Montana Law Review

Volume 64
Issue 2 *Summer 2003*

Article 1

7-2003

Indian Aboriginal and Reserved Water Rights, an Opportunity Lost

John B. Carter
Tribal Attorney, Confederated Salish and Kootenai Tribes

ESSAY

INDIAN ABORIGINAL AND RESERVED WATER RIGHTS, AN OPPORTUNITY LOST

John B. Carter*

Article IX, section 3 of Montana's 1972 Constitution significantly expanded upon the Montana's 1889 constitutional provision on water rights. The transcripts of the 1972 Montana Constitutional Convention debates evidence that extensive discussion and a small amount of paranoia[1] went into this portion of the new constitution. The transcripts logically reflect a focus on the state water law doctrine of prior appropriation for irrigation and domestic use. However, they reflect no in-depth discussion of the federal doctrine of Indian reserved water rights. If the 1972 Constitution had recognized and confirmed that long-established doctrine of federal law, the state of Montana, the Tribes within Montana, and the United States may have avoided numerous expensive and divisive state and

* Tribal Attorney, Confederated Salish and Kootenai Tribes, Flathead Indian Reservation. The authors of these essays have been told that the structures of a typical law review article do not apply, and more importantly, that brevity is a precondition to publication. Accordingly, there will be no effort to address federal reserved water rights held by the United States in its capacity as steward of public lands, though that topic is interrelated. Additionally, case citation will be kept to a minimum. Should anyone desire complete citation, please contact me. Finally, the opinions expressed herein are my own.

1. For example, fear that the Atomic Energy Commission was prepared to build a nuclear powered electrical generation plant "somewhere in eastern Montana."

federal litigations that have consistently confirmed the dominance of federally-protected Indian reserved water rights over rights asserted under Montana state law.

The Indian reserved water rights doctrine was enunciated in *Winters v United States*.[2] *Winters* involved a dispute between Indian and non-Indian claimants to water on the Fort Belknap Indian Reservation in eastern Montana. The U.S. Supreme Court determined that the Tribes had reserved to themselves adequate water to satisfy the purposes for which the Reservation was created even though water was never specifically mentioned in the treaty documents. The Court further concluded that the United States was obligated to protect these rights. In the eyes of the Court, it defied logic to assume that the Indians would consent to be concentrated on a small fraction of their vast semi-arid aboriginal territory to, among other purposes, become "civilized" as an agrarian society, yet fail to secure the water necessary to achieve those ends.

The Indian reserved water rights doctrine protects for a Tribe all waters necessary to satisfy the purposes for which a particular Indian Reservation was created and includes past, present and future uses, regardless of the equities of junior claimants. Because these rights arise from federal law, they are free from state control. Indian reserved water rights are commonly called *Winters* rights.

After the *Winters* decision, the Indian reserved water rights doctrine lay relatively dormant until 1939, when the U.S. Supreme Court decided another case arising from Montana, *Powers v United States*.[3] *Powers* addressed a dispute involving non-Indian successors to Indian allotments on the Crow Indian Reservation. The Court upheld the *Winters* doctrine and confirmed the existence of federally reserved Indian water rights on the Crow Indian Reservation independent of the laws of Montana, even though the Reservation land at issue was by then owned by non-Indians.

At about the same time that *Powers* was decided, the Ninth Circuit Court of Appeals decided *United States v McIntire*,[4] an Indian reserved water rights case arising on the Flathead Indian Reservation. In *McIntire*, the court applied the *Winters*

2. 207 U.S. 564 (1908).
3. 305 U.S. 527 (1939).
4. 101 F.2d 650, 653 (9th Cir. 1939).

doctrine to the Treaty of Hellgate.[5] The court concluded that under the *Winters* doctrine the Confederated Salish and Kootenai Tribes had reserved the waters of the Flathead Indian Reservation to themselves, and "[b]eing reserved, no title to the waters could be acquired by anyone except as specified by Congress." Because the Tribes' water rights were protected under the *Winters* doctrine, they were not subject to Montana state water law unless Congress legislated otherwise.[6]

Because federal and Indian reserved water rights are vested with governmental sovereign immunity, they are precluded from state court jurisdiction. As a result, any state effort to adjudicate water rights in areas of federal and Indian Reservation lands was impossible. In response to this condition, the 1952 Congress enacted the McCarran Amendment[7] to waive federal sovereign immunity over water rights held by the United States in its own right.[8] If properly waived, state courts could then adjudicate and administer the United States' federal reserved water rights, so long as the state system satisfied several conditions. Under the McCarran Amendment, the United States' sovereign immunity may be waived only if a state court water rights proceeding is a general *inter sese* water rights adjudication of all claimants on the whole hydrologic system at issue. The McCarran Amendment did not address Indian reserved rights.

It was not until *Colo. River Water Conservation Dist. v United States*,[9] that the U.S. Supreme Court interpreted the McCarran Amendment to apply to Indian reserved water rights as well as to federal reserved waters held in the name of the United States. The Court determined that since the United States is a trustee for Tribal water rights and because the United States can be joined in a proper McCarran adjudication, state courts may also adjudicate Tribal rights as long as the United States, as trustee, is a party. Tribal immunity per se is not waived by McCarran, but many Tribes see the value of affirmatively waiving immunity to actively join in the defense of their aboriginal and reserved rights, rather than leave it to their trustee alone. The Court made clear that the waiver of Tribal

5. 12 Stat. 975 (1855). The Treaty of Hellgate was between the United States and the Flathead, Kootenai, and Upper Pend d'Oreilles Indians.

6. *See also* United States v Alexander, 131 F.2d 359 (9th Cir. 1942).

7. 43 U.S.C. § 666 (1994).

8. For example, Forest Service or Bureau of Land Management land.

9. 424 U.S. 800 (1976).

sovereign immunity was not absolute. Jurisdiction over Indian reserved water rights would be concurrent between the state and federal courts, but with a preference for a McCarran-qualifying state forum. The *Colorado* Court made clear that absent a proper McCarran waiver of tribal sovereign immunity a Tribe cannot be joined in a state court water adjudication. Accordingly, not until four years *after* the new Constitutional assertion of ownership and authority over all water within the State, could Montana make even a colorable claim of authority over Indian reserved water rights.

The Montana Supreme Court also follows the *Winters* doctrine. In a 1951 case, *Lewis v. Hanson*,[10] the court stated that upon "the creation of the [Crow] reservation, title to the waters was vested in the United States as trustee for the Indians." This statement was again followed several years later in a case arising from the Flathead Indian Reservation, *Big Four v. Bisson*.[11] Through these two cases, the Montana Supreme Court gave explicit notice to all Montanans of federal and tribal ownership of water within the State long before the 1972 Constitution was conceived.

The delegates to the 1972 Montana Constitutional Convention focused their attention on traditional western state water issues. The theme that pervaded the debates was the desire to protect existing water uses in Montana against federal and out-of-state claims. In order to perpetuate the then-existing body of Montana state water law, article IX, section 3, subsection 2 of the new provisions incorporated almost verbatim that portion of article III section 15 of the 1889 Montana constitution pertaining to water rights.[12] The remainder of article IX, section 3 of the 1972 Montana constitution is the creation of the 1972 Constitutional Convention. It states:

> (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use

10. 124 Mont. 492, 496 (1951).

11. 132 Mont. 87, 89 (1957).

12. That portion of article IX, section 3 of the 1972 Montana constitution reads as follows:

> (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
>
> (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.

of its people and are subject to appropriation for beneficial uses as provided by law.

(4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.[13]

The 1972 Constitutional Convention delegates found it appropriate to expand upon the old Constitutional protections in several ways. For instance, Montana had no centralized system for keeping records of existing water usage, for administration of water use, or for permitting new uses. In fact, in 1972 it was difficult, if not impossible, to accurately quantify state-based existing water uses in Montana. As with many of the arid Western states, the connection between actual water use and courtroom water law ("paper rights") was frequently ephemeral. Subsection 4 set in motion the Montana Water Use Act, a system of statewide adjudication, administration and record keeping, codified in title 85 of the Montana Code Annotated. That Act was designed to quantify and administer all water within the state under a single and comprehensive body of state law. The justification for the Act lay in the new Constitutional assertion that *all* water within the state is the "property of the State."[14] Although the Indian reserved water rights doctrine had been a fact of life since the 1908 *Winters* decision, the 1972 Constitution failed to address it. It instead declared, "all waters. . .are the property of the state."[15]

Since 1972, the Montana Supreme Court has confirmed that "tribes 'own' reserved rights for past, present and future uses."[16] The *Greely* court relied upon *Winters* to confirm that Indian reserved water rights were creatures of federal law, not state law, and that the state courts are under a "solemn obligation to follow federal law" when dealing with them.[17]

The *Winters* doctrine originated in Montana and had been central to United States Supreme Court and Ninth Circuit Court of Appeals decisions arising on Montana Indian Reservations prior to the 1972 Constitutional Convention. The Montana Supreme Court had followed the *Winters* doctrine in the 1950's.

13. MONT. CONST. art. IX, § 3.

14. *Id.*

15. *Id.*

16. State *ex rel.* Greely v Confederated Salish and Kootenai Tribes, 219 Mont. 76, 97 (1985).

17. *Id.* at 95.

Nevertheless, time and again the Indian Tribes in Montana, as well as the United States in its capacity as trustee for the Tribes, have found themselves forced into litigation to protect their federal rights against improper state incursion, an incursion predicated at least in part upon Montana's claim of ownership of all water within the State. If article IX, section 3, subsection 3 had been written along the lines suggested below, it is possible that many of the battles would have been unnecessary. Bridges, rather than walls, might be stronger between the State and the seven Tribal governments. Instead, Montana, like its sister states, has chosen to try to convince its non-Indian citizens that it can make water flow uphill and stay there.

For example, since 1981, the Confederated Salish and Kootenai Tribes have filed three federal district court cases, several state district court cases, and two original proceedings before the Montana Supreme Court in order to protect their reserved water rights.[18] In each case that has reached final resolution the result has been favorable to the Salish and Kootenai Tribes. In addition the State initiated two original proceedings with the Montana Supreme Court involving the question of whether Indian reserved water rights could be adequately addressed within the framework of the Montana Water Use Act. Further, others have filed actions making claim against Tribal aboriginal and reserved water rights on the Flathead Indian Reservation in federal suits and before the Interior Board of Indian Appeals.[19] Each of these cases involved, either directly or indirectly, a conflict between Montana's assertion of ownership of all water and the Indian

18. *See* Confederated Salish and Kootenai Tribes v. Montana, CV-81-147 (D. Mont. 1981); Confederated Salish and Kootenai Tribes v. Flathead Irrigation and Power Project, 616 F.Supp 1292 (D. Mont. 1985); Confederated Salish and Kootenai Tribes v. Simonich, 29 F.3d 1398 (9th Cir. 1994); In re Matter of the Application for Beneficial Water Use Permit Nos. 66456-76L, Ciotti, 278 Mont. 50, 923 P.2d 1073 (1996); Confederated Salish and Kootenai Tribes v. Clinch, 1999 MT 342, 297 Mont. 448, 992 P.2d 244; Confederated Salish and Kootenai Tribes v. Stults, 2002 MT 280, 312 Mont. 420, 59 P.3d 1093; Confederated Salish and Kootenai Tribes v. Clinch, BDV-2001-253 (1st Jud. Dist. Mont. 2001); *see also* Joint Bd. of Control of the Flathead, Mission, and Jocko Irrigation Dists. v. United States, 832 F.2d 1127 (9th Cir. 1987), cert. denied 486 U.S. 1007 (1988); Joint Bd. of Control of the Flathead, Mission, and Jocko Irrigation Dists. v. United States, 862 F.2d 195 (9th Cir. 1988).

19. Aboriginal water rights had not been federally confirmed at the time of the 1972 Constitution. An aboriginal right is a tribal right to water adequate to satisfy pre-treaty uses within a Tribe's aboriginal territory, such as instream flows for fish. *See* United States v. Adair, 723 F.2d 1394 (9th Cir. 1983). While not discussed any further, aboriginal rights will be incorporated into the conclusion of this essay.

reserved water rights doctrine. Had the 1972 Constitution recognized and confirmed Indian reserved water rights this litigation may have been avoided.

From a states' rights perspective the constitutional treatment of water makes good sense. However, the omission of Indian reserved water rights has been a social, political, and economic misstep for the people of Montana, Indian and non-Indian alike. The Indian reserved water rights doctrine had existed for over sixty years when the Constitutional Convention first met. It is based on preemptive federal law. It is not incorporated into the 1972 Constitution, even though it was firmly established in Montana state and federal case law and in several United States Supreme Court rulings. That omission has cost the State, Indian Tribal governments, individual Indians, non-Indians and the United States, in its roles as trustee to Tribes, an incredible amount of court time, money and good will.

In conclusion, I would suggest that adding the following italicized language to article IX, section 3, subsection 3 of the Montana Constitution, would represent an accurate rendition of state and federal water law and properly incorporate Indian reserved water rights.

> (3) *Aboriginal and reserved water rights of Indian Tribes are recognized and confirmed.* All *other* surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.