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Northern Cheyenne Tribe v. Adsit

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NOTES

NORTHERN CHEYENNE TRIBE v. ADSIT

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I. INTRODUCTION

The McCarran Amendment,[1] passed in 1952, grants a limited waiver of federal sovereign immunity by permitting joinder of the United States in state water rights adjudication. The United States Supreme Court, in *Dugan v. Rank*,[2] required the presence of a complete adjudication of an entire river system in an ongoing state court proceeding before the waiver would be effective.[3] In *United States v. District Court for Water Division No. 5*,[4] and *United States v. District Court for Eagle County*,[5] the Supreme Court further interpreted the McCarran Amendment to allow joinder not only in claims involving federal rights acquired pursuant to state law, but also in claims involving federal reserved rights.[6]

In *Colorado River Water Conservation District v. United States*,[7] commonly referred to as the *Akin* case, the Court held that the McCarran Amendment permitted state adjudication of Indian reserved rights.[8] Montana, in recent legislation,[9] claims the right to adjudicate all water rights claims in the state, including Indian reserved rights.[10] In a 1979 joint opinion, the three divisions of the United States District Court of Montana deferred to that state's legislation and dismissed seven suits brought by the United States and one Indian tribe to determine Indian and federal rights in Montana river systems.[11] The United States and the tribe appealed these

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1. 43 U.S.C. § 666 (1976). As codified the Amendment reads:

   (a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

2. 372 U.S. 609 (1963).
3. *Id.* at 617-19.
4. 401 U.S. 527 (1971).
5. 401 U.S. 520 (1971).
6. 401 U.S. at 529 and 401 U.S. at 524.
7. 424 U.S. 800 (1976) [hereinafter referred to as *Akin*].
8. *Id.* at 809-13.
9. S.B. #76, 1979 Mont. Laws, ch. 697 (codified at MONT. CODE ANN. [hereinafter MCA] §§ 3-7-101 to -502, 85-2-211 to -243, 85-2-701 to -704, 2-15-212 (1981); amending §§ 3-5-111, 85-2-102, -112, -113, -114, -401 and -406; repealing §§ 35-2-201 to -210.
10. *See* MCA §§ 85-2-701 to -704 (1981).
11. Northern Cheyenne Tribe v. Tongue River Water Users, 484 F. Supp. 31 (D.C. Mont.

dismissals, and in *Northern Cheyenne Tribe v. Adsit*,[12] the Court of Appeals for the Ninth Circuit reversed the district court's decisions.[13] The court of appeals distinguished *Adsit* from *Akin* by finding significantly different facts in each case, and by finding that Montana did not have subject matter jurisdiction over Indian lands in either its enabling legislation[14] or its constitution.[15] Recognizing the importance of this case, the United States Supreme Court granted Montana's petition for a writ of certiorari.[16] Because of the importance of *Adsit* to the state of Montana, non-Indian water users, and the seven tribes in Montana, the main holding in this case is worth reviewing to determine its validity.

II. Events Leading Up to the Ninth Circuit Decision

Until 1973, Montana did not have a comprehensive means for protecting the rights of individual water users, or for quantifying claims in order to plan for future needs.[17] In 1973, the Montana Legislature attempted to address this need by enacting the Montana Water Use Act.[18] This attempt was subsequently refined and expanded in 1979 when the legislature passed a bill commonly referred to as "Senate Bill #76."[19] This legislation was an attempt to correct deficiencies which had surfaced in the 1973 Act.[20] In 1975, three suits were filed in the three divisions of the United States District Court of Montana seeking an adjudication of the rights of two Indian tribes and the federal government to water in southeast

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1979). Actions had been filed in the Billings, Great Falls and Missoula divisions of the Montana United States District Court: United States v. Abell, No. 79-33-M (D. Mont. 1979); United States v. AMS Ranch, Inc., No. 79-22-GF (D. Mont. 1979); United States v. Aageson, No. 79-21-GF (D. Mont. 1979); United States v. Aasheim, No. 79-40 BLG (D. Mont. 1979); United States v. Bighorn Low Line Canal, No. 75-34 BLG (D. Mont. 1975); United States v. Tongue River Water Users Ass'n, No. 75-20 BLG (D. Mont. 1975); Northern Cheyenne Tribe v. Tongue River Water Users Ass'n, No. 75-6 BLG (D. Mont. 1975).

12. 668 F.2d 1080 (9th Cir. 1982) [hereinafter referred to as *Adsit*].

13. *Id.* at 1090.

14. 25 Stat. 676 (1889).

15. Mont. Const. art. I, quoted at 668 F.2d 1084, 1087.

16. 103 S.Ct. 50 (1982). The Tenth Circuit Court of Appeals in 1979 refused to recognize the distinction between states with constitutional disclaimers and those without, and followed *Akin* in Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979), *cert denied*, 444 U.S. 995 (1979). The *Adsit* decision therefore created adverse holdings between the Ninth and Tenth Circuit Courts of Appeals. The Supreme Court also granted petitions for writs of certiorari for two similar cases decided at the same time as *Adsit*: Arizona v. San Carlos Apache Tribe, 668 F.2d 1093 (9th Cir. 1982), *cert. granted*, 103 S.Ct. 50 (1982), and Arizona v. Navajo Tribe of Indians, 668 F.2d 1100 (9th Cir. 1982), *cert. granted*, 103 S.Ct. 50 (1982).

17. A. Stone, Montana Water Law for the 1980's, 4 (1981).

18. 1973 Mont. Laws ch. 452.

19. *See* note 9 *supra.*

20. *See* A. Stone, *supra* note 17, at 5, 6. Judging from the amount of time it was taking to adjudicate action then pending, it was estimated that it could take a "century or more" to adjudicate water rights claimed in the entire state.

Montana.[21] By 1979, four more suits were filed in the federal courts to adjudicate federal rights in Montana streams and rivers bordering or running through federal or Indian lands.[22] Montana filed motions to dismiss in the first three cases, arguing that state court actions filed in 1975 were the proper means of settling all water rights claims in the state.[23]

Until 1979 and Senate Bill #76, however, the state did not have a workable system to adjudicate water rights.[24] Action on the suits filed in federal court was deferred for the purpose of allowing Montana to pass comprehensive legislation like Senate Bill #76. The three divisions of the federal district court then issued a joint opinion dismissing the suits in favor of the "comprehensive" state proceedings.[25] The courts involved found that *Akin* required application of "wise judicial administration" to defer to the concurrent jurisdiction of the state courts.[26] The United States, along with the tribes involved, appealed these decisions to the Court of Appeals for the Ninth Circuit.

III. THE NINTH CIRCUIT DECISION

On appeal, the Ninth Circuit held that in a state which, unlike Colorado in the *Akin* case, expressly disclaims jurisdiction over Indian lands within its constitution and enabling act, the McCarran Amendment does not grant jurisdiction or repeal the state's disclaimers.[27] The court found that Montana lacked subject matter jurisdiction over tribes in the state because of its disclaimers.[28] Furthermore, the court reasoned that "[t]he power of a court in a disclaimer state to enforce a regulatory statute that may adversely affect Indians falls far short of the power to adjudicate a direct challenge to Indian water rights in and to the waters of streams."[29]

The facts in *Adsit* were also found to be different enough from those in *Akin* to warrant retention of federal court jurisdiction. In *Akin* the Supreme Court found "exceptional circumstances" which required dismissal pursuant to "wise judicial administration."[30] While *Akin* involved an ongoing comprehensive adjudication process which the United States had participated in for years, Montana did not even have a comprehensive

21. *See* note 11 *supra.*
22. *Id.*
23. 668 F.2d at 1083.
24. *See* A. STONE, *supra* note 17, at 6.
25. 484 F. Supp. at 36.
26. *Id.*
27. 668 F.2d at 1084.
28. *Id.* at 1086.
29. *Id.* at 1087.
30. 424 U.S. at 817-18.

plan until four years after the first federal suits were filed.[31] Also, *Akin* involved a truly comprehensive proceeding in state court with a concurrent piecemeal proceeding in federal court. *Adsit*, meanwhile, involved a situation where the tribes claimed the state proceeding specifically excluded some water rights claims, and did not have jurisdiction over Indian allottees. At the same time, the tribes identified a means to make the federal court proceeding more comprehensive than Montana's plan.[32]

The court also found *Adsit* distinguishable in two less crucial factors. In Montana both state and federal proceedings were in their infancy. Additionally, the locations of the federal courts in Montana do not provide facts for a "forum non conveniens" analysis.[33] In *Akin* these factors had been important to the overall decision, as the state proceeding had been ongoing for a number of years when the federal action was filed, and the federal proceeding was 300 miles from the water district in question.[34]

The Ninth Circuit also noted that if conflicts of interest were present between the United States and the Indian tribes they represent, the state would not have the authority to join the tribes in state court proceedings.[35] Indian tribes have long been recognized as possessing sovereign immunity from suit, and without an *express* waiver of this immunity, an Indian tribe cannot be sued.[36] In *Adsit* the tribes involved would appear to be necessary parties if conflicts of interest were present, yet neither Congress nor the tribes have consented to such a suit in state court. The court refused to require the tribes to waive their basic right to sovereign immunity by requiring them to protect their rights in state court water adjudication proceedings.[37]

IV. Scope of Analysis

A complete analysis of the various factors supporting the Ninth Circuit's decision in *Adsit* is beyond the scope of this casenote. Instead this note will concentrate on the main holding of the Ninth Circuit: Montana's inability to adjudicate Indian water rights because of disclaimers of jurisdiction over Indian lands in the state's enabling act and constitution.

A. *Congressional Authority*

In *Akin*, the United States Supreme Court interpreted the McCarran

31. 668 F.2d at 1088.
32. *Id.* at 1089.
33. *Id.*
34. 424 U.S. at 820.
35. 668 F.2d at 1089.
36. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1979).
37. 668 F.2d at 1090.

Amendment as it applied to Colorado, a state which, unlike Montana, was not required to disclaim jurisdiction over Indian lands in its enabling act or constitution. To determine whether there is a difference between non-disclaimer and disclaimer states, it is necessary to look at the origin of the disclaimer provisions.

Congress derives its authority over Indians from a short phrase in the Commerce Clause of the United States Constitution granting Congress the power to "regulate Commerce with the Indian Tribes."[38] The Supreme Court has long held that this power constitutes virtually unlimited authority to regulate Indian affairs.[39] The policy developed was to leave Indians free from state jurisdiction. "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union."[40]

The Supreme Court raised some doubts about the certainty of these theories in *United States v. McBratney*.[41] The Court recognized that the federal government had exclusive jurisdiction over reservations in Colorado before it was granted statehood. However, when Colorado entered the Union, there was nothing in the enabling act explicitly reserving exclusive federal jurisdiction over Indians and Indian lands. Therefore, the Court concluded that the reservation at issue was "no longer within the sole and exclusive jurisdiction of the United States."[42]

After this decision, Congress required disclaimer provisions in the enabling legislation of all states admitted to the Union.[43] Apparently, Congress did not want to leave the door open for states to assert jurisdiction over Indian lands unilaterally, but wished to reserve authority for such a move unto itself. As noted previously, this decision clearly was within Congress' authority as granted by the Constitution.[44]

Thus it is clear that the disclaimer provisions in Montana's Enabling Act[45] and constitution[46] were not meaningless, but were included for specific reasons. Montana's constitution provides that the disclaimer shall "continue in full force and effect until revoked by the consent of the United States and the people of Montana."[47] The McCarran Amendment does not

38. U.S. CONST. art. I, § 8, cl. 3.
39. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).
40. *Id.* at 557. *See also* United States v. Kagama, 118 U.S. 375, 383-85 (1886).
41. 104 U.S. 621 (1882).
42. *Id.* at 623, 624.
43. *See, e.g.* Montana's disclaimers at note 50 *infra.*
44. *See* note 38 *supra.*
45. 25 Stat. 676 (1889). *See* note 50 *infra* for text of Act.
46. MONT. CONST. art. I (1972); *see* note 50 *infra* for text of Article I.
47. *Id.*

expressly consent to the revocation of Montana's disclaimers. Its legislative history does not even mention disclaimers. Nevertheless, Congress must have been aware of such impediments to state jurisdiction, if it intended to extend such jurisdiction to Indians. Only one year later, 1953, in passing Public Law 83-280, Congress required states to remove legal impediments in their constitutions and legislation before assuming jurisdiction over Indian lands.[48]

There would appear to be no basis on which to allow the general language of the McCarran Amendment to repeal impliedly specific Congressional legislation; the disclaimer provision in Montana's enabling act. There is no conflict between this conclusion and the intent of the McCarran Amendment. The amendment was not mandatory, as federal courts can still be the appropriate forum in some circumstances.[49] States will be allowed to bring the federal government into state proceedings in timely actions not involving Indian reserved rights. It is consistent to conclude that Indian reserved rights should be adjudicated in federal courts, as the federal forum was left available, and there are valid reasons, discussed *infra*, for adjudicating such suits in federal court.

B. *Montana Disclaimers*

When reviewing Montana's assertion of jurisdiction over Indian lands pursuant to the McCarran Amendment, there appears to be serious problems arising from inconsistent assertions of the jurisdiction now claimed.

Montana clearly disclaimed jurisdiction over Indian lands in both its enabling legislation and in its first constitution.[50] Pursuant to Public Law 280, the Montana legislature passed a law in 1963, enabling the state to

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48. Public Law 83-280, § 6 (1953) states:

> Notwithstanding the provisions of the Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

(Now codified as amended at 25 U.S.C. § 1324 (1976)).

49. *See* note 1 *supra* for text of McCarran Amendment, and *Akin*, 424 U.S. at 809, for U.S. Supreme Court affirmance of this statement.

50. Montana's enabling act (25 Stat. 676 (1889)) provides that the state: "disclaim[s] all right and title to the unappropriated public lands. . .owned or held by any Indian or Indian tribes. . ." and Montana's Constitution (article I, 1972) provides: "[a]ll 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.".

assume jurisdiction over Indian lands with the approval of the tribes.[51] The statute, using language identical to that in Public Law 280, specifically excluded the right to adjudicate water rights from the jurisdiction of the state in a section now entitled "Rights, privileges and immunities reserved to Indians."[52] Apparently, even though the McCarran Amendment was passed in 1952, as of 1963 Montana did not claim jurisdiction to adjudicate Indian water rights. In 1968, Congress amended Public Law 280 to require tribal approval before states could extend criminal or civil jurisdiction over them.[53] In 1972, the people of Montana revised their constitution, and again, even though the McCarran Amendment was still in effect, and there existed some case law which said it allowed state jurisdiction over Indian water rights claims, the new document contained language very similar to the original disclaimer.[54] Finally, in 1979, the Montana legislature enacted a statute which expressly asserted jurisdiction over Indian water rights pursuant to the McCarran Amendment.[55]

Public Law 280 required states to amend their statutes and/or constitutions as necessary before assuming jurisdiction over Indian matters.[56] The United States Supreme Court has held that Public Law 280 allows disclaimer states to assume jurisdiction by legislative action.[57] The Montana Supreme Court has held that the earliest disclaimer provision concerning jurisdiction over Indian lands was legitimately revoked by the 1963 law on assumption of jurisdiction.[58] These findings would appear to clear the path for Montana to have extended state court jurisdiction over Indian water right claims by passing Senate Bill #76 in 1979.

Nonetheless, this reasoning is seriously flawed in several ways. In 1972, after the *McDonald* decision purportedly legitimized the 1963

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51. 1963 Mont. Laws ch. 81, *codified at* MCA §§ 2-1-301 to -307 (1981).
52. *See* MCA § 2-1-304 (1981):

Rights, privileges, and immunities reserved to Indians. Nothing in this part shall:

(1) Authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States;

(2) authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto;

(3) confer jurisdiction upon the state of Montana to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein; or

(4) deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, statute, or executive order with respect to hunting, trapping, fishing, or the control, licensing, or regulation thereof.

53. *See* 25 U.S.C. § 1322(a) (1976).
54. *See* note 38 *supra.*
55. *See* MCA §§ 85-2-701 to -704 (1981).
56. *See* 25 U.S.C. § 1324 (1976).
57. Washington v. Yakima Indian Nation, 439 U.S. 463, 484 (1979).
58. State ex rel. McDonald v. District Court, 159 Mont. 156, 164, 496 P.2d 78, 82 (1972).

legislative revocation of the constitutional disclaimer, the people of Montana ratified a revised constitution which contained the allegedly revoked disclaimer.[59] In addition, the new constitution was much more thorough on how it was to be revised.[60] Nowhere in the procedures for amending the constitution can one find the method the state supreme court set out in *McDonald*. This apparent refusal of the constitutional convention to recognize the "legislative revocation" of Montana's constitutional disclaimer concerning jurisdiction of Indian lands would seem to discredit clearly this method of revocation in Montana. Therefore, it would appear not only that the 1963 law is invalid, but that S.B. #76 is also invalid insofar as it attempts to exercise jurisdiction over Indian lands. Montana is not precluded entirely from exercising jurisdiction over Indian lands under this rationale, but it appears a constitutional revision is a prerequisite to assertion of jurisdiction.[61]

Any constitutional revision of Montana's disclaimer provision at this time must be done while considering the requirements set forth in Public Law 280 as amended. As noted previously, the law now requires tribal approval of any assertion of state jurisdiction over tribal lands.[62] The adjudication of water rights are specifically exempted from the provisions of Public Law 280, as amended. Also, the United States Supreme Court in a footnote in *Akin* commented that this exemption of state court jurisdiction over Indian water rights should not extend to limit the McCarran Amendment.[63]

The *Akin* case, however, did not involve a disclaimer state that had voluntarily reaffirmed its disclaimer of jurisdiction over Indian lands as

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59. *See* note 38 *supra*.

60. *See* MONT. CONST. art. XIV (1972), including provisions on "Constitutional Convention," "Amendment by legislative referendum," and "Amendment by initiative.".

61. This conclusion is supported by an examination of the 1972 constitutional convention history. Montana looked primarily to how North Dakota treated its disclaimer when it revised its constitution in 1958. Article XIII, § 1 of the North Dakota Constitution is nearly identical to Montana's 1972 disclaimer, except it provides ". . .however, that the legislative assembly of the state of North Dakota may, upon such terms and conditions as it shall adopt, provide for the acceptance of such jurisdiction as may be delegated to the state by Act of Congress." *Cf.* note 50 *supra* for text of Montana's disclaimer, and 1972 Constitutional Convention Committee Reports, Vol. II, at 840-41, 1031; Verbatim Transcript, Vol. VII, at 2567.

The North Dakota Supreme Court has recently reviewed North Dakota's disclaimers and laws, and found the state could not exercise jurisdiction over civil causes of action arising within a reservation, unless the Indians of the reservation voted to accept jurisdiction. Three Affiliated Tribes, Etc. v. Wold Eng., P.C., ___ N.D. ___, 321 N.W.2d 510, 512 (1982), *petition for cert. pending*, 103 S.Ct. 441 (1982).

Montana could have at least partially avoided the problems herein described if it had followed North Dakota's example. The North Dakota Supreme Court provides some guidance as to how these issues could be determined when reviewed by state courts.

62. *See* text accompanying note 44 *supra*.

63. 242 U.S. at 812 n. 20.

late as 1972. Public Law 280 was much more specific than the McCarran Amendment as to how disclaimer states could assert jurisdiction over Indian lands: it required states to amend their statutes and constitutions.[64] Arguably, the specific requirements of Public Law 280, passed only one year after the McCarran Amendment, should control the broad general language of the McCarran Amendment for disclaimer states that wish to adjudicate Indian water rights. This law provides guidance for a judicial interpretation of the McCarran Amendment, which allegedly extends state jurisdiction to Indian lands, just as P.L. 280 was created to do.

Extending this rationale one step further, the Public Law 280 amendment requiring tribal approval before states can assert any further jurisdiction over Indians could rationally be applied to the McCarran Amendment as well. Apparently, the McCarran Amendment envisioned some federal court action for the adjudication of water rights, otherwise it could have made state court proceedings the exclusive method.[65] Furthermore, limitation of state jurisdiction in this case is consistent with the long-standing federal policy of federal court jurisdiction over Indians on reservations, unless jurisdiction is explicitly granted to the states by congressional statute.[66]

If Montana's disclaimers as to Indian lands are still in full force, it is still questionable whether these provisions mandate denial of state jurisdiction to adjudicate Indian water rights. The Supreme Court in *Akin* found: "The Amendment in no way abridges any substantive claim on behalf of Indians under the doctrine of reserved rights."[67] In *Kake Village v. Egan*,[68] the Supreme Court held that a disclaimer state could regulate the fishing of off-reservation Indians by enforcing against non-reservation Indians a state statute forbidding the use of salmon traps.[69] The Ninth Circuit, in *White Mountain Apache Tribe v. Arizona*, decided one year previous to *Adsit*, relied on *Kake* and held that a disclaimer state is not precluded from imposing fishing and hunting license fees on non-Indians on a reservation, as enabling acts do not force states to disclaim governmental or regulatory authority over Indian lands.[70]

In *Adsit*, the Ninth Circuit distinguished the findings in *Kake* and *White Mountain Apache Tribe*, because it found Indian rights to water

64. *See* 25 U.S.C. § 1324 (1976).

65. 424 U.S. at 809.

66. Fisher v. District Court of Montana, 424 U.S. 382, 388 (1976); *see also* Bryan v. Itasca County, 426 U.S. 373 (1976); Morton v. Moncari, 417 U.S. 535 (1974); Minnesota v. United States, 305 U.S. 382 (1939).

67. 424 U.S. at 813.

68. 369 U.S. 70 (1962).

69. *Id.* at 75.

70. White Mountain Apache Tribe v. Arizona, 649 F.2d 1274, 1280 (9th Cir. 1981).

more important than regulation of fishing traps or licenses.[71] Basically, the court disagreed with the Supreme Court's conclusion in *Akin* that state court adjudication of reserved Indian water rights in no way abridges any substantive Indian claim. While not expressly set forth, this disagreement would appear to be well-founded. Many factors determinative in the quantification of reserved Indian water rights have not been fully adjudicated.

V. The Need For a Federal Forum

Assignment of priority dates for the Indian reserved rights could vary from time immemorial to the date such rights were recognized in *Winters v. United States*.[72] Another unsettled issue is whether reserved quantities will be quantified based on past or present needs, agricultural or other uses, and tribal, state, or federal perception of such needs. Even Supreme Court cases have differed on what standards will be used, depending on the circumstances of each case.[73] Nevertheless, the laws which have developed concerning Indian reserved rights have been developed by federal courts.[74] The federal courts have the expertise to deal with the complex federal statutory and federal caselaw that controls this area. Montana state courts meanwhile, have never adjudicated reserved Indian water rights because they have never been within their jurisdiction. It is easily foreseeable that state courts, accustomed to an appropriative water law system, could interpret many of the unsettled questions concerning reserved Indian water rights in the context of Montana law. The choice of law in these cases could drastically affect the quantity of water apportioned to Montana tribes. In spite of the Supreme Court's observance in *Akin* that final judgments of state courts can be appealed,[75] tribes could be justifiably concerned that review might be unlikely and the standards of review uncertain, especially since the entire area of law is unsettled.

The Montana Supreme Court's treatment of Indian rights in the past has been inconsistent and at times seemingly ignorant of established federal case law.[76] Because "water rights" is such a politically explosive

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71. 668 F.2d at 1087.

72. 207 U.S. 564 (1908).

73. *See generally* United States v. New Mexico, 438 U.S. 696 (1976); Cappaert v. United States, 426 U.S. 128 (1976); Arizona v. California, 276 U.S. 340 (1964); Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955); Winters v. United States, 207 U.S. 564 (1908).

For specific comparisons of these and other cases, *see* Hostyk, *Who Controls the Water? The Emerging Balance Among Federal, State, and Indian Jurisdictional Claims*, 18 Tulsa L.J. 35 (1982).

74. *Id.*

75. 424 U.S. at 813.

76. *See, e.g.*, Bad Horse v. Bad Horse, 163 Mont. 445, 452, 517 P.2d 893, 897 (1974), Chief Justice Haswell writing for the court: "The myth of Indian sovereignty has pervaded judicial attempts by state courts to deal with contemporary Indian problems. Such rationale must yield to the realities of

issue, it is easily foreseeable that the state courts will decide Indian reserved water rights decisions quite differently, to the detriment of tribal interests, than would experienced federal courts.[77]

Further questions concerning the continuing impact on the governmental integrity and sovereignty of tribes were only minimally addressed in *Adsit*. Since *Akin* involved a suit brought solely by the U.S. Government, questions of impacts on tribal government were not addressed. The Supreme Court, however, has previously commented on the significance of jurisdictional disclaimers on tribal governments:

> The upshot ([of] more individualized treatment of. . .statehood enabling legislation as [it]. . .affect[s] the respective rights of states, Indians, and the Federal Government) has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or served by federal law.[78]

The *Adsit* case presents a situation where it appears tribal self-government will be impugned, and a right granted by federal law could be impaired. The tribal governments, using what appears to be good judgment, decided it would be better to adjudicate their water rights in federal court.[79] The federal courts have jurisdiction to adjudicate the issues involved, but the state is seeking to interfere with this exercise of tribal self-government by applying state law. Even if the McCarran Amendment is construed to grant the state this right, future tribal government decisions concerning other aspects of their water rights are not even mentioned by the Amendment. Nevertheless, the laws the state is now trying to apply to the tribes will require all reservation water users to report all actions to the state, and some actions are prohibited.[80] Certainly the McCarran Amendment, in simply waiving the sovereign immunity of the U.S. Government for joinder purposes to adjudicate some water rights cases, was not intended to abrogate substantial rights of tribes to govern themselves. In

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modern life, both on and off the reservation."

77. *See* NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE, 478-79 (1973), Established pursuant to an act of Congress, 82 Stat. 868 (1968), the National Water Commission, after studying national water problems for five years, specifically recommended federal courts should have exclusive jurisdiction to adjudicate Indian water rights, with states appearing "parens patriae" for all other water users, unless a conflict of interest existed. The Commission reasoned: "Because of potential conflict between Indian and non-Indian users and to avoid suspicion of bias that might attend adjudication by elected state officials," Indian water rights should be adjudicated in federal courts, "the traditional forum for this kind of litigation." *Id.* at 479.

78. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973) (citations omitted).

79. *See generally* 484 F. Supp. 31, 33 (1979).

80. *See, e.g.*, MCA §§ 85-2-316, "Reservation of waters"; 85-2-401 *et seq.* "Utilization of water"; 85-2-221 "Filing of claim of existing water right.".

the past, limitations on tribal government have required specific congressional language evidencing such intentions.[81] The McCarran Amendment and its legislative history contain no specific language which even hints that Congress intended to abrogate substantial rights of tribal self-government.

VI. CONCLUSION

The state of Montana would obviously like to see the waivers in its enabling act impliedly revoked by the McCarran Amendment. This conclusion would also impliedly authorize application of state law in the place of potential tribal law on the reservation. In spite of previous action by the state's constitutional convention, the state would also like to extend Senate Bill #76 adjudicative procedure to reservation interests. While certainly understandable, these intentions do not appear consistent with existing law. The *Akin* case would have to be stretched substantially beyond its actual holding to find that it was controlling in the *Adsit* case. Of course, the state has a very large interest in adjudicating the water rights in the state so that future uses and needs can be planned. But as the Supreme Court noted in *Akin*, the McCarran Amendment does not require state courts to be the exclusive forum for adjudicating water rights.[82]

The most comprehensive study ever done on American water policies specifically recommended that Indian water rights be adjudicated in federal court, "the traditional forum for this kind of litigation."[83] The Commission envisioned the state involved in such a proceeding action as "parens patriae" to represent non-Indian interests in the quantification of Indian rights.[84] Alternatively, the federal court could appoint special masters, and even adopt state joinder and service of process methods to be sure all claimants were made parties to the adjudication process.[85] Findings under either system could then be "plugged" into the state process. Either method would effectively accomplish the state's goal: to adjudicate fully and quantify accurately existing water claims in this state.

Congress has plenary power to regulate the affairs of Indian tribes. This power was specifically set out in Montana's enabling act and constitution. It would be inconsistent with current law to imply a waiver of

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81. Santa Clara Pueblo v. Martinez, 436 U.S. at 58-59.

82. *Akin*, 424 U.S. at 809.

83. *See* NATIONAL WATER COMMISSION, *supra* note 77, at 479.

84. *Id.* Also, there would appear to be a precedent for such a practice in conceptually similar circumstances. States are not required to join individual water users in interstate suits against other states. Nevertheless, the findings in such cases are binding against each individual user, even though not a party in the adjudication process. *See generally* Nebraska v. Wyoming, 324 U.S. 589 (1945); Wyoming v. Colorado, 286 U.S. 494 (1932); Wyoming v. Colorado, 259 U.S. 419 (1922); Kansas v. Colorado, 206 U.S. 46 (1907).

85. *Adsit*, 668 F.2d at 1089.

this power, and by implication, repeal a specific congressional act—Montana's enabling legislation. By allowing the federal courts in Montana to adjudicate the water rights of the tribes involved, the Ninth Circuit in *Adsit* chose to follow the strict mandates of the law involved. Montana certainly has a vested interest in having the quantification adjudicated in its courts. Nevertheless, Montana will still see its most important goal accomplished. At the same time, the tribes are allowed to retain important rights to govern their own resources free of state intervention. Although it might be "simpler" to allow the state courts to adjudicate rights of Indian tribes, this option is solely within the purview of Congress, and as of yet, Congress has not given its authorization for states to "invade" this area of tribal self-government.