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In re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources in the State of Wyoming

by

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In re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources in the State of Wyoming

*Gover, Stetson & Williams**

(Editor's note: From the very beginning, Indian law has been about tribes fighting for resources. In the earliest days, the resource was land, and the fights were political and military, as well as legal. But as the Indian land base stabilized with the end of treaty-making in the 1870s and, more importantly, when President Franklin Roosevelt suspended the allotment system, the fights turned toward the resources the land contained. Perhaps, at least in the West, the most important of all of these resources was water.

In 1908, the United States Supreme Court set forth the Winters[1] *doctrine, which is very protective of Indian tribal water rights in those places where water is most scarce. In deciding whether tribes had reserved water rights in the Milk River, the Court asked a series of questions:*

> *The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce area of their occupation and give up the waters which made it valuable or adequate? . . . If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the Government or deceived by its negotiators.*[2]

The Court did not accept affirmative answers to any of these propositions and held instead that the Gross Ventre and other Indians had impliedly reserved irrigation rights in the arid re-

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1. *See* Winters v. United States, 207 U.S. 564 (1908).
2. *Winters*, 207 U.S. at 576.

gions of the Montana Territory.[3]

The modern embodiment of Winters *came along in* Arizona v. California[4] *in which the tribes along the Colorado River were held to have substantial rights to the water in the river. These rights were to be measured by 'potentially irrigable acreage' (PIA), a standard while, if not generous, at least was advantageous to the tribes.*

Procedurally, though, the tribes suffered a setback with the McCarran Amendment and its construction in the Colorado River case, where it was held that the adjudication over state water rights belonged in state, not federal court. It is the federal courts that traditionally adjudicate matters of Indian law, and are seen by the tribes to be generally friendlier forums than those of usually-elected state court judges. Nonetheless, the Supreme Court held that the possibility of its review on certiorari, as well as the obligation of state court judges to uphold federal law, protected all federal interest and sent the litigants to state court.

Since the time of Arizona v. California, *these so-called 'general adjudications' have been slowly working their ways through the court systems of several states in the West. One such state is Wyoming and one such controversy is use of water in the Big Horn water system. This dispute is the subject of the brief below.*

If the battle of Indian tribes for resources is one as old as the European presence here, one factor is new. Increasingly, as the battles have become courtroom battles, the lawyers for the tribes have become Indians. A generation ago, there were said to be fewer than two dozen American Indian lawyers, and most litigation for the tribes was done by whites. Today, there are thought to be more than two thousand American Indian lawyers. And, for that reason, the future of Indian law seems to be Indian tribes and Indian lawyers fighting for ever-diminishing resources.

It is for this reason that the Arkansas Law Review *has departed from its usual requirements of style, and presents in this symposium an appellate brief* qua *brief. The editors think*

3. *Id.* at 577-78.

4. 439 U.S. 419 (1979).

not only that it sets forth the relevant legal arguments in striking fashion, albeit with undisguised advocacy, but also because it represents a trend that should be expected to continue. For the first time ever, Indian tribes these days are being represented by their own. Some of these lawyers speak their clients' languages; some do not. Whatever their background, their entry into the courtroom can only be encouraging to a justice system that counts equality before the law as one of its principal attributes.

INTRODUCTION

Pursuant to Wyoming Rule of Appellate Procedure 8.01, the Shoshone and Northern Arapaho Tribes ("Tribes") of the Wind River Reservation ("Reservation") petition the Court for rehearing of the Court's June 5, 1992 decision of Justice Macy announcing the result in this appeal ("Opinion") in the above-captioned matter with respect to the following issues:[5]

A. The Result of the June 5, 1992 Opinion of this Court that the Tribes May Not Dedicate Their Decreed Water Right Quantified on the Basis of Lands Not Historically Irrigated to Instream Flow.

Specific points the Tribes contend are in error and should be reconsidered include the following:

1. Justice Macy's statement that the doctrine established in *United States v. New Mexico*—that state law and jurisdiction exists over water quantification on a federal reservation for purposes other than the primary purpose for which water was reserved—applies also to the Wind River

5. The standard for rehearing the Court's result in this case is clear. Rehearing should be granted if there is a reasonable probability that the Court arrived at an erroneous conclusion or overlooked some important question or matter necessary to a correct decision. Elmer v. State, 466 P.2d 375 (Wyo.), *cert. denied*, 400 U.S. 845 (1970). The Tribes will show below that the Opinion, though obviously the result of a great deal of work and analysis by the Court, is based on erroneous conclusions. Because the Opinion skirts the key issues in the case, no common reasoning among the members of the Court exists. As a result, the Opinion fails to provide any consistent, useful, or practical guidance to the parties in this case. Accordingly, the Tribes will submit new and expanded arguments that the Court overlooked in reaching the result in the Opinion.

Tribes' use of their reserved water for purposes other than agricultural and subsumed uses, and that, more generally, Indian reserved water rights are subject to state law restrictions and procedures;

2. Justice Macy's statement that the State of Wyoming owns the Tribes' Treaty-based water rights;

3. Justice Thomas' statement that the ceded area of the Reservation was disestablished and that the state engineer thus has *per se* authority in this area and, also the diminished Reservation; and

4. Justice Cardine's statement that the Tribes must apply their future project water right to agricultural and subsumed uses before applying the water to other uses.

B. The Determination by the Court in its June 5, 1992 Opinion that Judge Hartman Erred by Appointing the Tribes' Water Agency as Water Master.

The specific bases for the Tribes' reconsideration request on this issue include:

1. Justice Macy's statement that the Wyoming constitution and principles of separation of powers bar the district court from appointing a water master to implement its decree in this McCarran Amendment proceeding, especially where, as here, the district court found the state engineer was not carrying out his duties under the decree and had placed himself in conflict with the interests of persons whose water rights he was charged to protect;

2. The statements of Justices Macy and Thomas on the jurisdiction of the State of Wyoming to administer, other than by enforcement of the decree under the McCarran Amendment, the Tribes' Treaty-based water rights in this case.[6]

6. In limiting this Petition for Rehearing to six specific points, the Tribes do not abandon any other issues that are properly appealable.

THE COURT INCORRECTLY RULED THAT THE TRIBES COULD NOT DEDICATE THEIR DECREED WATER RIGHT QUANTIFIED ON THE BASIS OF LANDS NOT HISTORICALLY IRRIGATED TO INSTREAM FLOWS.

The Tribes assert that the clear law of this case is that stated explicitly in the 1985 Decree and not specifically reversed by this Court. As noted in Justice Golden's opinion, that law clearly authorized the Tribes to dedicate their future project water to instream flows. The Tribes offer the following additional applicable law in support of their position that they may dedicate their future project water to instream flows.

A. Federal, Not State, Law Governs The Use Of Indian Reserved Water Rights.

1. United States v. New Mexico is Inapplicable To the Tribes' OnReservation Use of Treaty-based Water Rights.

The use of Indian reserved water rights is governed not by *United States v. New Mexico,*[7] but by *Arizona v. California,*[8] which establishes that Indian tribes may apply their reserved water to any beneficial use once such rights are quantified. *New Mexico* concerned the quantification of additional reserved water rights for water uses in addition to those for the original purpose of the federal non-Indian reservation. The Tribes here are seeking to use their existing decreed federal Indian water right in accordance with the governing law in this case and the applicable federal law. Justice Macy's Opinion reasoning that *New Mexico* has application here focuses narrowly on a quote from the decision and thus misses the factual and legal distinctions between federal non-Indian water rights and federal Indian reserved water rights. State law does not apply to the use of Indian reserved water rights. Indian reserved water rights are federal law rights, are not subject to restriction on their use by states, and are vested property rights as of the date of the reservation. Only the Tribes and Congress may impose restrictions on the use of In-

7. 438 U.S. 696 (1978).
8. 439 U.S. 419 (1979).

dian reserved water rights; these property rights may not be divested by judicial fiat as Justice Macy's Opinion suggests.

Courts consistently have recognized that Indian reserved rights are distinct from other federal reserved rights. Courts and commentators have highlighted the significant differences between Indian reservations and Indian reserved water rights, and other federal reservations and federal water rights. The significant differences include origin, ownership, priority date, manner of determining the purposes of the reservation, and quantification standards. Consequently, courts have recognized that the primary purpose/secondary purpose analysis relating to federal non-Indian reserved rights does not apply to Indian reserved rights.

Moreover, the special canons of construction for interpreting Indian treaties do not apply to other federal reserved rights. As the United States Supreme Court consistently has stated:

> [T]he standard principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians."[9]

These canons appear not to have been applied by the Court in its June 5, 1992 Opinion.

Foremost among the well-established principles of treaty construction is the principle that "the treaty is not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[10] Further, Indian treaties must be construed as the tribes would have understood them.[11]

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9. Montana v. Blackfeet Tribe of Indians, 471 U.S. at 766 (citing Oneida County v. Oneida Indian Nation, 470 U.S. 226, 247 (1985)); *see also* State of Montana *ex rel.* Greely v. Confederated Salish & Kootenai Tribes, 712 P.2d 767 (Mont. 1985) ("the purposes of Indian reserved rights . . . are given broader interpretation in order to further the federal goal of Indian self-sufficiency").

10. United States v. Winans, 198 U.S. 371, 381 (1905); *accord* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 678 (1979); United States v. Wheeler, 435 U.S. 313, 327 n.24 (1978).

11. As the United States Supreme Court elaborated:

> [I]t is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule. It has held that the United States, as the party with the presumptively superior negotiating skills

And, "[T]reaties should be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit."[12] Ambiguity must be resolved in favor of the Indians.[13] Treatybased Indian reserved water rights thus must be treated in a manner fundamentally different from federal non-Indian reserved water rights.

In *United States v. Adair*,[14] the court expressly ruled that *New Mexico* and *Cappaert v. United States*[15] are not directly applicable to the *Winters* doctrine rights of Indian tribes.[16] In *Colville Confederated Tribes v. Walton*,[17] the court stated succinctly the basis for treating Indian reserved water rights differently from federal reserved rights:

> The general purpose [of an Indian reservation], to provide a home for the Indians, is a broad one and must be liberally construed. We are mindful that the reservation was created for the Indians, not for the benefit of the government.[18]

The court also noted that "Congress envisioned agricultural pursuits as only a first step in the 'civilizing' process," and the Tribes' need to maintain themselves under changed circumstances.[19]

In his 1971 study for the National Water Commission, Professor Frank Trelease recognized that reserved rights for

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> and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. "[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

Washington Fishing Vessel Ass'n, 443 U.S. at 676-77. *See also* United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); Kimball v. Callahan, 493 F.2d 564, 566 & n.7 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974).

12. *Oneida*, 470 U.S. 247.

13. Bryan v. Itasca County, 426 U.S. 373, 392 (1976).

14. 723 F.2d 1394, 1408 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

15. 426 U.S. 128 (1976).

16. Citing FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 58185 (1982). *See also In re* General Adjudication of All Rights to Use Water in Big Horn River System, 753 P.2d 76, 111 (Wyo. 1988), *aff'd by split decision*, Wyoming v. United States, 492 U.S. 406 (1989) ("*Big Horn I*").

17. 647 F.2d 42, 47 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981) ("*Walton II*").

18. *Id.*

19. *Id.* at n.9.

Indian reservations must receive special treatment.[20] A number of features distinguish them from federal reservations of water for general non-Indian governmental purposes.[21]

In *Greely*,[22] the court provided a comprehensive analysis of the differences between federal and Indian reserved rights, holding that federal non-Indian reserved rights differ from Indian reserved rights in their origin, ownership, determination of priority date, the manner in which the purposes of the reservation are determined, and quantification standards. Regarding the origin of the federal non-Indian rights, the court recognized that, although federal non-Indian water rights can be reserved by implication, they are not based upon treaties. Rather, federal reserved water rights are created by the legislation, executive order, or agreement that takes the land from the public domain for federal purposes. Federal non-Indian rights cannot predate the document reserving the federal land. "By contrast, aboriginal-Indian reserved water rights exist from time immemorial and are merely recognized by the document that reserves the Indian land."[23] Thus, unlike Indian reserved rights, no need exists to look to the purpose and nature of the federal non-Indian reservation to determine a priority date because there is no aboriginal use by the government.[24] Form of ownership is another basis for distinguishing federal and Indian reserved water rights. Whereas the United States owns federal reserved rights, the United States is merely the trustee for the benefit of the Indians, rather than the fee owner of the Indian reserved rights, and is burdened with special responsibilities concerning those water rights. The Indians "own" the tribal reserved water rights. Unlike general federal reserved rights, the federal government

20. Frank Trelease, *Federal-State Relations in Water Law*, 160 NATIONAL WATER COMM'N. LEGAL STUDY NO. 5 (1971).

21. *See id.* at 152, 172; C. Meyers, *Federal Groundwater Rights: A Note on Cappaert v. United States*, 13 LAND & WATER L. REV. 377, 388-89 (1978) (Indian reserved rights to groundwater necessarily differ from and are greater than those of other federal reservations); NATIONAL WATER COMMISSION 1973 FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES, *Water Policies for the Future*, 459483 (noting significant differences between Indian reserved water rights and water rights for other federal reservations).

22. 712 P.2d at 767.

23. *Id.* at 765-66.

24. *Id.*

may not lease, sell, quitclaim, or encumber Indian reserved rights.[25]

The *Greely* court noted that federal reserved water rights are *quantified* on the basis of "minimal need," that is, the "amount of water necessary to fulfill the primary purpose of the reservation, no more."[26] Water for secondary purposes is not included in the quantification.[27] The court further recognized that, whereas federal reserved rights are quantified on the basis of the original purposes of the reservation, Indian reserved rights, in contrast, include quantification of water for future needs and changes in use.[28]

Thus, Indian reserved water rights are fundamentally different from other federal reserved water rights, and *New Mexico* cannot be uprooted from its narrow context and applied to the use Indian reserved rights. The primary purposes/secondary purposes doctrine of *New Mexico* does not apply to the *use* of *any* federal reserved water rights, much less Indian reserved water rights, and Justice Macy's Opinion erred in this regard.[29] Even in *New Mexico*, while limiting the *purposes* for which reserved water rights could be claimed for a National Forest, the Supreme Court specifically stated that the "reserved rights doctrine" is an exception to Congress's explicit deference to state water law in other areas.[30] And, directly on point here, when deciding whether the explicit Congressional deference to state law in other areas should be applied to In-

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25. *Id.*

26. *Id.* (citing Cappaert v. United States, 426 U.S. at 141-42; *New Mexico*, 438 U.S. at 700).

27. *Greely*, 712 P.2d at 767. *See also* United States v. City and County of Denver, 656 P.2d 1, 20 (Colo. 1982):

> For each claim of a [non-Indian federal] reserved water right, the trier of fact must examine the documents reserving the land from the public domain and the underlying legislation authorizing the reservation; determine the precise federal purposes to be served by such legislation; determine whether water is essential for the primary purposes of the reservation; and finally determine the precise quantity of water—the minimal need as set forth in *Cappaert* and *New Mexico*-required for such purposes.

28. *Greely*, 712 P.2d at 767.

29. *New Mexico's* application to Indian reserved rights is illogical here where the Tribes' right to water vested in 1868, years before Wyoming became a state. There is no credible basis to believe that the parties to the Treaty intended that the Tribes seek state approval for use of the Tribes' water right for non-agricultural uses.

30. *New Mexico*, 438 U.S. at 715.

dian reserved rights, the court in *Walton* specifically held that such deference was not applicable to water use on the Indian reservation.[31]

The Opinion's analysis of *New Mexico* focuses upon language from *New Mexico* that" [w]here water is valuable for a secondary use of the reservation, however, there arises the . . . inference that Congress intended, consistent with its other views, that the United States would *acquire* water in the same manner as any other public or private appropriator."[32] As stated earlier, the case here is distinguishable because the Tribes do not want to acquire water; they merely are using their water already acquired by the decrees in this case, in accordance with the explicit decrees in this case and the governing federal law. The Tribes, moreover, are unlike any other private appropriator, as they have both propriety and sovereign interests in their water rights, and a unique federal relationship.

In *Sporhase v. Nebraska*,[33] where Nebraska relied upon the *New Mexico* "inference" of congressional intent, the Supreme Court sharply rebuked Nebraska for contending that it could assert jurisdiction over a constitutionally protected use of water because of what the lower court viewed to be a "policy." The Supreme Court said:

> Appellee's suggestion that Congress has authorized the States to impose otherwise impermissible burdens on interstate commerce in groundwater is not well founded. The suggestion is based on 37 statutes in which Congress has deferred to state water law, and on a number of interstate compacts dealing with water that have been approved by Congress.
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> * * *
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> Although [various statutes and interstate compacts] demonstrate Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of

31. *Walton II*, 647 F.2d at 53 (state water laws are not controlling on Indian reservations even as to non-Indians' water use).

32. *New Mexico*, 438 U.S. at 702.

33. 458 U.S. 941 (1982).

> the valid state law to which Congress has deferred. Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. In the instances in which we have found such consent, Congress' " 'intent and policy' to sustain state legislation from attack under the Commerce Clause" was " 'expressly stated.' "[34]

The *Sporhase* decision clearly states that "alleged implications" of congressional consent to state jurisdiction are not always applicable, and this must be particularly true where efforts are made by a state to infringe upon the rights and sovereign status of Indian tribes.[35] In these cases, the basis for state jurisdiction must be expressly stated by Congress. It is noteworthy here that the Supreme Court based the *Sporhase* decision on *Merrion v. Jicarilla Apache Tribe*,[36] a case that reaffirmed the sovereign status of Indian tribes and their right to exercise full authority over their homelands.

2. The Governing Indian Treaty-based Water Rights Are Federal Rights and Are Not Subject to State Restrictions on Use.

Principles of federal law clearly establish that the quantification of reserved rights based upon agricultural and related purposes does not limit the uses to which tribes may put their water. In its Supplemental Decree[37] in *Arizona v. Cali-*

34. *Sporhase*, 458 U.S. at 958-60 (quoting Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 427 (1946)). *Cf.* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 155, n.21 (1982).

35. *California v. United States*, 438 U.S. 645 (1978) is likewise not applicable. That case involved a request for a permit from the state pursuant to the Reclamation Act, which Act explicitly required state permits for reclamation irrigation projects such as that at issue in *California*. Furthermore, the application of state law was only allowed to the extent it was not inconsistent with federal law. *California*, 438 U.S. at 674.

36. 455 U.S. 130, 155, n.21 (1982).

37. Any argument that the 1979 *Arizona v. California* Supplemental Decree of the Court carries no precedential value because its terms were agreed upon by the parties should be rejected. The *Arizona* parties reached their agreement in response to Article VI of the Court's original Decree, 376 U.S. 340, 351-52 (1964), *as amended*, 383 U.S.

fornia,[38] the United States Supreme Court ordered that:

> Additional present perfected rights . . . shall be in annual quantities not to exceed the quantities of mainstream water necessary to supply the consumptive use required for irrigation of the practicably irrigable acres which are included within any area determined to be within a reservation by such final determination of a boundary and for the satisfaction of related uses. The quantities of diversion are to be computed by determining net practicably irrigable acres within each additional area.
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> The foregoing reference to a quantity of water necessary to supply consumptive use required for irrigation . . . *shall constitute the means of determining quantity of adjudicated water rights but shall not constitute a restriction of the usage of them to irrigation or other agricultural application.*[39]

The federal government has long taken the position approved by the Supreme Court in *Arizona v. California*. When asked whether agricultural use was the limit, as well as the measure, of a tribe's water right, the Department of the Interior concluded that water reserved for Indian reservation lands could be used for purposes other than irrigation and related uses.[40]

The *Colorado River* Opinion emphasized that the Tribe's water rights did not have to be used for agricultural purposes, any more than the lands themselves had to be so used, because the water right was essentially a special type of real property

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268 (1966). Pursuant to Article VI, the Supreme Court entered the Supplemental Decree. Arizona v. California, 439 U.S. at 420. The agreement, therefore, is entitled to the same precedential value as the Court's original opinion and Decree, and the opinion of the Court which followed. In *Arizona v. California*, 460 U.S. 605 (1983), the Supreme Court recognized that "[t]he 1979 decree thus resolved outstanding issues in the litigation." *Id.* at 611. The Court also recognized that "[w]ith respect to the question of reserved rights for the reservations, and the measurement of those rights, the Indians, as represented by the United States, won what can be described only as a complete victory." *Id.* at 617.

38. 439 U.S. 419 (1979).

39. *Id.* at 421-22 (emphasis added).

40. Memo Sol. Int., Feb. 1, 1964, *reprinted in* 2 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs*, 1917-1974 at 1930 ("Colorado River Opinion"); *see also* Memorandum from the Solicitor to the Regional Solicitor of the Department of the Interior at Los Angeles (January 21, 1971) (unpublished memorandum).

that was part and parcel of the reservation.[41] The Deputy Solicitor emphasized the need for flexibility in the use of reservation resources to promote the economic well-being of the reservation and further noted that Indian land and water, in some circumstances, could bring greater benefits if used for commercial or industrial purposes rather than agriculture. The Deputy Solicitor concluded that, where circumstances warrant the use of Indian lands for recreational, commercial, or industrial purposes rather than for agriculture, the reserved water rights remain available for these purposes.[42] Thus, Judge Hartman correctly concluded below that federal law supports the Tribes' decreed right to use their water as they deem advisable.[43] This right is a federal vested property right and cannot be altered by this Court. Accordingly, Judge Hartman's conclusion must be affirmed here.

Application of state law or state regulatory authority over Indian water rights has never been approved or contemplated by Congress. In fact, the enactment of 25 U.S.C. § 1322 (1983), commonly known as Public Law 280 and which demarcates the high-water mark of Congressional acquiescence to state jurisdiction over Indian rights and property within an Indian reservation, shows the contrary. This statute permitted state assumption of civil and criminal jurisdiction over actions involving Indians.[44] Significantly, Congress specifically exempted Indian reserved water rights from the areas of authority states could assume.[45] Thus, Congress' reservation of Indian water rights from state jurisdiction even at the zenith of state authority over reservations, implicitly reaffirms the federal character of the Indian reserved water right.

Should any doubt remain that an Indian treaty-based

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41. Colorado River Opinion at 1931.

42. *Id.*

43. Judgment and Decree dated March 11, 1991 at 7-8.

44. Public Law 280 was amended in 1968 to require tribal consent as a precondition to state assumption of jurisdiction.

45. 25 U.S.C. § 1322(b). Public Law 280 was enacted in 1953, a mere one year after the McCarran Amendment. It seems apparent from the plain meaning of the Amendment and P.L. 280 that Congress understood the McCarran Amendment's provision waiving federal sovereign immunity in state courts was not intended to and did not permit the general regulation of federal reserved Indian water rights.

water right is a federal and not a state water right and is not subject to state law or jurisdiction, recent congressional action on this matter should eliminate such doubt. In 1988, Congress enacted the Colorado Ute Water Rights Settlement Act of 1988.[46] Subsection 5(c) of the Act authorizes the tribe to lease Indian reserved water rights off the reservation. The settlement agreement had originally provided that, when the tribal reserved water right is used off-reservation, the reserved water right becomes a state water right.[47] During congressional consideration and ratification of the settlement, Senator Bradley offered an amendment to subsection 5(c), which was adopted by the Congress. The amendment modified the subsection (and, notably, the underlying agreement of the parties) to provide that, as a matter of federal law and policy, the tribe may voluntarily elect to sell, exchange, lease, use, or otherwise dispose of any portion of its water right off the reservation, and, if it does so elect, as a condition precedent, that portion of the tribe's water right shall be changed to a Colorado State water right, "only during the use of that right off the reservation."[48] If Congress had believed that Indian reserved water rights are state water rights or are subject to state law or procedures, Senator Bradley's amendment would have been unnecessary. Instead, Congress confirmed that, when an Indian reserved water right leaves the reservation, it must be changed to a state water right in order for it to become subject to state law; until then, it is subject only to federal and tribal law.

This congressional mandate is instructive in this case. The United States Supreme Court long has held that, as a general matter, state law applies to Indians off their reservations.[49] Congress now has expressly limited this standard insofar as Indian reserved water rights are concerned. Not only may state law never change the fundamental federal character of Indian reserved water rights when used off-reser-

46. Pub. L. 100-585, 102 Stat. 2973 (1988).

47. *See* letter of March 6, 1990 from the Honorable Bill Bradley, Chairman of the Subcommittee on Water and Power, of the Committee on Energy and Natural Resources, to the Honorable Manuel Lujan, Jr., Secretary, United States Department of the Interior (on file with author).

48. *See* letter of April 5, 1990 from the Honorable Manuel Lujan, Jr. Secretary of the Interior, to the Honorable Bill Bradley (on file with author).

49. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

vation, but the Indian right reverts to full federal status when it returns to the reservation. Congress, in the exercise of its paramount power over Indian affairs,[50] and pursuant to its trust responsibility for Indian reserved water,[51] has affirmatively acted to preserve the fundamental federal character of the Indian reserved water as a matter of federal law and policy.

III. THE STATE OF WYOMING DOES NOT OWN THE TRIBES' TREATY-BASED WATER RIGHTS.

Justice Macy's suggestion that the state owns the Tribes' Treaty-based water right, and that the state thereby has authority over the Tribes' use of their reserved water right, is without any foundation in law. The Tribes' water right is both quantified and defined by federal law. Justice Macy suggests that, in ratifying the Wyoming Constitution upon Wyoming's admission to the union, Congress implicitly abrogated the Tribes' preexisting vested water right reserved under the Fort Bridger Treaty and transferred ownership of the Tribes' federal water right to the state. This ignores the longstanding rules of statutory construction in Indian law for determining the meaning of a Treaty or whether Congress has abrogated a vested Indian treaty property right. The Opinion also ignores applicable United States Supreme Court precedent.

In *United States v. Dion*,[52] the Court held that Congress will be held to have abrogated an Indian treaty right only where Congress actually considered the conflict between the Indian treaty right and the statute in question, and chose nonetheless to abrogate the right. Justice Macy's Opinion cites no evidence that Congress understood that, by authorizing Wyoming to be a state, it was abrogating the Tribes' preexisting Treaty water right. The better interpretation of the Wyoming constitutional provisions in Article 1, § 31 (vesting control of waters of the state in the state itself) and Article 8, § 1 (declaring that the waters of the state are the property of the state) is that Congress understood Wyoming was claiming

50. United States v. Kagama, 118 U.S. 375 (1886).
51. Fort Mojave Indian Tribe, et al., v. United States, 23 Cl. Ct. 417 (1991).
52. 476 U.S. 734, 470 (1986).

control only over waters that did not belong to the Tribes pursuant to the Treaty. This is the only interpretation consistent with the requirement that Congress' intention to abrogate Indian rights be unequivocally clear.[53] Moreover, Justice Macy's opinion omits reference to Wyo. Const. Art. 21, § 26 wherein the state disclaimed ownership and jurisdiction over Indian lands within the state when it joined the union and expressly recognized the "said Indian lands shall remain under the jurisdiction and control of the Congress of the United States . . . ."

Justice Macy also suggests that, in *Big Horn I*,[54] the Court ruled that the Tribes' water right was reserved under state law. He reaches this conclusion by misreading the *Big Horn I* Court's ruling that, "the government may reserve water from appropriation under state law for use on the lands set aside for an Indian reservation."[55] Justice Macy suggests that the prepositional phrase "under state law for use on the lands set aside for an Indian reservation" modifies the word "reserve," rather than the word "appropriation" that the phrase follows. If the *Big Horn I* Court wished to modify the Tribes' reservation of waters with a state law requirement, it would have properly placed such a requirement after the word "reserve," and not after the word "appropriation," as was done.

Correct grammar, as well as Supreme Court precedent, must be ignored in order to justify Justice Macy's interpretation. The *Big Horn I* court faithfully restated the citation from the *Winters* decision that "the power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be."[56] Justice Macy inexplicably dismisses the clear statement of the *Winters* Court that the federal government may reserve federal water rights and exempt them from, not subject them to, appropriation under state law. No court has ever suggested that *Winters* intended the contrary.

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53. *See* Menominee Tribe of Indians v. United States, 391 U.S. 404, 412 (1968); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985).

54. 753 P.2d at 94.

55. *Big Horn I*, 753 P.2d at 94.

56. *Winters*, 207 U.S. at 577.

United States v. District Court for Eagle County[57] is instructive on the issue of who owns federal reserved water rights. In that case, which involved an appeal to the United States Supreme Court from the Supreme Court of Colorado, the state asserted ownership of all water within its boundaries because of language in the State Constitution to that effect.[58] Thus, the state contended that the United States had surrendered any right under federal law to reserve water for such purposes as National Forests to the extent that those claims were raised after Colorado's admission to the Union.[59] The Supreme Court of Colorado postponed ruling on the issue, noting that it appeared to have merit. On appeal to the United States Supreme Court, the Court emphatically recognized the authority of the federal government "both before and after a state is admitted into the Union 'to reserve waters for the use and benefit of federally reserved lands.' "[60] Thus, the Court flatly rejected the argument that a state constitutional provision vesting ownership in the state of water within the boundaries of the state somehow destroys the federal nature of federal reserved water rights.

The Tribes' reserved water rights are vested property rights, and are quantified and defined under federal law. The Tribes' federal water is not the property of the state; it belongs to the Tribes. Any suggestion to the contrary simply is wrong.

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57. 401 U.S. 519 (1971).

58. United States v. District Court for Eagle County, 458 P.2d 760, 769-70 (Colo. 1969).

59. *Id.* at 770.

60. *Eagle County*, 401 U.S. at 522-23 (quoting Arizona v. California, 373 U.S. 546, 597 (1963)).