaimer provisions or to look to the general principles which define the limits of state authority over Indians and Indian property, because the Court was "convinced that, whatever limitations the enabling acts or federal policy may have originally placed on state court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment." However, this conclusion demanded the establishment of a new rule. The Court responded by applying a rule of construction which required that a statute, (in this case, the McCarran Amendment) or its legislative history, indicate an interest to limit state jurisdiction over Indian water rights. However, the usual rule of construction is that an act of Congress must explicitly confer jurisdiction on state courts over Indians and Indian property.

Citing the McCarran Amendment as controlling, the Court found no impediment to state court jurisdiction in the disclaimer provisions. After concluding that these provisions did not preclude state jurisdiction, the Court had little difficulty in finding that the federal courts should defer to the state courts.<sup>48</sup>



4. Effects of these Decisions:<sup>49</sup>

- a. These decisions are likely to have a significant impact on Indian water rights litigation, as they represent the possibility that federal courts could be inaccessible to some claims and that other claims could be virtually abandoned to the state courts.
- b. Each of the three decisions of the Supreme Court involved basic procedural issues of jurisdiction and the effect of prior court decrees. The Court's jurisdictional ruling raises the possibility that the remaining substantive law questions involving the nature and extent of Indian water rights may be decided by state and not federal courts.
- c. Tribes will be required to take into consideration new factors in developing water rights strategies. As well, Indian tribes may have less control over the time and the location for bringing their claims. Even if they bring their claims in federal court, the possibility of being dismissed in favour of state court adjudications is considerable. As per the McCarran Amendment, states can seek to adjudicate Indian rights in state courts merely by naming the United States as a party to the action.

- d. For those tribes with existing water rights decrees, the Supreme Court's decisions in the above cases mean that the possibility of obtaining additional water with an early priority date will be greatly diminished. However, for the majority of tribes, the Pyramid Lake and Arizona v. California decisions will have little effect because, for the most part, Indian water rights remain undetermined and thus there are no existing decrees.
5. Perceptions of the Supreme Court Emerging as a Result of the Pyramid Lake, Arizona, and San Carlos Apache Tribe Decisions<sup>50</sup>
  - a. The Court was concerned with the need to avoid the possibility of upsetting the rights of non-Indians who have relied upon earlier water rights decrees. The rules of finality (Arizona v. California) and res judicata (Pyramid Lake) have been invoked to prevent tribes from threatening the status quo.
  - b. When tensions between federal and state courts arise on the question of water rights, the Supreme Court has shown its preference for state court adjudications, even if federal court adjudication "might, in the

abstract, be practical and even wise...." This is due primarily to the Supreme Court's view that the McCarran Act "allows and encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications."

- c. The Court is not reluctant to establish new tests or standards to insure that the outcome of a case is consistent with its concerns and preferences.

C. Varying Academic Perspectives on Indian Water Rights in the Western United States

In reviewing articles and studies discussing Indian water rights in the western United States, it became apparent that certain authors took differing thematic perspectives on the current state of Indian water law. The viewpoints of several of these authors are presented below.

The first of these (Shrago: 1980) examined the changing patterns of construing and applying the Winters doctrine as well as the efforts of Congress to resolve current controversies over Indian water rights. He perceived the Supreme Court as attempting to refine the Winters doctrine in order to ensure more equitable

treatment for all those affected by it. The legislative attempts of Congress to resolve the complicated and conflicting claims of both levels of government to water rights have yet to meet with any major successes. Shrago details some of these efforts in his study and discusses why they have failed.

Another author (Dellwo: 1980) interpreted the judicial decisions of the late 1970s as being indicative of an assimilationist tendency on the part of the courts, as they sought to curtail Indian jurisdiction. He links the jurisdiction question with Indian water rights and concludes that while the courts continue to respect Indian water rights under the Winters doctrine, any surplus waters or tribal lands are subject to state jurisdiction. Dellwo also discusses the effects of the Colorado River District decision (Akin). Special mention is made of the fact that, as a result of the Akin decision, many states have been preparing to litigate or are currently litigating Indian water rights in state courts.

The Colorado River decision was also seen as dramatically extending state court control of reserved rights claims, including those rights claimed by the federal government as trustee for American Indian lands withdrawn by treaty or other congressional action. (Abrams: 1978) Furthermore, he felt that the Akin decision will have harmful consequences for the proper

determination of reserved rights claims. Although the decision did not abolish concurrent jurisdiction (state/federal), it virtually assured adjudication of all claims in state courts, which will have strong incentives to discriminate against federal claims in favour of state and private users. The upshot seems to be, according to Abrams, that any significant diminution of federal water rights hampers the proper development of federal lands and interferes with congressional policies. He went on to state that the problems inherent in state adjudication of reserved water rights are especially acute when Indian claims are involved, because the states will give inadequate attention to the unique status and problems of the Indians.

In assessing the impact of the Akin decision, Abrams critically examines the Court's choice to remit to state courts claims involving federally created Indian water rights. In examining the jurisdictional implications of the decision, he concludes that most, if not all, reserved rights cases will now be tried in state courts. As well, he looks at the potential problems resulting from exclusive state control of reserved rights water cases and puts forward justification for a federal forum in reserved rights cases. Abrams also discusses the special status of American Indians and concludes that this status warrants reconsideration of the Colorado River decision.

If one were to choose a central or major issue in the western United States water rights debate, it would most likely be that of jurisdiction. There are certainly other issues underlying water rights claims, and they have been discussed in the course of this paper. However, jurisdiction seems to be a constant consideration in most water rights claims -- whether it is a question of in which court the claimed rights should be adjudicated, or one of who has rights to surplus or additional waters on or off Indian lands. The issue of jurisdiction seems to be the focal point for the resolution of Indian water rights claims, both at the present and in the future.

NOTES

1. Native American Rights Fund, 1982 Annual Report, (Boulder, Colorado: 1982), p. 20.
2. D.H. Getches, D.M. Resenfelt and C.F. Wilkinson, Federal Indian Law: Cases and Materials, (St. Paul, Minnesota: West Publishing Co., 1979), pp. 587-590; and R.L. Foreman, Indian Water Rights: A Public Policy and Administrative Mess, (Dainville, Illinois: Interstate Printers and Publishers Inc., 1981), pp. 2-5.
3. Winters v. United States, 207. U.S. 504 (1908).
4. U.S. v. Winans, 198 U.S. 371 (1907).
5. Federal Indian Law: Cases and Materials, p. 66, and, p.593.
6. Robert Pelcyger, "The Winters Doctrine and the Greening of the Reservations" (1977) 4 Journal of Contemporary Law, 19, in Federal Indian Law: Cases and Materials, p. 66.
7. Federal Indian Law: Cases and Materials, p. 590. See also discussion at pp. 587-589, Federal Indian Law concerning the development of state water law systems.
8. American Indian Policy Review Commission (AIPRC), Task Force Seven: Reservation and Resource Development and Protection, (Washington, D.C.: Government Printing Office, 1976), p. 69.
9. Winters v. U.S., 143 Fed. 684 (CA9, 1906).
10. American Indian Policy Review Commission, Task Force Four: Federal State and Tribal Jurisdiction, (Washington, D.C.: Government Printing Office, 1976), p. 156.
11. No mention of those rights is contained, however, in the Treaty of 1855 with the Blackfeet in the Act of 1874 (which sharply constricted the original area established by the treaty) or the Agreement of 1888 (which limited the Indians to a small semi-arid acreage which could be made habitable only by means of irrigation. AIPRC, Task Force Four, pp. 156-157.
12. AIPRC, Task Force Four, pp. 156-157.
13. AIPRC, Task Force Seven, p. 69.
14. U.S. v. Winans, 198 U.S. 371 (1907).

15. AIPRC, Task Force Four, pp. 156-157.
16. U.S. Commission on Civil Rights, Indian Tribes, a Continuing Quest for Survival: A Report of the U.S. Commission on Civil Rights, (Washington, D.C.: 1981, p. 48).
17. The doctrine of prior appropriation is that doctrine which is most often in diametrical opposition to the Winters rights doctrine.
18. Arizona v. California, 283 U.S. 423 (1931).
19. AIPRC, Task Force Four, pp. 158-159.
20. Ibid., p. 158.
21. Ibid., p. 159.
22. AIPRC, Task Force Seven, p. 70.
23. Ibid.
24. Ibid., p. 71. See also: Conrad Investment Company v. United States, 161 Fed. 829 (CA9 1928).
25. AIPRC, Task Force Seven, p. 71. See further: Arizona v. California, 373 U.S. 546 (1962).
26. AIPRC, Task Force Seven, p. 71.
27. Winters v. United States, 207 U.S. 564 (1908) emphasis added.
28. AIPRC, Task Force Seven, p. 72.
29. Ibid., pp. 72-73.
30. AIPRC, Task Force Four, p. 160.
31. Ibid.
32. 401 U.S. 520 (1971).
33. 401 U.S. 527 (1971).
34. 424 U.S. 800 (1976).
35. AIPRC, Task Force Four, p. 166-167.
36. Ibid., p. 167.



37. Ibid., p. 170.
38. Ibid.
39. Ibid., p. 171.
40. Ibid.
41. Ibid., p. 173.
42. 30 March 1983.
43. This summary is taken from the Native American Rights Fund Legal Review, (1983) Summer, pp. 1-2.
44. June 24, 1983.
45. Res judicata: a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgement. Rule that a final judgement rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action ... The sum and substance of the whole rule is that a matter once judicially decided is finally decided. (Black's Law Dictionary, 5th ed., 1979, p. 1174).
46. This summary is taken from the Native American Rights Funds Legal Review, (1983) Summer, p. 2.
47. 1 July 1983.
48. This summary is taken from the Native American Rights Fund Legal Review, (1983) Summer, p. 3.
49. Ibid.
50. Ibid., p. 4.

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#### Legislation

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