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WATER RIGHTS: THE *Winters* CLOUD OVER THE ROCKIES: INDIAN WATER RIGHTS AND THE DEVELOPMENT OF WESTERN ENERGY RESOURCES

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Introduction

Earth, fire and water—the medieval concept of what constituted the basic elements of the universe. And while subsequent science has broken "earth" down into a plethora of basic elemental molecular units and "fire" has been termed more a process than a distinct entity, "water" remains, curiously enough, very similar in concept today to what it was to man as far back as the dawn of human existence. Water is the keystone of essentially all life on the planet. More specifically, it is the vehicle upon which civilization has ridden for eons. He who controls water controls life itself.

Until relatively recent times ("recent" being within the last 150 years or so), water was valued chiefly for personal, agricultural, or food support (fish, wildlife, cattle, etc.) purposes. When life was simple, needs were likewise simple. But with the march of sophisticated technology, particularly in the area of energy development, water has taken on another value. It is virtually indispensable in the processes involved in converting many natural energy resources into usable, manageable fuels. Modern society has become so dependent on these refined energy fuels in virtually every facet of life that it might now be more correctly stated that "he who controls water, *controls the energy* that controls life itself." The obviously simplistic nature of this assertion should not be allowed to take away from the underlying truth that energy development is inextricably intertwined with and heavily dependent upon water. The precious liquid is needed to extract, refine, and transport the energy resources.

The area of natural resources law is permeated with an overabundance of highly technical data. It is simply the nature of the complex beast. What must be distilled from all of this statistical information is policy. Yet neither data nor policy exists totally in a vacuum. They are each at least partially a function of the other.

With that thought in mind, the purpose of this note is to take a broad look at the relationship between western Indian water rights and the development of natural energy resources in the

Rocky Mountain region. There will be a noticeable absence of much technical information regarding such things as exact acre-feet statistics or water effluent standards. It is sufficient to state here that large-scale energy development in the Rockies will require immense quantities of water. That fact is generally considered to be indisputable. What is more crucial, and what this note will illustrate, is the fact that the magnitude of American Indian water rights is uncertain, and consequently these rights loom as a large roadblock in the path of the region's resource development. A policy initiative is needed to work toward a fair quantification of these rights.

It should also be mentioned that this note will not speak to the issue of environmental concerns, important as these concerns undoubtedly are. The scope of the discussion is simply not broad enough to do adequate justice to the matter of eco-balance in the region.

One final point: the conclusions reached herein are based on the assumption that relationships between state, federal, and Indian governments will remain fundamentally unchanged. The possibility of some sort of large-scale federal intervention being initiated as a means of securing adequate water supplies for much needed energy development processes is recognized. However, for the purposes of this discussion, it is regarded as highly unlikely.

The United States is a virtual treasure trove of fossil and mineral energy resource reserves. This is particularly true of the area which can be generally described as the Rocky Mountain region. For purposes of this discussion, this region includes the following states: Arizona, Colorado, Idaho, Montana, New Mexico, North Dakota, South Dakota, Utah, and Wyoming. From this list, it is apparent that "mountains" are not a prerequisite for membership in the group. The backbone of the Rockies runs north and south through only New Mexico, Colorado, Wyoming, and Montana. But the remaining states are united with these "true" Rockies' states by what might be termed the Rocky Mountain water-energy resource pool. All of these states sit atop major energy resource deposits and are traversed by at least one of five great rivers of the region: the Missouri, which begins in Montana and flows some 2,500 miles to the east until it reaches the Mississippi, running through North and South Dakota in its journey; the Snake, which flows through Wyoming and Idaho; the Great Colorado, which has its headwaters deep in the Colorado Rockies and travels from there through Utah, Arizona, and eventually into Mexico; and the Rio Grande and the Arkan-

sas, both of which rise in Colorado and flow respectively to the south through New Mexico and to the east across Colorado toward the Mississippi. These five rivers total more than 8,500 miles of major water system, and this figure does not take into account the great number of tributaries that flow into these great rivers. Taken together, these watercourses form a matrix of life-giving moisture that is of fundamental importance in this otherwise arid and semiarid region.

It is this arid nature of the Rocky Mountain region that forced even early settlers in the area to establish a priority system for determining who was entitled to the beneficial use of the flow waters and groundwaters of the area. As the gold rush pushed across the western terrain, the idea of "first in time, first in right" became a slogan to live (and to die) by in regard to both land and water rights. But while land was stable in character and relatively easy to quantify and defend, water was migratory. Dusty prospectors knew all too well that a gallon pulled out at the headwaters meant a gallon less farther downstream. That simple maxim still controls, by and large, the approach of governments, both state and federal, business enterprises, and private concerns to the water allocation system in the region. As the country continued to expand, both in terms of population and of technological diversity, the demand for water became greater on a geometric scale. But the water source itself remained relatively constant. The conflict that arose and which continues today is obvious: more factions want and need increasingly larger quantities of this finite resource to supply everything from tap water needs to coal slurry pipelines. The stakes involved are incredibly high and encompass the essential elements of economic stability and progress both within the region itself and across the country as a whole.

Because of dwindling energy resources and political uncertainty over energy availability, the entire nation is looking to the Rocky Mountain region to supply a great deal of the natural resources for future energy needs.[1] There is good reason for this. Beneath the soil of the region there are immense quantities of coal and oil shale in particular, with correspondingly large concentrations of uranium, oil, gas, and geothermal sources (*e.g.*, a full 48 percent

1. SCIENCE & PUB. POLICY PROGRAM (Univ. of Oklahoma), ENERGY FROM THE WEST: A PROGRESS REPORT OF A TECHNOLOGY ASSESSMENT OF WESTERN ENERGY RESOURCE DEVELOPMENT 2 (1977) [hereinafter cited as ENERGY FROM THE WEST]: "Given its substantial and diverse energy resources, the western U.S. is a prime regional candidate for increasing domestic energy production."

of the nation's known coal reserves lie beneath a sixty-three-county area in Wyoming, Montana, and North Dakota).[2] In other words, there is enough raw energy in the region to supply this country with reliable power well into the future. The primary problem is one of conversion—transforming these raw natural resources into usable gas, oil, and electricity. This is where water becomes so important.

The greatly increased interest in water as the key to the energy development process has acted as a catalyst in accelerating the pace of the "water-grab" that has always existed in the dry Rocky Mountain region. The conflict consists of several distinct levels. The federal government, by asserting its sovereign rights over water, inflames state's rightists who want the rivers within their borders to be mainly under state control. States are arguing with sister states over which has paramount rights, though the situation is in more of a tense impasse than in real conflict due largely to various river compacts which quantify and allocate water rights among the participating states. The Colorado River compact signed in 1922 is probably the best example of such an interstate agreement.[3] There are even *intra*state disputes over water, perhaps best characterized by the eastern slope-western slope rivalry in Colorado. Denver, the major eastern-slope advocate, wants more water to satisfy the needs of an increasing urban population. The Denver water board estimates that water consumption in the city area will jump from 345,000 acre feet in 1975 to 849,000 by 2010.[4] The western slopers in Colorado are somewhat less than ecstatic about these figures since much, if not all, of the increase will have to come from their side of the Continental Divide. Finally, there are both private and commercial concerns which need water for their various activities. Everyone is hankering for his fair share, many of them being totally oblivious to an element of the issue which could have a potentially immense effect on the determination of who gets what: American Indian water rights.

2. Northern Great Plains Resources Draft Interim Report at III-1, *cited in* Sierra Club v. Morton, 514 F.2d 856, 861 n.1 (D.C. Ct. App. 1975).

3. This compact included the following states: Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming. *See, e.g.*, ARIZ. REV. STAT. § 45-571 (1956).

4. Stegner & Stegner, *Rocky Mountain Country*, ATLANTIC MONTHLY (Apr. 1978), at 54 [hereinafter cited as Stegner & Stegner].

The Nature of Indian Water Rights: Winters v. United States.[5]

The relationship of native Indian peoples to the United States might be best described as one of subordinate sovereignty. Those tribes which presently have reservation land under their control have been recognized by the federal government as being uniquely independent entities subject only to limited custodial control by the United States. The Supreme Court has recognized this unique status by describing Indian tribal reservations as separate though dependent nations, totally outside the control of state law.[6] The Court stated in *Rice v. Olson*, a 1945 opinion, that "the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."[7] It is out of the special relationship among Indian, state, and federal governments that the concept of Indian water rights has evolved.

Although there is some opinion to the contrary,[8] Indian water rights are generally divided into two categories—reserved rights, or those which are vested through the federal sovereign to Indian peoples by virtue of federal reservation of lands for Indian use, and aboriginal or immemorial rights,[9] which are deemed vested in tribes due to their beneficial use of water systems long before the appearance of the Euro-American on the continent. The latter kind of rights are less extensive than the former, the major claimants of aboriginal rights being the Pueblo Indians of New Mexico. This is due in large part because although New Mexico, including the Pueblos, became part of the United States pursuant to the Treaty of Guadalupe Hidalgo in 1848, the lands of the Pueblos never technically became part of the public domain. Consequently, the federal government has never "reserved" the Pueblos as Indian reservations.[10] The vast bulk of Indian water rights are attached to the reserved lands that were set aside by the government out of the public domain to provide a home for

5. 207 U.S. 564 (1908).

6. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

7. 324 U.S. 786, 789 (1945).

8. *See* Bloom, *Indian "Paramount" Rights to Water Use*, 16 ROCKY MTN. MINERAL L. INST. 669 (1971) [hereinafter cited as Bloom].

9. Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 75 B.Y. L. REV. 639, 662 (1975) [hereinafter cited as Ranquist]: "This aboriginal right, simply stated, is a right to continue using water as it was used by the Indians in their aboriginal state from time immemorial."

10. *Id.* at 663.

Indian peoples. These reservations were established either by treaty (with the Indians), statute, or executive order.

The nature of the water rights that attached to these reserved areas was first enunciated in the pivotal case of *Winters v. United States*,[11] where the Supreme Court held that when the federal government created an Indian reservation out of the public domain, it also intended to reserve an adequate supply of water from the watercourses running through, bordering on, or rising in the reserved area to sustain the tribal existence.[12] The Court arrived at this conclusion by reasoning that since the land of the reservation in question (the Fort Belknap Indian Reservation in Montana), was "arid and, without irrigation, . . . practically valueless,"[13] the alternative to finding an implied water reservation would be tantamount to sentencing Indian peoples to a parched, backward existence. Although it has been speculated that the Court in *Winters* was attempting judicially to salvage what remained of national self-respect out of the carnage and destruction of past American policy toward Native American peoples,[14] it is patently clear that the holding of the case was based on sound logic and legal reasoning.

The Supreme Court's holding, coined the *Winters* doctrine, has stood for the proposition that Indians on federally reserved lands have a paramount right to the "beneficial use" of waters which come into contact with these reservations. The priority of this right is determined by the date of establishment of the reservation. But within this doctrine the Court inadvertently left a time bomb. For the Justices did not know, nor could they have known, what future years would bring in terms of water utilization. They refrained from laying down any specific guideline for quantifying the Indian rights. And today, some seventy-two years later, the question is still open because an upper limit on the *quantity* of Indian water has not been established.

Since the rendering of the *Winters* decision, there have been a long line of federal cases which have affirmed and further clarified the doctrine. The scope of Indian reserved water rights has been established to extend beyond the irrigational purposes addressed in *Winters*.[15] It has also been held to cover ground-

11. 207 U.S. 564 (1908).
12. *Id.* at 577.
13. *Id.* at 576.
14. Bloom, *supra* note 8, at 672.
15. Conrad Inv. v. United States, 161 F. 829 (9th Cir. 1908).

water beneath the reservation,[16] as well as surface water, and perhaps most importantly, the rights have been emphatically established to apply to present and *future* needs of the Indians.[17] The judicial sculpting of the *Winters* doctrine has created a principle that might be summarized as follows: whenever the federal government, by treaty, act of Congress, or executive order, reserves or withdraws a portion of land from the public domain for a federal purpose[18] which presently or will ultimately require water, absent an intent otherwise, an adequate supply of water to accomplish that federal purpose is likewise reserved.[19]

Little imagination is needed to see that this firmly entrenched idea of paramount Indian rights to water is bound to cause considerable strain between Indian peoples and the individual states. This is particularly true of the Rocky Mountain region because of the countervailing state principle of water law based on what are called appropriative rights. Most state-created water rights in this region are appropriative rights. Basically, these rights stem from state grants that allow specific quantities of water for specific beneficial purposes.[20] It requires *actual* diversion or appropriation of the water within a reasonable time of the grant. Those rights are subject to loss through nonuse. The principles of required specificity and of actual use of appropriative rights run directly counter to the basic characteristics of Indian water rights within the same watercourses. The *Winters* doctrine rights may be created *without* diversion or actual beneficial use, and they are *not* lost by nonuse. The determination of amount is open-ended, and most importantly, the reserved right is subject *only* to private appropriative rights which vested prior to the federal reservation, and which have not been subsequently lost through abandonment or nonuse.[21] The practical result of this reserved versus appropriative rights conflict is that most non-Indian rights in water systems which touch Indian reservations in the Rocky Mountain region are perched on a precipice of uncertainty, for while appropriative rights are quantified, they are subject to the amorphous

16. Tweedy v. Texas Co., 286 F. Supp. 383 (D. Mont. 1968).

17. Arizona v. California, 373 U.S. 546 (1963).

18. In United States *ex rel.* Eagle County v. District Ct., 401 U.S. 520, 523 (1971), the Supreme Court extended the *Winters* doctrine to include any federal enclave (*i.e.*, national forests, wilderness areas, monuments, etc.).

19. Comment, *Application of the Winters Doctrine: Quantification of the Madison Formation*, 21 S.D. L. REV. 144, 147 (1976).

20. *Id.* at 148 n.30.

21. *Id.* at 148.

character of the Indian rights. And since priority is based on point in time of grant or reservation, as the Indian conversion of water increases (as most certainly it will), the later in time appropriative-rights holders may theoretically lose out altogether.

Indian Water and Rocky Mountain Energy—The Scope of the Problem

The increased public and governmental concern with the efficient development of energy resources has done much to exacerbate the uncertainty and conflict over water rights. The situation has grown particularly acute in the Rockies, where water was a cherished commodity long before it became indispensable to most energy development processes. In Montana, for instance, it has been estimated that somewhere between 3,500 and 5,000 non-Indian state residents are presently involved in lawsuits stemming from their use of water which conflicts with Indian water claims.[22] This situation seems to be the rule rather than the exception. As Indian peoples are becoming more confident and assertive of their rights, non-Indian concerns are being forced to sit up and take notice. Native Americans are learning quickly how to take advantage of their rights and opportunities and are seeking expert guidance in areas in which they feel less than competent.[23]

It seems appropriate here to give a brief look at the quantities of water and types of use which are in question regarding Rocky Mountain energy development. Of all the energy resources in the region, coal requires the greatest amount of water for exploitation and utilization. One coal slurry pipeline requires up to 18,000 acre feet of water a year.[24] Coal gasification techniques require between 900 and 6,500 acre feet per year, depending upon the method used and the extent of the operation.[25] Eventual conversion of coal and other energy resources to electricity would use a staggering 29,000 acre feet (for 3,000 megawatts-electric).[26] A combination of energy-water uses amounts to an immense withdrawal of water from the already overtaxed river systems of the West. This is not even considering the expansion of human consumption based on increased workforce population in areas where the resources are extracted and processed. Any attempt to

22. Stegner & Stegner, *supra* note 4, at 73.
23. *Id.* at 72.
24. ENERGY FROM THE WEST, *supra* note 1, at 51.
25. *Id.*
26. *Id.*

establish an upper limit estimate on the total number of acre feet needed for energy development in the nine-state Rocky Mountain region would almost certainly be futile, and in any event would probably render an obsolete figure because plans for such development are constantly increasing in scope. Whether it is a firm figure or not, the states of the region are becoming increasingly apprehensive about their water rights in the face of the two-pronged onslaught of increased energy needs and expanding Indian rights. This is particularly true when one realizes that Indian water use could in the future be tied to Indian energy resource exploitation in many cases. The western states feel at the questionable mercy of the combined forces of the federal government and the Indian nations. It is not overstatement to say that the states are near panic. River compacts among respective states mean little when an undetermined percentage of the watercourse flow belongs to the federal government through sovereign prerogative and to Indian peoples through either aboriginal or derivative "reserved" rights.[27]

This uncertainty as to water rights is having far-reaching effects in the Rocky Mountain region. The individual states are being petitioned by a growing number of both private and commercial interests for appropriative rights. However, the lack of information concerning the extent of the federally reserved rights makes it virtually impossible for state water engineers to determine how much water is available for new or expanded uses.[28] And the problem is not going to get any easier. Indian peoples are fast becoming weaned from their stepchild relationship to the parent federal government. While the government has been viewed for some time as being the champion and protector of Indian reserved water rights,[29] each passing day brings continued divergence between Indian interests and government interests. Governmental agency infighting aside, the federal government is becoming more assertive about the need for a national energy

27. Although some authorities consider reserved Indian water rights to have been reserved not by the federal government for the benefit of the Indians, but by the Indians themselves when they made treaties or agreements with the sovereign, the vast weight of opinion is that the federal government in fact did the reserving. *Compare* Veeder, *Indian Prior and Paramount Rights to the Use of Water*, 16 ROCKY MTN. MINERAL L. INST. 631, 645-49 (1971) *with* Ranquist, *supra* note 9, at 654.

28. Warner, *Federal Reserved Water Rights and Their Relationship to Appropriative Rights in the Western States*, 15 ROCKY MTN. MINERAL L. INST. 399, 413 (1969).

29. In Winters v. United States, 207 U.S. 564 (1908), the Supreme Court said emphatically, "The Government is asserting the rights of the Indians." *Id.* at 576.

policy. At the beginning of his presidency President Jimmy Carter called the energy situation "the moral equivalent of war." But the Indians are more concerned with their own tribal development, as perhaps they should be. In this sense, they share many of the same kinds of concerns as the state governments. However, the Indians hold a wild card the states do not have: a potentially limitless right to use their reservation water. And the watercourses subject to this Indian priority are not simply small feeder tributaries. The Missouri River, for example, runs *through* the Fort Peck Indian Reservation in eastern Montana. In Utah, which is entitled to 23 percent of the water allocated to the upper Colorado basin by the Colorado River Compact,[30] the Utes on the Uinta-Ouray Reservation are entitled to the beneficial use of the waters of the Green, White, and Duchesne rivers, all substantial tributaries of the Colorado.[31] Utah is no doubt wondering "23 percent of what?"

As the federal government and the Indians become more adversary in the relationships with each other (particularly in the areas of water and energy development), the states are being drawn into the crossfire with unsettling frequency. Consequently, increased pressure is being applied on the federal government by the states to do the one thing the states desperately need but have little power to do on a broad, inclusive scale: quantify Indian aboriginal and reserved water rights.

Quantification: Can It Be Anything But a "Nobody Wins" Situation?

In the scheme of Rocky Mountain water law, there are no real villains. True, the early state water law systems operated in almost total disregard of the dormant federal sovereign water rights,[32] but this is forgiveable on at least two counts: the states were trying to get fledgling economies stabilized, with a key element in this process being water; and the federal government gave little cause to indicate that it would assert its rights to any significant degree. It too was primarily concerned with western settlement and expansion. The states needed significant support, and water was one element which could supply it.

30. UTAH CODE ANN. § 73-13-10 (1953).
31. Stegner & Stegner, *supra* note 4, at 73.
32. Ranquist, *supra* note 9, at 646.

But, as is now plainly evident, this all changed drastically in 1908 with the inauguration of the *Winters* doctrine.[33] The states were quick to yell "foul!" after *Winters*, for they felt their water rights had been undercut almost retroactively by the "creation" of the federal reserved water rights. In the seventy-two-year scramble that has followed, the states have been forced to regroup. Rather than fighting over the issue of federal predominance, they have settled for pushing for quantification. Unfortunately for them, and actually for all the various concerns whether Indian, state, or federal, there appears to be even less certainty today as to the extent of federal reserved water rights, than there was in the early part of the century. This is due primarily to subsequent judicial attempts to refine the doctrine.[34]

The judicial solutions can be grouped under three general categories: the "open-ended" approach of *Winters*,[35] the "present uses" approach,[36] and the "irrigable acreage" approach.[37] The "open-ended" approach did nothing more than state that Indians had rights to sufficient water for beneficial uses. The *Winters* Court applied the principle to the specific facts of that case and found it meant sufficient water for irrigation purposes. But the key determinant remained "beneficial use" (*not* solely defined as irrigation). This approach gave little more than a chilling notice to the state and private users that Indian water rights were lurking somewhere in the beds of many of the western watercourses. The "present uses" approach actually quantifies the reserved water on the basis of the amount being utilized by the Indians at the time of the judicial proceeding.[38] There is no account taken as to future expansion of Indian needs. This approach is based on questionable grounds and obviously favors non-Indian use. It tends to freeze the amount of water for Indian appropriation at an artificially low level. It actually appears to be a method of bootstrapping the "actual diversion" requirement of

33. Winters v. United States, 207 U.S. 564 (1908).

34. An excellent and succinct summary of these judicial efforts is found in Comment, *Application of the Winters Doctrine: Quantification of the Madison Formation*, 21 S.D. L. REV. 144, 147 (1976). A brief restatement of this information is found in the text accompanying notes 35-37 *infra*.

35. *Id.* at 150-51.

36. *Id.* at 151.

37. *Id.* at 151-52.

38. *See* United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957); United States v. Walker River Irrigation Dist., 104 F.2d 334 (9th Cir. 1939).

western states' appropriative rights water law into the realm of Indian water law. Subsequent Supreme Court decisions have more or less invalidated this approach.[39] The final approach was delineated by the Supreme Court in *Arizona v. California*,[40] a landmark case in 1963, which based the amount of water reserved on the number of irrigable acres on the reservation. It must be emphasized here that the Supreme Court did not intend for this determination to be the absolute maximum of Indian water rights. The Court specifically limited its holding to the facts of the case, which revolved around agricultural endeavors of the Indian reservation.[41] The issue of future, nonagricultural uses was left open. This is presently where the issue stands: bits and pieces of the Indian paramount rights puzzle are in place, but an overall picture is far from completion.

There also have been legislative attempts to quantify Indian rights. Over fifty bills have been introduced in Congress calling for the abolition of or quantification of these reserved rights,[42] but none has yet been enacted. There is one piece of legislation which may allow the states to indirectly adjudicate Indian (and other federal) reserved rights, subject to Supreme Court review, in *state court*. It is the McCarran Amendment, which gives consent to join the United States as a party defendant in a state suit to adjudicate rights to the use of the water of a given river system.[43] Although there is no mention of "Indian" rights in the amendment, the Supreme Court has recently held, at least by implication, in *United States v. Akin*[44] that Indian water rights come within the purview of the statute. The practical effect of this construction is that states can now effectively decide matters relating to Indian water law. The long-range ramifications of the *Akins* holding have yet to be determined, but there has been strong criticism of the decision.[45] The dissent by Justice Stewart in the case poignantly stressed that the majority's holding seemed to fly in the face of long-established precedent:

39. *E.g.*, Arizona v. California, 373 U.S. 546 (1963).

40. *Id.*

41. *Id.* at 595, 596.

42. Comment, *Application of the Winters Doctrine: Quantification in the Madison Formation*, 21 S.D. L. REV. 144 (1976), *citing* Trelease, *Water Resources on the Public Lands: PLLRC'S Solution to the Reservation Doctrine*, 6 LAND & WATER L. REV. 89 (1970).

43. 66 Stat. 560, 43 U.S.C. § 666 (1970).

44. 96 S.Ct. 1236 (1976) (decided with companion case at 424 U.S. 800 (1976)).

45. Ranquist, *supra* note 9, at 698.

> It is not necessary to determine that there is no state court jurisdiction of these claims to support the proposition that a federal court is a more appropriate forum than a state court for determination of questions of life-and-death importance to Indians. This court has long recognized that "the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. Arizona St. Tax Comm'n*, 411 U.S. 164.[46]

In light of the *Akin* decision, it is quite possible that the application of the McCarran Amendment will, as a practical matter, present more problems than it solves. Each of the Rocky Mountain states will be able to speak independently on the issue of the water rights of Indians who reside on reservation lands within each state's respective borders. Lack of uniformity is virtually assured.

It may be a simplistic observation, but one revelation seems to sift through all the debate on the issue of quantification. While most factions consider it to be highly desirable, no one is quite sure if they will be satisfied with the outcome of quantification efforts. Certainty is fine but not when water rights are permanently lost through quantification. Few would suffer total loss of these rights but many might be given water rations that are substantially less than what their future projections had called for. And who is to be the maker of the rule: the judiciary, the Congress, or perhaps an administrative agency?

The Inevitable Showdown

Amid all the confusion of the Rocky Mountain water situation, one fact is brilliantly clear. The forces of the marketplace, as a function of the even more basic concerns of mere economic survival, will eventually force a showdown among the three major spheres of power. The Rocky Mountain states are each concerned, in varying degrees, with their own economic progress. A given state may prefer a substantial degree of environmental preservation as opposed to another which may be seeking "progress" at almost any price, environmental or otherwise, but both need some security as to the extent of their water resources if they are to accomplish either goal. The federal government, on the other hand, must consider its priorities on a national basis, while at the same time trying to strike a delicate balance among various

46. 96 S.Ct. 1236, 1251 (1976) (decided with companion case at 424 U.S. 800 (1976)).

concerns. Economic depression in one area of the country eventually affects all parts to some degree. And intimately connected with this concern is the hope of a national energy policy. That end will not easily be realized if the development of the Rocky Mountain energy pool is handicapped by investor and developer reticence caused by questions as to the availability of vital water. Finally, the Indians, who are just beginning to experience the transition from economic nonentity to a viable political and fiscal force, know or are quickly learning that their economic advancement is connected to the stability of the state and region within which their reservations lie. The American Indians might see themselves as having the most to lose by quantification, and to a limited extent this may be true. But while being the "dog in the manger" can save the straw, it does little to make friends—valuable friends in business, politics, and government. The Indians have a vested interest in this country. They are, after all, its true "first citizens."

The most reasonable prognosis for the situation would appear to be in some sort of federally constructed system for first establishing priorities, and second, for translating these findings into specific water allocations. A hybrid form of administrative action has been proposed as the most feasible method of approach.[47] Indians would understandably balk at the idea, since they have had enough running conflict with agencies, ranging from the BIA to HEW, to more than stifle their enthusiasm for one more administrative boondoggle. The states might not be too thrilled with the idea either. But the federal government really holds all the cards—paramount sovereign rights—and both the Indians and the states know it. Besides, the alternatives of judicial or congressional determination are really only on a different side of the same coin. There are no real optimum choices, only tolerable alternatives. The administrative approach to quantification could turn out to be quite beneficial, so long as it is constructed with sufficient care to allow procedures for taking all pertinent factors and concerns into account. The task will be gargantuan as well as thankless, but it is one which needs to be done.

47. Ranquist, *supra* note 9, at 710-23.

Summary

There can be little doubt that within the next decade the Rocky Mountain region will be the focal point of greatly increased interest primarily because of its vast energy reserves. Paralleling this interest will be the continued rise in the nation's energy needs. A combination of these elements will force a national initiative to exploit the natural energy resources of the region. Since large-scale energy development demands substantial quantities of water, the already overburdened water systems of the arid region will have to be frugally managed in order to support the increased demand. The present state of western water rights, particularly those held by the federal government and the various Indian tribes, is such that no real long range or substantial water-use planning can be contemplated. The uncertain quantity of sovereign and Indian rights simply discourages enthusiastic private investment in the future of the region's energy development. The ultimate loser in this situation is the country as a whole.

Indian tribes hold a unique place in the political system of this country. They are autonomous, yet dependent. Their rights are generally determined by federal law. This is certainly true of their water rights. Over seventy years of judicial interpretation have established Indian water rights to be by and large paramount to most other non-Indian rights. But while the character of the Indians' water rights is uncontested, the *quantity* of those rights is uncertain. It is this cloud of uncertainty which has moved western states and regional advocates to clamor for some form of quantification of Indian rights. The world energy situation has intensified these efforts. Congress, through passage of the McCarran Amendment, provided a means by which state courts could adjudicate the issue of federal reserved water rights. The United States Supreme Court has extended the scope of this amendment to include Indian water rights.[48] The wisdom of allowing this state determination of federal, and particularly Indian rights, is at best questionable, and at worst is an invitation for further confusion and inequity in the determination of who will have the right to use the nation's water.

48. Akin v. United States, 424 U.S. 800 (1976).