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ABORIGINAL WATER RIGHTS*

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> Clearly then to argue by example is neither like reasoning from part to whole, nor like reasoning from whole to part, but rather reasoning from part to part, when both particulars are subordinate to the same term and one of them is known. Aristotle, *Analytica Priora* 69a (McKeon ed., 1941).

I. INTRODUCTION

An aboriginal water right, one which was the first of its kind in a region, is based on the use of water from earliest days.[1] While "aboriginal" is a relative term, the existence of a water right which predates federal sovereignty is sufficient to render that right aboriginal vis-a-vis the United States. Philosophically, aboriginal rights rest on the familiar "first in time, first in right" dictum which governs prior appropriation water law. However, the early dates and uncertain quantities attendant to aboriginal rights pose a threat already familar to prior appropriation water users confronted by federal reserved rights. Yet aboriginal rights constitute a potentially greater threat to present water users because they may displace federal water rights as well as those held under state prior appropriation law.

Prior appropriation water law, as adopted by most western states, rests on four elements: (1) diversion and application, (2) of a fixed amount of water, (3) to a beneficial use, (4) on a given date. Non-use of an appropriative right for a long enough time will result in its loss.[2] Federal reserved rights are the antithesis of this system because they do not honor these fundamental requirements. The federal reserved rights doctrine states that whenever the United States sets aside land for a specific purpose (thereby withdrawing that land from the public domain), there is implied (if not expressed) a concomitant

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1. *Compare* WEBSTERS NEW COLLEGIATE DICTIONARY 3 (1975) *with* WEBSTERS NEW WORLD DICTIONARY 4 (College Ed. 1958).

2. 1 R. CLARK, WATERS AND WATER RIGHTS 293-99 (1967).

federal intent to reserve sufficient unappropriated water to fulfill the purposes for which the land was reserved.[3]

Federal reserved rights do not depend on the prior appropriation requirements listed above and, furthermore, may not be lost by nonuse. State appropriators with post-reservation priority dates risk having their water uses displaced by federal water requirements that can be satisfied under a long-existing but dormant reserved right.[4]

Similar to federal reserved rights, aboriginal rights exist without the confines of prior appropriation. Aboriginal rightholders naturally agree that the date each water right (of whatever type) was created establishes its seniority in the hierarchy. This, of course, puts aboriginal right holders at the top of the list above all federal and state water rights.

Given their potential impact, aboriginal water rights are the subject of surprisingly little law. Although aboriginal rights were judicially decreed in a 1935 Arizona case and exist as pueblo water rights in California and New Mexico, little has been heard about them until recently. Native American Indian tribes have begun to claim they have always held and now hold aboriginal water rights. Several factors have combined to bring these claims to court. Many Indian domains are situated on or near vast deposits of coal and uranium;[5] water is required to develop these energy sources.[6] Growing energy demands and the strategic incentive to increase reliance on domestic energy sources have renewed the impetus for a definitive resolution of the conflicting state, federal, and Indian claims to western water.

This article explores aboriginal water rights which exist today and speculates concerning the form these rights might assume in the future. New Mexico land grant law, the California pueblo rights doctrine, and the *Winters* doctrine of federally reserved Indian water rights all lend guidance to an examination of aboriginal rights. I will survey these doctrines and attempt to fit aboriginal rights into a historically coherent scheme consistent with existing water law. The strongest claim to aboriginal water rights belongs to the Indian

3. Cappaert v. United States, 426 U.S. 128, 138 (1976).

4. As a practical matter, the disruption to administration of water rights has not been as severe as the doctrinal clash between reserved and appropriative theories might suggest. Until a federal reserved right is exercised, the water necessary to satisfy that right may be diverted by appropriators under state law, even though some of them may have a priority date junior to the establishment of the reservation.

5. *See, e.g.*, Northern Great Plains Resource Program Draft Report at V-21, III-1 (September 1974); Northern Great Plains Resource Program, Declaration of Indian Rights to the Natural Resources in the Northern Great Plains States (June 1974).

6. Kneese & Brown, *Water Demands For Energy Development*, 8 NAT. RES. L. 309 (1975).

pueblos along the middle Rio Grande in New Mexico. The history of these pueblos and the pending litigation concerning Indian pueblo water rights furnish an excellent backdrop against which we can examine specific attributes aboriginal water rights might assume.

Widespread recognition of aboriginal water rights would raise a host of new issues. Do these rights extend to groundwater? How should an aboriginal right be quantified? To what purposes may water diverted under an aboriginal right be put? Do state courts have jurisdiction to determine the existence and scope of aboriginal rights? We will touch these issues and conclude with some ideas concerning how aboriginal rights might affect existing federal and state water rights.

Depending on their particular histories, claimants to aboriginal water rights fall into one of three loosely defined groups. When European explorers first ventured into North America they encountered nomadic Indians who were hunting and fishing on large territories, as well as settled agrarian tribes who farmed smaller domains. While the nomadic Indians used water principally for domestic purposes (although farming was not uncommon), the settled tribes diverted water through ditches for irrigation. Many of the nomadic tribes have been displaced onto reservations but many of the settled tribes remain on their original territory. The Spaniards called the former group *Indios Barbaros* and the latter, *Indios Naturales* or *Indios de los Pueblos.*[7] Spain and Mexico drew sharp distinctions between the legal status of these two groups of Indians, as did the United States until the early twentieth century.

The third group holding aboriginal rights derives from the European settlement of North America. Many Spanish explorers settled into civil pueblos, established religious missions, and set up military and presidial towns in the New World. These Spanish and Mexican pueblos trace their land and water rights to grants from the Spanish and Mexican sovereigns to the original settlers.[8]

By contrast, the Indians do not base their aboriginal claims on European grants. Indian rights stem from the tribes' original occupation and dominion over the land and water for centuries before the Europeans arrived. The Indian theory of aboriginal rights views the "grants" to the tribes as mere quitclaims which did nothing but confirm and officially recognize pre-existing Indian rights.

7. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 383 (1971).

8. For a vivid description of the documents and ceremony of such grants, *see, e.g.*, Bond v. Unknown Heirs of Barela, 16 N.M. 660, 120 P. 707 (1911); Catron v. Laughlin, 11 N.M. 604, 72 P. 26 (1903).

The distinctions between these aborigional rights theories are important to bear in mind. Although some acts of Spain, Mexico, and the United States applied to all three groups (nomadic Indians, pueblo Indians, and pueblo Europeans), the discrete legal effects on a particular group depend on its individual history. The common denominator among all three groups is that each had some form of vested land and water rights before the United States asserted sovereignty over their territories. With respect to the United States then, all of these rights (whatever their nature and scope) are technically aboriginal.

Before delving into legal theories, we will examine an aboriginal water right claim. In 1974, the Northern Cheyenne Tribal Council made the following resolution:

> *[The Northern Cheyenne Tribe of Indians of Montana] does hereby claim* and assert the right of said Indians to, and does hereby notify all persons, firms, corporations, states, and the United States, and all agencies and political subdivisions of said states and of the United States *that the Northern Cheyenne Tribe is entitled and now has and at all times had, the first, paramount and aboriginal right to the use of all waters* herein referred to including all waters flowing or located in streams which have their source of water supply upon said Indian reservation or which have their source of water supply outside the boundaries of said Indian reservation, or both, including all sub-terranean waters herein referred to, and to all waters that may now or in the future be artificially augmented or created by weather modification, by desalination [*sic*] of present usable water supplies, by production of water supplies as a by-product of geothermal power development, or any other scientific, or other type or means within the Northern Cheyenne Indian Reservation, State of Montana, *and hereby declares and claims the aboriginal right to the appropriation, use and storage of all of said waters* for the purpose of the use of said waters including, but not limited to domestic use, irrigation, manufacturing, development of natural resources and development of recreation projects and other facilities; . . .[9]

This resolution contains several features of particular significance. The tribe claims the right to waters on and under its reservation, not its original lands. Thus, the Cheyenne have implicitly limited their water claims to their reservation. On the other hand, the tribe claims *all* waters connected with the reservation, thereby implicitly rejecting the *Winters* doctrine standard which has heretofore quantified most Indian water rights. (This doctrine is discussed in Section III, *infra.*)

9. Northern Cheyenne Tribal Council Resolution No. 179(74) (March 25, 1974) (emphasis added).

The groundwater claim may find some support in recent cases suggesting that federal reserved rights extend to groundwater as well as surface streams.[10] What the rights to developed water are is anybody's guess, and the legal issues surrounding water rights created by weather modification remain unresolved.[11]

As advanced by the Indians, aboriginal rights are difficult to fit into western water law; they would displace state and federal water rights and give the Indians additional power as water wholesalers in the West. As recognized thus far by the courts, however, aboriginal rights have a more subdued character than the Indians ascribe to them.

II. PUEBLO WATER RIGHTS

Pueblo water rights in some form exist in California, Arizona, and New Mexico, but each state's treatment of the rights has been unique. California law concerning Spanish and Mexican pueblo water rights is by far the most developed. The water rights of many cities, including Los Angeles and San Diego, are determined by California law which, like the *Winters* doctrine, is judge-made law based on historical implications and is criticized accordingly. An Arizona federal court decreed an immemorial priority date for Indian uses of Gila River water in 1935, but the circumstances of the case and a current question concerning whether its holding rests on state or federal law vitiates its precedential value. New Mexico seems to have adopted California's pueblo rights doctrine *in toto,* but the viability and wisdom of the lone New Mexico case which did so has been questioned since the day it was decided.

A. *California Pueblo Rights*

Under American law, Spanish and Mexican pueblos in California attained priority over non-pueblo right holders when the California Supreme Court decided *Feliz v. City of Los Angeles.*[12] In *Feliz,* the successors in interest to appropriators who had respected and acknowledged a superior water right claimed for more than a century by the pueblo (later City) of Los Angeles were held unable to challenge the city's paramount priority after being silent for so long. Long before American sovereignty over California, Los Angeles had

10. While Cappaert v. United States, 426 U.S. 128 (1976) suggested that federal reserved rights extend to groundwater, United States v. Fallbrook, Civil No. 1247 (S.D. Cal, April 6, 1966, *as amended,* June 27, 1968), held that they do for the Pechanga Indian Reservation.

11. Fischer, *Weather Modification and the Right of Capture,* 8 NAT. RES. L. 639 (1975).

12. 58 Cal. 73 (1881).

claimed, and other water users customarily had recognized, that the city held a first priority water right. *Feliz* simply formalized the state of affairs which had existed since the first European settlement of the region.

Feliz has been criticized because it fails to cite any Mexican law expressly giving priority to the pueblos,[13] but a likely explanation for this lack of reliance on precedent may be that the sparse development in the region at the time the grants were made obviated any need expressly to set priorities for rights. In eighteenth century California there was plenty of water for everybody. Mexican law did give non-pueblo riparian landowners a right to use water on the condition that they did not interfere with pueblo uses.[14] The Mexican government obviously wanted to insure that its religious and military outposts would not go dry.

Fourteen years after *Feliz*, the California Supreme Court affirmed the case's rationale and holding.[15] Later cases have given the court the opportunity to reaffirm the doctrine and clarify its contours. The needs of the city's inhabitants define the quantity of these rights and the doctrine "thus insures a water supply for an expanding city."[16] Pueblo water can be put to any beneficial use within the city limits. The right extends to groundwater as well as surface streams and the city's use takes precedence over all others. Pueblo rights cannot be lost by forfeiture, abandonment, prescription, or estoppel.[17] The United States Supreme Court has refused to review California pueblo rights because they rest on state law.[18]

California pueblo water rights have evolved to provide pueblos and their successor cities with first priority, expanding water rights which are immune to the prior appropriation penalty of loss for nonuse. While the original pueblo grants from Spain and Mexico did not expressly give priority to pueblo water rights, all non-pueblo rights were granted subject to the condition that pueblo uses would not be impaired. The pueblo right's superiority, customarily recognized by all under Mexican rule, is one aspect of previous law which the California Supreme Court elected not to alter.

California also has chosen to leave undisturbed the nonforfeit-

13. Hutchins, *Puebo Water Rights in the West,* 38 TEX. L. REV. 748 (1960).

14. Lux v. Haggin, 69 Cal. 255, 10 P. 674, 715-16 (1886).

15. Vernon Irr. Co. v. City of Los Angeles, 106 Cal. 237, 39 P. 762 (1895).

16. City of Los Angeles v. City of Glendale, 23 Cal.2d 68, 142 P.2d 289, 293 (1943), *citing* City of Los Angeles v. Pomeroy, 124 Cal. 597, 649, 57 P. 585 (1899).

17. For a more thorough summary, see Hutchins, *supra* note 13, at 751-52.

18. *See, e.g.,* City of Los Angeles v. Los Angeles Farming & Milling Co., 152 Cal. 645, 93 P. 869 (1908), *app. dism'd,* 217 U.S. 217 (1910); Devine v. Los Angeles, 202 U.S. 313 (1906) (dismissing appeal for lack of jurisdiction).

ability and expanding aspects of pueblo water rights under Mexican law, seemingly because all non-pueblo water users have had actual or constructive notice of the nature of pueblo rights since their inception.[19] The California doctrine reaches essentially the same result as a constitutional or statutory provision which gives preference to municipal or domestic uses.[20]

B. *The Arizona Globe Equity Decree*

In 1935, the United States District Court for the District of Arizona entered an unpublished decree which incorporated a settlement between the United States and many Gila River valley water users.[21] Although puzzling in some respects, the Globe Equity Decree, as it has come to be called, recognized an aboriginal water right by awarding an "immemorial date of priority" to rights for the Pima Indians and other tribes of the Gila River Indian Reservation. While it would be helpful to an aboriginal rights inquiry to see the findings of fact and conclusions of law supporting such a decision to award an immemorial priority date, none exist because the decree is not the product of trial; it was written to effect a settlement reached by the parties.[22]

One curiosity of the Globe Equity Decree is that the Apache and other Indians of the San Carlos Indian Reservation were accorded rights with an 1846 priority date,[23] in contrast with the immemorial date of the Pima tribes.[24] Although the decree contains no explanation for this distinction, it explicitly states that the United States owns these Indian water rights. The decree speaks twice in terms of "[t]hose [water rights] owned by the United States for and on account of the Indians of the Gila River and San Carlos Indian Reservations."[25] Thus the federal government, not the tribe, owns even the immemorial right to use water in this case. The basis for this result is uncertain.

A final point is that the decree apportions successive increments of Gila River water to both Indian and non-Indian rights established by the decree. Even though the Gila River Reservation has an immemorial priority date, it does not enjoy absolute seniority in the actual

19. Feliz v. City of Los Angeles, 58 Cal. 73 (1881).

20. *See, e.g.*, COLO. CONST. art. XVI, §6; N.D. CENT. CODE §61-04-06.1 (Supp. 1979).

21. United States v. Gila Valley Irrigation Dist., Globe Equity No. 59 (D. Ariz., June 29, 1935) (hereafter "decree" or "Globe Equity Decree").

22. *Id.* at 6.

23. *Id.* at 86.

24. *Id.*

25. *Id.* at 6, 86.

allocation of water. For example, the first 300 c.f.s. of flow is divided: 60.6 percent to satisfy Indian rights and the remainder to non-Indian rights. Additional increments are allocated similarly, but the percentages vary.[26] This arrangement requires the Indians to share shortages of water with other users who hold later priority dates. This riparian-like result vitiates any real-world advantage which might be ascribed to the immemorial priority date in this case.

It is unfortunate for the development of aboriginal rights that the Globe Equity Decree is the product of negotiation rather than litigation. The decree is of little help in determining the factual foundation required to support a water right of immemorial priority. The disparity in priority dates accorded the two Gila reservations is unexplained, as is the allocation of water between Indian and non-Indian lands; neither result is attractive precedent for tribes evaluating the aboriginal theory. Federal ownership of even the immemorial right threatens the tribes with state court adjudication of aboriginal rights,[27] and litigation is pending to determine whether the Globe Equity Decree rests on state or federal law.[28]

C. *New Mexico*

New Mexico's rich history provides fertile ground for the assertion of aboriginal rights. Before its exploration and conquest by the Spanish military, New Mexico was inhabited by both *Indios Barbaros* and *Indios de los Pueblos.* The *Indios Barbaros,* some of whom hold *Winters* doctrine reserved rights, now claim that those rights are but a federal recognition of their aboriginal rights.[29] The precise scope of the water rights of some of the *Indios de los Pueblos* is being litigated in the United States District Court for the District of New Mexico.[30]

Further complicating the situation is the New Mexico Supreme Court's 1959 adoption of the entire California pueblo rights doctrine, in a case which has never been cited but has been frequently and vociferously criticized since it was handed down. Finally, some New Mexico land grant law may be helpful for thinking about aboriginal water rights.

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26. *Id.* at 92-93.

27. Although the fact that the decree was negotiated rather than litigated undoubtedly detracts from its precedential value.

28. United States v. Smith, No. 78-1869 (9th Cir., filed April 19, 1978).

29. Indeed, a literal reading of Winters v. United States, 207 U.S. 564 (1908), the doctrine's namesake, suggests that Indian reserved and aboriginal water rights often may be the same.

30. New Mexico v. Aamodt, Civil No. 6639 (D.N.M. filed April 20, 1966). This case is on remand from the Court of Appeals for the Tenth Circuit. *See* note 42, *infra.*

1. The Cartwright Decision

In 1914 and again in 1938, the New Mexico Supreme Court rejected claims of the existence of pueblo water rights for Spanish and Mexican pueblos. In the first case, the court found that no pueblo existed and consequently there could be no pueblo water right.[31] In the second case, the court acknowledged the existence of the pueblos claiming rights, but found that the lack of a grant from the King of Spain to the pueblos was fatal to their claim for pueblo water rights.[32]

In 1950, Cartwright and other private water users along the Gallinas River, a tributary to the Pecos River, brought suit against the Public Service Company of New Mexico (PNM), seeking to enjoin diversions made by the company on behalf of the Town of Las Vegas, which had contracted with PNM to supply water for the town. The town intervened, claiming that as the successor to a community land grant made by the Mexican government in 1835, it held pueblo water rights under which PNM, pursuant to a contract with the town, was lawfully diverting water for municipal use. In upholding the diversions by PNM in *Cartwright v. Public Service Co.*,[33] the New Mexico Supreme Court adopted the California pueblo water rights doctrine and stated that the reasons which had prompted the California Supreme Court to uphold pueblo water rights applied with as much force in New Mexico as in California.

The *Cartwright* case has been criticized on the basis that New Mexico was not compelled to adopt California state law[34] and should not have done so. The New Mexico court had available to it more accurate and complete translations of Spanish and Mexican laws concerning pueblo water rights than did the California Supreme Court when it first embraced the pueblo water rights doctrine a century ago. Critics argue that the New Mexico Supreme Court should have made its own examination of prior law and based its ruling accordingly, rather than follow relatively uninformed rulings of the California Supreme Court.[35]

31. State *ex rel.* Community Ditches v. Tularosa Community Ditch, 19 N.M. 352, 143 P. 207 (1914).

32. New Mexico Products Co. v. New Mexico Power Co., 42 N.M. 311, 315, 77 P.2d 634, 639 (1938).

33. 66 N.M. 64, 343 P.2d 654, 668 (1959).

34. If the California Supreme Court had articulated the doctrine as a product of federal law, the United States Supreme Court would have had jurisdiction to review the California pueblo water rights cases. The New Mexico Supreme Court, of course, would have had no choice but to follow these cases or distinguish them.

35. Cartwright v. Public Service Co., 66 N.M. at 87-105, 343 P.2d at 670-82 (dissenting opinion); Hutchins, *supra* note 13, at 759-61.

Cartwright also has been criticized because the historical, factual bases of notice and estoppel on which the early California cases relied were not present in the New Mexico case. California water users have been on notice since the times of the early settlements that the pueblos claimed paramount water rights. The *Cartwright* plaintiffs never knew that the Town of Las Vegas had a superior right to the Gallinas River; these appropriators labored and used water with the idea that the town was but another diverter subject to prior appropriation. Little could they have realized, prior to *Cartwright,* that the town would be endowed with expanding, preferred rights under the law of another state.

Cartwright's viability today poses an interesting question. The New Mexico Supreme Court has not cited *Cartwright* since it decided the case. The reasoning of two dissenting justices in the case might persuade the court to limit the case to its facts or even to overrule it if the opportunity arose.

2. The Rio Grande Pueblos

The most clearcut argument for aboriginal water rights in New Mexico belongs to the Indian pueblos on the middle Rio Grande. By the time the Spanish *conquistadores* first ventured up the Rio Grande valley, the Indian pueblos in that valley had existed for centuries as independent communities with their own governments and irrigation systems.[36] Spanish law treated the pueblo Indians as wards of the Crown but recognized that the Indian pueblos held "prior water rights to all streams, rivers, and other waters which crossed or bordered their lands."[37]

Non-Indian encroachment onto pueblo lands created a problem for the Spanish, as it would later for Mexico and the United States. Although Mexico granted full citizenship to the pueblo Indians (in contrast with its failure to accord such status to the *Indios Barbaros,* the nomadic tribes), the pueblo Indians remained wards of Mexico and enjoyed greater protection of their lands and legal rights than did other Indians.[38]

When the United States accepted the surrender of Mexican sovereignty over most of New Mexico by the Treaty of Guadalupe Hidalgo in 1848,[39] it agreed to recognize and preserve the liberties and prop-

36. F. COHEN, *supra* note 7 at 383-84.

37. H. BRAYER, PUEBLO INDIAN LAND GRANTS OF THE RIO ABAJO, NEW MEXICO (1939).

38. F. Cohen, *supra* note 7 at 383-84.

39. Treaty of Guadalupe Hidalgo, February 2, 1848, United States-Mexico, 9 Stat. 922 (1948).

erty rights granted to inhabitants of the region by Mexico and Spain.[40] In fulfillment of this obligation, Congress in 1858 confirmed the land claims of almost all the middle Rio Grande pueblos.[41] Thus, whatever land and water rights the Indian pueblos held during Spanish and Mexican rule, they retained under United States sovereignty by virtue of the 1848 treaty and the 1858 confirmation. Precise determination of the water rights of these pueblos may require a detailed analysis of Spanish and Mexican laws concerning the pueblo water rights. That such an inquiry may be appropriate has been suggested by the United States Court of Appeals for the Tenth Circuit.[42]

Unfortunately, the situation is very complex and more than an analysis of prior law will be required to determine the pueblos' rights, due to events which have occurred since American sovereignty was established over the pueblos in 1848. Like its predecessor sovereigns, the United States was unable to prevent white settlers from moving onto pueblo lands. For nearly four decades, the federal government considered the pueblos beyond the reach of most federal laws extending special protections to Indians, including those laws requiring government approval of Indian land sales.[43] During that time many pueblos and individual Indians sold, without government supervision, lands to whites who bought, settled, and farmed in good faith. Other settlers simply trespassed on pueblo lands or extended their domain beyond that which they held legally.

While the laws which fostered white settlement on pueblo lands were easily changed, the effects of those laws were not. When the constitutionality of federal control over the pueblos was upheld in 1913,[44] those who had settled on pueblo lands became concerned about the status of their land titles. A decade of congressional infighting produced legislation designed to sort out the conflicting land claims and compensate the Indians for any land and water rights which a Pueblo Lands Board, established by the Pueblo Lands Act of 1924,[45] unanimously voted to vest in non-Indians. Nine years later,

40. *Id.* arts. VIII and IX.

41. 11 Stat. 374 (ch. V) (1858). Santa Ana Pueblo was confirmed in 1869, 15 Stat. 438 (ch. XXVI) (1869), and Zuni Pueblo in 1931, 46 Stat. 1509 (ch. 438) (1931).

42. New Mexico v. Aamodt, 537 F.2d 1102, 1112 (10th Cir. 1976), *cert. denied,* 429 U.S. 1121 (1977).

43. United States v. Joseph, 94 U.S. 614 (1876), held that the Indian Intercourse Act of 1834, ch. CLXI, 4 Stat. 729 (1834) did not apply to the pueblos. An 1851 Appropriation Act, ch. XIV, 9 Stat. 587, had extended all protective federal legislation "over the Indian Tribes in the Territories of New Mexico and Utah," but *Joseph* was based on the Court's view that the pueblo Indians were not "Indian Tribes."

44. United States v. Sandoval, 231 U.S. 28 (1913).

45. 43 Stat. 636 (ch. 331) (1924).

federal legislation appropriated additional funds for the land board's work and detailed procedures to dispose of unclaimed lands.[46] Section 9 of that act provided:

> *Nothing* herein contained *shall* in any manner be construed to *deprive* any of *the Pueblo Indians of a prior right to the use of water* from streams running through or bordering on their respective pueblos for domestic, stock-water, and irrigation purposes for the lands remaining in Indian ownership, and such water rights shall not be subject to loss by nonuse or abandonment thereof as long as title to said lands shall remain in the Indians.[47]

In 1966, the state of New Mexico brought a water adjudication suit in the United States District Court for the District of New Mexico to determine the rights to use waters of the Nambe-Pojoaque River system, a tributary to the Rio Grande, which drains the land of four Indian pueblos north of Santa Fe, New Mexico.[48] These pueblos, along with the United States in its proprietary capacity[49] and as guardian and trustee for the pueblos, became parties along with about 1,000 private individuals.

In a letter to counsel, the court held that the pueblos were not entitled to be represented by their own lawyers because tribal interests could be adequately represented by the United States Attorney, the counsel for their guardian and trustee, the United States. The court further ruled that the pueblos' use of water was governed by New Mexico's prior appropriation water law.

On an interlocutory appeal, the United States Court of Appeals for the Tenth Circuit reversed on both issues and remanded the case to the district court for further proceedings, which still are in progress.[50] Both rulings are significant for aboriginal rights. As discussed below, aboriginal rights of paramount priority and large quantity could upset even federal water rights; the court's holding that the pueblos may be represented by independent counsel[51] leaves the pueblos free to argue the full measure of aboriginal theories unencumbered by the ethical dilemmas which could constrain a United States attorney pressing for recognition of aboriginal rights.

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46. 48 Stat. 108 (ch. 45) (1933).

47. *Id.* at 111 (emphasis added).

48. New Mexico v. Aamodt, Civil No. 6639 (D.N.M., filed April 20, 1966).

49. Although the United States seeks a determination of a federal reserved right for national forest lands lying within the Nambe-Pojoaque River System, its presence in *Aamodt* is primarily for the purpose of representing the interests of the pueblos.

50. New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), *cert. denied* 429 U.S. 1121 (1977).

51. *Id.* at 1107.

The Tenth Circuit also held that "[t]he water rights of the Pueblos are not subject to the laws of New Mexico because the United States has never surrendered its jurisdiction and control."[52]

III. ABORIGINAL WATER RIGHTS AND THE WINTERS DOCTRINE

Indians have the most colorable claims to aboriginal water rights. A distinct body of federal judicial law, which has come to be called the *Winters* doctrine, establishes Indian water rights on Indian reservations. For most reservations, the quantity of water needed to irrigate all the irrigable land within that reservation defines the amount of water to which the Indians are entitled.[53]

The *Winters* doctrine began when the United States sued several non-Indian settlers living on former Indian lands along the Milk River in Montana. By diverting large quantities of water, upstream settlers left insufficient water in the river to satisfy the needs of an Indian irrigation project constructed downstream by the United States on the Fort Belknap Reservation. The government's suit, in seeking to enjoin these non-Indian diversions, argued the agreement establishing the Indian reservation implicitly had reserved irrigation water for the Indians.

Both the United States Circuit Court of Appeals for the Ninth Circuit[54] and the United States Supreme Court in *Winters v. United States*[55] agreed with the government and rejected the settlers' claims that, as lawful diverters under Montana law, they were entitled to protection against later diversions, including the federal project constructed for the Indians. The Supreme Court reasoned that, as of the date of the reservation (which predated the settlers' appropriations under Montana law), water had been reserved for the Indian irrigation project.[56]

Since *Winters*, later Supreme Court cases have sparked a debate

52. *Id.* at 1112.

53. Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 B.Y.U. L. REV. 639, 659-62 (1975). To be exact, the amount of water to which a reservation is entitled depends on the purposes for which the reservation was created. While the agriculturally based standard is applied most frequently, courts have not hesitated to use other measures. *See, e.g.*, Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1973), *cert. denied*, 420 U.S. 962 (1975) (fishing). In United States v. Anderson, No. 3643 (E.D. Wash. July 23, 1979), the court decreed 20 c.f.s. as the minimum flow necessary to maintain the water temperature of Chamokane Creek at or below 68° F. and thus preserve the habitat of the native trout historically fished by the Spokane Indian Tribe. The court then commented that "[t]his amount of water will also suffice to preserve the creek's esthetic (sic) and recreational qualities." Slip op. at 11.

54. Winters v. United States, 143 F. 740, *aff'd*, 148 F. 684 (9th Cir. 1906).

55. 207 U.S. 564 (1908).

56. *Id.* at 577.

concerning who reserved the water—the Indians or the United States. This controversy is an important one to consider with regard to aboriginal water rights. Aboriginal Indian dominion over the land and water is an unspoken assumption underlying the theory that the Indians reserved land and water for themselves and ceded the remainder to the United States. On the other hand, if the federal government created the reservation for the Indians, the argument for aboriginal water rights will at best find no help in the *Winters* doctrine.

Of the reserved rights cases decided by the Supreme Court, two[57] lead to the inescapable conclusion that the United States created the reservations. In *Cappaert v. United States,* the Court found that "[b]y the Proclamation of January 17, 1952, President Truman withdrew from the public domain a 40-acre tract of land surrounding Devil's Hole."[58] Similarly, in *Arizona v. California,* the Court approved the special master's recommendation quantifying Indian water rights for five tribal reservations created by the United States along the lower Colorado River.[59]

A careful reading of *Winters* itself leads to the unsatisfying conclusion that the United States and the Indians together agreed to reserve the water. There the Court said, "The case, as we view it, turns on the agreement of May 1888, resulting in the creation of the Fort Belknap Reservation."[60] The Court had no doubts concerning the federal power to reserve the waters: "The power of the government to reserve the waters and exempt them from appropriation under state laws is not denied, and could not be. . . . That the government did reserve them we have decided."[61]

In answer to the argument that the Indians' right "was the bare right of the use and occupation [of the reservation] at the will and sufferance of the Government of the United States,"[62] the circuit court had declared that the trial court was correct in holding that, "when the Indians made the treaty *granting rights to the United States,* they reserved the right to use the waters of the Milk River."[63] Affirming the lower courts, the United States Supreme Court pointed out the "reservation was part of a very much larger tract which the Indians had the right to occupy and use"[64] and that

57. Arizona v. California, 373 U.S. 546 (1963), *decree,* 376 U.S. 340 (1964); Cappaert v. United States, 426 U.S. 128 (1976).
58. 426 U.S. at 131.
59. 373 U.S. at 600-01.
60. Winters v. United States, 207 U.S. at 575.
61. *Id.* at 577.
62. *Id.* at 567.
63. Winters v. United States, 143 F. at 749 (emphasis added).
64. Winters v. United States, 207 U.S. at 576.

the "Indians had command of the lands and the waters."[65] The Court emphatically rejected arguments that "the means of irrigation were deliberately given up by the Indians" or that "the Indians . . . made no reservation of the waters."[66]

Winters suggests that while both the Indians and the United States reserved water from the Milk River, either standing alone had the power to do so. The Indians' power to reserve necessarily implies the existence of aboriginal rights. While tribes relocated by the federal government onto new reservations created for them from the public domain[67] appear to have no claim to aboriginal rights, those tribes with reservations located in whole or in part on their ancestral lands may find support in *Winters* for their claims to aboriginal rights.[68]

Two factors require an assessment of how aboriginal water rights might coexist with (or within) *Winters.* First, many tribes entitled to *Winters* doctrine rights claim aboriginal rights. In fact, many tribes now argue that *Winters* and its progeny constitute no more than federal judicial cognizance of Indian aboriginal water rights under another name.[69] Second, some writers have attempted to shape the aboriginal rights of the Rio Grande pueblos to *Winters* contours for no more apparent reason than that the holders of both types of rights are Indians.[70] Indeed, the pueblos concede much of the rationale behind *Winters,* but not all of it, seems to apply to them. Comparison of *Winters* rights, which are known, with aboriginal rights, which remain largely unknown, might illuminate by analogy the rights claimed by the pueblos.[71]

Three major inquiries govern the applicability and scope of the *Winters* doctrine. The first concerns the establishment of a reservation, or whether the United States has set aside land for a specific purpose; the second, when the reservation was made; and third, how much water was reserved.

Where specific reservations have been carved out for Indians by treaty or act of Congress, answering the first question is simple enough, but for the Rio Grande pueblos a superficial inquiry will not suffice. The pueblos' lands never have been part of the federal public

65. *Id.*

66. *Id.*

67. Such as the five tribes whose rights were established by Arizona v. California, 376 U.S. 340 (1964).

68. Indian reservations located in part on former ancestral lands and in part on lands reserved from the federal public domain may hold an aboriginal water right appurtenant to their ancestral lands while they enjoy a federally reserved right for the remainder of their reservation.

69. *See* New Mexico v. Aamodt, 537 F.2d at 1109.

70. *See, e.g.,* Nelson, *The Winters Doctrine,* University of Arizona Office of Arid Land Studies 40 (1977).

71. *Cf.* E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1974).

domain; the 1858 confirmation issued by the United States is a quitclaim deed which officially recognizes pre-existing Indian title. This point often creates difficulty because the same 1858 act also has been held to constitute an original conveyance of land from the United States to certain non-Indian community land grants in New Mexico.[72]

New Mexico community land grants, much like the pueblos of California, were settled by European colonials from the sixteenth to the nineteenth centuries. To encourage settlement in the New World, the sovereign granted title to specific lands to each settler in fee simple. In addition, the Crown often designated "common lands" to which it retained title, but it granted the settlers a collective, permissive use of the areas for pastureland and wood gathering.

As between the land grants and the pueblos, the 1858 patent had different effects. To the common lands of community land grants, the patent was not a quitclaim because the Spanish and Mexican sovereigns had not granted title to the lands to the inhabitants. Title remained in the sovereign and passed to the United States by the Treaty of Guadalupe Hidalgo.[73] As to those common lands, then, the 1858 federal act conveyed title to, rather than confirmed title in, the grantees.[74] To the Indian pueblos and the holders of individual grants however, the patent was simply congressional consummation of a duty which arose as a result of Sections VIII and IX of the Treaty of Guadalupe Hidalgo. It officially recognized vested property rights which had been respected by the governments of Spain and Mexico.

With respect to the private land grant claimants, the United States Supreme Court has pointed out:

> The United States, in dealing with parties claiming under Mexican grants, lands within the territory ceded by Mexico, never made pretense that it was the owner of them. *When,* therefore, guided by the action of the tribunals established to pass title upon the validity of these alleged grants, *the Government issued a patent, it was in the nature of a quitclaim–an admission that the rightful ownership had never been in the United States, but had passed at the time of cession to the claimant,* or to those under whom he claimed. . . . It is perhaps more accurate to say that the action of the United States is a confirmation rather than a quitclaim.[75]

72. Bond v. Unknown Heirs of Barela, 16 N.M. 660, 120 P. 707 (1911).

73. *Supra* note 39.

74. Bond v. Unknown Heirs of Barela, 16 N.M. 660, 120 P. 707 (1911). For these grantees, the patent is a time barrier behind which courts have refused to look to ascertain the nature of any property interest the grantees may have held under prior sovereigns. *Id.*

75. Los Angeles Farming & Milling Co. v. City of Los Angeles, 217 U.S. 217, 227 (1910) (citations omitted) (emphasis added).

Similarly with respect to the Rio Grande pueblos, the United States Court of Appeals for the Tenth Circuit found that in granting the 1858 patent, "the United States gave the pueblos a quitclaim deed to lands which were recognized by the Treaty of Guadalupe Hidalgo to be in their ownership."[76]

Such a confirmation never has been held to be a reservation for *Winters* purposes, but as one authority has pointed out, "[w]hat constitutes an Indian reservation is a question of fact."[77] Another commentator has suggested that pueblos might be considered reservations (and thereby brought directly within *Winters*) by extending the definition of a reservation to include areas subject to federal guardianship and control, even if the federal government never reserved those areas from the federal public domain.[78] Such an extension is quite possible. The United States Supreme Court never has embraced a restrictive view of how federal reservations can be created and the proposed extension would not run counter to the Court's rulings in this area.

The second major inquiry *Winters* asks is, when was the reservation created? This issue is important because dating federal reserved rights is the only way to fit them into a state law scheme based on prior appropriation. Appropriators whose rights vested after the reservation date are subject to the reserved right being fulfilled first; appropriators with rights senior to the reservation are not. With most reservations, the answer to this inquiry also is relatively easy—the date of the federal action establishing the reservation.

For the Rio Grande pueblos, however, dating the reservation is another difficult yet important inquiry. Theoretically, possible dates range from 1933 (the date of the last congressional land act authorizing additional compensation for pueblo lands vested in non-Indians)[79] back to an immemorial date that reflects continuous Indian occupancy of their lands for roughly nine centuries. A 1933 date on the Rio Grande would leave the pueblos little, if any, water. An immemorial date would insure a supply adequate to meet virtually any quantification test. Naturally, and to make the inquiry more difficult, many other dates between these suggest themselves as well.

Deciding which date to use for the Rio Grande pueblos requires an

76. New Mexico v. Aamodt, 537 F.2d at 1113. Thus for these Indians, the 1858 act was not a source but a confirmation of rights, and the inquiry into earlier history and law, a prohibited inquiry for land grants, is not only allowed but necessary in order to determine the full scope of the rights at issue here.

77. Ranquist, *supra* note 53 at 663.

78. Comment, *Pueblo Indian Water Rights: Who Will Get The Water? New Mexico v. Aamodt*, 18 NAT. RES. J. 639, 656 (1978).

79. *Supra* note 46.

analysis of the purpose of dating a federal reservation. Notice–the concept used by the California Supreme Court to establish and expand pueblo water rights in that state–is the basis underlying the date of federal reservations. In recognizing the pueblo rights doctrine, the California Supreme Court relied heavily on the fact that non-pueblo water users had always known of and acknowledged the pueblos' paramount rights. Similarly, state appropriators in watersheds encompassing federal reservations use water with notice that their uses may ultimately be curtailed by expanding federal needs on established reservations.

Every non-Indian who has appropriated waters from the Rio Grande has to have known of the pueblos' existence. Certainly Henry Winters, the famous appropriator from Montana, had no idea that the rights of the Fort Belknap Indian Reservation would eventually curtail his Montana-granted rights. Yet the existence of the reservation in 1888 was enough to give the Indians priority over Winters' 1889 diversion date, even though the Indians began using water after Mr. Winters did.[80] Similarly, the pueblos' presence for centuries prior to European immigration into the Southwest and up the Rio Grande valley argues for the application of an immemorial right.

Of the reserved rights cases, *Winters* itself is the most applicable in answering the third inquiry; how to quantify the water rights of the Rio Grande pueblos. The applicability of the irrigable acres standard to the pueblos depends on the *raison d'etre* for the standard. In *Winters,* the United States and the Indians agreed the Indians would farm their new reservation. This transition to an agrarian economy and the Indians' location on the high plains of Montana required that the lands be irrigated in order to produce crops. Both the circuit court and the Supreme Court recognized this change was one contemplated as part of the bargain made by the Indians and the United States.[81] Thus, each court's adoption of an agricultural standard to quantify the water right was naturally *apropos* to the situation before it.

In later instances, the Supreme Court has elaborated that a *Winters* right is usually quantified by measuring all of the irrigable acreage on a reservation.[82] The point here is that the Court did not limit the quantity of water to either the scope of agricultural production originally intended or that historically used by the Indians; their rights

80. Winters v. United States, 143 F. 740, *aff'd,* 148 F. 684 (6th Cir. 1906) and 207 U.S. 564 (1908).

81. *Id.,* 143 F. at 745; 207 U.S. at 576.

82. Arizona v. California, 373 U.S. at 600-01. *But see* note 53, *supra.*

encompassed water sufficient for all the irrigable lands of the reservation. Similarly, pueblo water rights in California were defined with an eye to the future.[83] Being somewhat like both *Winters* doctrine Indian tribes and California pueblos, the Rio Grande pueblos might derive some support from each.

The economic basis of the pueblos always has been agriculture—their irrigation systems and farming methods had been well-established for centuries when Spaniards first happened upon the region.[84] Thus, irrigable acreage is an appropriate standard on which to base pueblo water rights quantification, but not for the reasons enunciated in *Winters*, which relied upon a mutual understanding and express treaty language to tie in agriculture. Pueblo water rights are linked to agriculture by nine centuries of history. This alone justifies quantification of the pueblos' water rights by a measure of irrigable acreage.

Irrigation water for how much land? For California pueblos, water rights have grown with the needs of the pueblo and its successor city. Historically, the territory of the Rio Grande pueblos, on the other hand, always has been limited to known boundaries. Within those boundaries, however, the pueblos have always held a right to use all their resources—that dominion over resources was precisely the basis for defining pueblo territory. The pueblos' irrigable acreage, therefore, must be limited to the lands within their boundaries, much like *Winters* reservations. But, like California pueblo water rights, Rio Grande pueblo rights might extend to the pueblos' boundaries, unconfined by historical or present uses.

Thus, pueblo water rights are tied to agriculture by history, but could grow like California pueblo water rights. Put another way, pueblo rights like those of *Winters* tribes could extend to all of their irrigable lands whether or not those lands are now under cultivation. The court, then, might apply the same standard as set forth in *Winters*, but for different reasons. Evidently, Congress has not concluded otherwise. It recognized that the extent of pueblo lands formed the basis for the pueblos' water rights when it specifically included water rights in the formula used to compensate the pueblos for the lands they lost to white settlers.[85]

Pueblo water rights look like *Winters* rights, but absent an extension of *Winters* they are not. The distinctions are important. Pueblo water rights are based on a unique history of pueblo uses and status.

83. City of Los Angeles v. City of Glendale, 23 Cal.2d 68, 142 P.2d 289 (1943).
84. F. COHEN, *supra* note 7.
85. *See* H. R. REP. NO. 123, 73rd Cong., 1st Sess. 3-4 (1933).

Winters rights, like all reserved water rights, are linked to a reservation created out of public lands. On the other hand, pueblo lands never have been a part of the federal public domain but always have been Indian lands.

At this juncture, two routes exist for the court to follow. The first and more expeditious action would be to extend *Winters* to the pueblos and apply the reserved rights doctrine to define their water rights. Setting a rational reservation date would remain the major problem following such a determination. The other alternative for the court would be to recognize the unique history of the pueblos and accord them a new species of water right which is truly aboriginal—one with an immemorial priority date and which is quantified by using either the irrigable acres standard or another appropriate to the pueblos' history.[86]

Some tribes urge that the *Winters* doctrine is simply a judicial confirmation of their pre-existing aboriginal water rights.[87] This position is difficult to accept for the simple reason that many tribes endowed with *Winters* rights have been moved onto reservations of land which are not coextensive with their original tribal domain. It is difficult to conceive any basis for arguing that the tribe brought with it a severable, aboriginal water right.

In addition, it may be a poor tactical decision for many tribes to seek aboriginal rights unless they are certain of winning a quantification standard more generous than the "practically irrigable acreage" yardstick of *Winters*. Virtually the only potential gain in obtaining a better standard would be the rights to all of the water in a particular basin—a political impossibility. There are many standards which would result in the quantification of aboriginal rights at a lower figure than the one reached using the *Winters* standards. Furthermore, many tribes lack a history similar to that of the Rio Grande pueblos or the Ft. Belknap Indians supporting an aboriginal claim. In short, many tribes have nothing to gain and much to lose by forsaking their *Winters* rights for aboriginal rights.

IV. OTHER ABORIGINAL RIGHTS ISSUES

Several other aspects of aboriginal rights deserve exploration. These include (1) the amenability of aboriginal rights to state court

86. New Mexico v. Aamodt, 537 F.2d at 1111. The Tenth Circuit recognized that "the decisions recognizing reserved water rights . . . are not technically applicable," *id.*, but suggested that further factual development would be required in order to construct an appropriate definition of the pueblos' water rights.

87. Resolution of the Navajo Tribal Council, *CAM*, 52-56 (n.d.).

jurisdiction and water adjudication actions therein; (2) groundwater, and (3) the uses to which waters diverted under an aboriginal right might be put.

A. *State Jurisdiction*

Advancing its affinity for expanded state court jurisdiction, the United States Supreme Court recently held that the waiver of federal sovereign immunity for state court determination of federal water rights, the McCarran Amendment,[88] included those water rights held in trust by the United States for the benefit of Indian tribes—*Winters* doctrine rights.[89] One of the first questions raised by the existence of aboriginal water rights is whether they too can be litigated in state court.

Although no court yet has faced this issue, several factors suggest state courts do have jurisdiction over aboriginal rights. The McCarran Amendment waived federal sovereign immunity for adjudication of water rights *owned* by the United States. The Globe Equity Decree, which accorded an immemorial priority date to certain Indian uses on the Gila River, expressly stated the United States owned these water rights for the Indians.[90] Thus the most aboriginal of all Indian water rights yet recognized fits within McCarran. In addition, the well-recognized fact of plenary congressional control over Indian affairs, including Indian property, supports this result.[91]

Yet to be determined is whether joinder of an Indian tribe in its own right as a party to a water adjudication is prerequisite to a determination of aboriginal water rights and, if so, whether P.L. 280[92] authorizes such a joinder by a state court.[93]

Assuming *arguendo* that aboriginal rights were owned by the tribes, the Indians' efforts to stay out of state courts would be an uphill effort because of the demand for comprehensive adjudication

88. The McCarran Amendment, 43 U.S.C. §666 (1976) provides in part:
> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

89. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

90. *See* United States v. Gila Valley Irrigation Dist., Globe Equity No. 59 at 6, 86 (D. Ariz. June 29, 1935); *but see* note 27 *supra.*

91. *See, e.g.,* United States v. Wheeler, 435 U.S. 313, 319 (1978).

92. 67 Stat. 588-90 (1953) (codified in scattered sections of 18, 28 U.S.C.).

93. State jurisdiction over Indians is extremely state-specific and complex. For a remarkably lucid survey, *see* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians,* 22 U.C.L.A. L. REV. 525 (1975).

of all western water rights. Congress passed the McCarran Amendment in an effort to avoid the piecemeal decrees which would result if the United States could not be joined to have its water rights quantified in the same state court proceedings as all others.[94]

This impetus, combined with the Supreme Court's expansion of state court jurisdiction, produced the 1976 decision known as the *Akin* case,[95] which held *Winters* doctrine rights were within state grasp under the McCarran Amendment. In that case, the Court appeared unconcerned with its prior holdings requiring that congressional surrender of jurisdiction to the states over Indian affairs be express (McCarran does not mention Indian water rights), or the fact that *Winters* rights are qualitatively different from other federally reserved rights.[96] Compared to the leap made by the *Akin* case, extending the McCarran Amendment to include aboriginal rights would be a small step, particularly in light of the expressed congressional goal of eliminating jurisdictional hurdles to the comprehensive adjudication of western water rights in state courts.

Finally, aboriginal water rights may be a creature of state law. Litigation is pending to decide that issue.[97] To deny state courts jurisdiction over a matter of state law would be an absurd result. But even if aboriginal rights are the product of federal law, aboriginal rights litigation may be headed for state courts.[98]

B. *Groundwater*

Do aboriginal water rights extend to groundwater? Probably so. If they are a new subspecies of federally reserved rights, aboriginal rights fit directly within *Cappaert v. United States*[99] which suggested that reserved rights may well include groundwater. If aboriginal rights are not reserved rights but a new type of federal right, *Cappaert* is still strong authority for the argument that federal law does

94. S. REP. NO. 755, 82d Cong., 1st Sess. (1951).

95. 424 U.S. 800. The name of the case as decided by the United States Court of Appeals for the Tenth Circuit was United States v. Akin, 504 F.2d 115 (10th Cir. 1974). Many water adjudications are known by names beginning with the letter "A" because all potential claimants on a stream system are usually named in alphabetical order as defendants in the case. *See, e.g.*, State of New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977); United States v. Anderson, No. 3643 (E.D. Wash. July 23, 1979).

96. Note, *State Jurisdiction to Adjudicate Indian Reserved Water Rights*, 18 NAT. RES. J. 221, 225 (1978).

97. United States v. Smith, No. 78-1869 (9th Cir., filed April 19, 1978).

98. In fact, given the current state initiative in this area, *Aamodt*, filed in 1966, prior to the *Akin* decision, may be one of the last cases in which Indian water rights will be determined by a federal court.

99. 426 U.S. 128 (1976).

not distinguish tributary groundwater from hydrologically connected surface streams.[100] If aboriginal rights are grounded in state law, an examination of the situs state's groundwater law will be necessary to determine whether aboriginal rights extend to groundwater.

C. *Permissible Uses For Aboriginal Water Rights*

Finally, it seems likely that holders of aboriginal rights are no more limited in the uses of their water than are tribes holding *Winters* rights. The debate concerning permissible Indian uses began with the "irrigable acres" standard endorsed by the United States Supreme Court in *Arizona v. California.* Proponents of Indian water rights argue that Indians could do as they pleased with their water.[101] Those on the other side contend the irrigible acres standard implicitly limited tribal uses to agriculture.[102] The Supreme Court's recent supplemental decree in *Arizona v. California* stated that "the means of determining quantity of adjudicated water rights [of Indians] shall not constitute a restriction of the usage of them to irrigation or other agricultural application."[103] This statement seems to have settled the issue, although the Court supplied no explicit basis or reason for this holding. The same rule might apply to aboriginal rights as well.

V. EFFECTS OF ABORIGINAL RIGHTS

The potential effects of aboriginal water rights depend largely upon their priority and quantification. An immemorial priority date coupled with a large quantification standard could disrupt existing water rights in a given basin. Aboriginal water rights of later dates would have to be evaluated in the context of other vested rights within a stream system or an aquifer.

In their most potent immemorial form, aboriginal water rights theoretically could displace any other type of water right which has been recognized. If the United States were to recognize the existence of vested rights pre-dating federal sovereignty, those rights would have priority over all federally created rights, including federally reserved rights, *Winters* doctrine rights, and contractual rights to

100. *Cf.* Grow & Stewart, *The Winters Doctrine as Federal Common Law,* 10 NAT. RES. L. 457 (1977).

101. Veeder, *Indian Prior and Paramount Rights to the Use of Water,* 16 ROCKY MTN. MIN. L. INST. 631 (1970).

102. Clyde, *Special Considerations Involving Indian Rights,* 8 NAT. RES. L. 237 (1975).

103. 439 U.S. 419, 422 (1979).

project waters administered by the Bureau of Reclamation. Water rights held under state law would be displaced as well.[104] Tribes holding aboriginal rights to large quantities of water could become wholesale water brokers in the West.

This result seems unlikely for several reasons. If aboriginal rights are found to exist, the United States might, as it did in the Globe Equity case, successfully assert ownership of those rights as guardian and trustee on behalf of the Indians. While such a result may appear anomalous to the very concept of an aboriginal right, federal guardianship over Indian property is deeply rooted in the nation's history. Furthermore, federal guardianship would assure continued control over a significant portion of western water by the Secretary of Interior, control the federal executive is reluctant to relinquish.

In addition, congressional control over Indian affairs, including property rights, is plenary,[105] and although Congress thus far has declined to tamper with the judicially created *Winters* doctrine,[106] no one seriously questions its power to do so. If aboriginal rights present a sufficient threat to the established order of western water rights administration, demands for congressional intervention will become increasingly difficult to ignore.[107]

This article has not explored the political foundations or ramifications of aboriginal rights. These factors, however, are undoubtedly more important than the legal theories. While perfectly credible legal arguments can be advanced for the recognition of many varieties of aboriginal water rights, politics will have an even greater effect on the final result. This is not to say that legal theories of aboriginal water rights are insignificant; quite simply they must be placed in perspective. As the Indians have learned, compromise is inevitable.[108]

The Navajo experience on the Upper Colorado River is a case in

104. Although title to water rights held under the appropriation laws of the western states was not created directly by the federal government, affirmative federal acts were required to sever the water from the lands and subject the water to appropriation under local custom and later, state law. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 155 (1935). Aboriginal rights antedated federal dominion, the severance of water from the land and the existence of the western states. As a result, aboriginal rights arguably are superior to all others.

105. United States v. Wheeler, 435 U.S. 313 (1978).

106. *See Indian Water Rights: Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary*, 94th Cong. 2d Sess. 2 (1976).

107. For a discussion of the factors motivating passage of the McCarran Amendment, *see* S. REP. NO. 755, 82d Cong., 1st Sess. (1951).

108. But, the *Aamodt* trial court recently stated: "I do not intend, and will not, incorporate a balancing of interests in determining the quantification of the federal, and then the state, law claims. There is no basis in the law for such a balancing." (October 24, 1978 letter from Judge E. L. Mechem to All Counsel of Record at 2.)

point. Given the vast size of the Navajo Reservation, quantification of the tribe's *Winters* doctrine rights might well dry up the Colorado River.[109] But water rights on paper are far removed from running ditches and green fields. In order to secure development funds for the Navajo Indian Irrigation Project (NIIP), the tribe had to agree to put the priority of its *Winters* rights on parity with the Bureau of Reclamation's San Juan-Chama Diversion Project. Even then, NIIP funding from Congress has lagged 10 years behind the companion reclamation project.[110]

There is no reason to believe that aboriginal water rights holders will be able to avoid the Navajo experience entirely. Even though it diverts water under an immemorial priority date, the Gila River Indian Reservation must share water shortages with users holding junior rights.[111]

VI. CONCLUSION

American Indians have long realized that the gap between their theoretical rights and the real world is a larger one than for most Americans. Under the threat of congressional power to abrogate their superior water rights, whether held under the *Winters* doctrine or a theory of aboriginal rights, the Indian tribes must recognize that they can do only so well in securing water rights for their people. They cannot realistically expect the federal government, through its judicial, legislative, or executive branches, to grant the tribes water rights which, while arguably justifiable legally, might hamper severely the well being of non-Indians competing for those same limited resources.

Aboriginal rights represent another legal theory which could endow tribes with paper power, some of which they probably will have to bargain away in order to gain real world benefits.[112] In this

109. The rights of five tribes along the Lower Colorado River with relatively small land area in comparison with the Navajo reservation were quantified at nearly one million acre-feet annually by the Special Master in Arizona v. California. The Supreme Court endorsed this quantification, 373 U.S. at 600-01, and incorporated it into its decree, 376 U.S. at 344-45.

110. *See generally,* Price & Weatherford, *Indian Water Rights in Theory and Practice: Navajo Experience in the Colorado River,* 40 LAW & CONTEMP. PROB. 97 (Winter 1976).

111. United States v. Gila Valley Irrigation Dist., Globe Equity No. 59 (D. Ariz., June 29, 1935).

112. The Supplemental Decree in Arizona v. California, 439 U.S. 419 (1979), may be read as tacit recognition of this reality. In refusing to restrict Indian uses of their *Winters* water to agricultural applications, the Court has never addressed the permissible use issue as a legal one.

context, aboriginal rights are nothing really new. But in a more subtle sense, aboriginal rights do offer something. *Winters* doctrine rights are based largely upon actions of the United States–white man's history. Aboriginal rights, on the other hand, rest on Indian history–in the case of the Rio Grande pueblos, on nine centuries of continuous Indian occupation of the same lands. That history is a heritage with which aboriginal rights are in harmony. Whether and in what form these rights exist, however, remains to be seen.