NATURAL RESOURCES JOURNAL

Volume 18
Issue 1 *Symposium on U.S. - Mexican Transboundary Resources, Part II*

Winter 1978

State Jurisdiction to Adjudicate Indian Reserved Water Rights

Jeff Taylor

Duane Birdbear

Recommended Citation
Jeff Taylor & Duane Birdbear, *State Jurisdiction to Adjudicate Indian Reserved Water Rights*, 18 Nat. Resources J. 221 (1978).
Available at: https://digitalrepository.unm.edu/nrj/vol18/iss1/19

This Note is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact amywinter@unm.edu, lsloane@salud.unm.edu, sarahrk@unm.edu.

CASE NOTE

STATE JURISDICTION TO ADJUDICATE INDIAN RESERVED WATER RIGHTS

WATER LAW–STATE COURT JURISDICTION AND FEDERAL RESERVED RIGHTS–In allowing state courts to adjudicate federally-held Indian water rights, the Supreme Court finds no distinction between Winters Doctrine rights and other federal reserved rights. *Colorado River Water Conservation District v. United States* and *Akin v. United States*, 424 U.S. 800 (1976).

About 1857, during the period of American exploration of the Southwest, army lieutenant Joseph Christmas Ives was leading an expedition to ascertain the limits of navigation on the lower Colorado River. In his report, Ives observed that "the region is . . . of course, altogether valueless. It can be approached only from the South, and after entering it there is nothing to do but leave. Ours has been the first, and will doubtless be the last, party of whites to visit this profitless locality."[1]

While Ives' opinion of the Grand Canyon region has been well refuted by the scores of visitors who journey annually to marvel at its surrealistic beauty, the sense of emptiness and barren remoteness that Ives felt still pervades many areas of the western United States. This is due principally to the role of water, which has always been at a premium in the West. Its presence, or lack of the same, not only shapes the landscape, but limits the areas of habitation and the growth rate of the population. Consequently, water use and control are becoming an increasingly important legal and political issue.

This struggle over water is especially pronounced in those states where large amounts of land are owned by Indian tribes. The unforeseen demand for western energy production, much of it being satisfied by Indian-owned reserves, has the potential of creating water shortages that may give rise to bitter water rights conflicts. Current energy development has already led to an increase in water costs, and projected increases in energy production will no doubt drive costs higher. A recent federally financed study of energy development in the western United States recognizes this potential problem:

> Unquantified federal and Indian rights might . . . create some rather significant water availability problems. In large part this is

1. L. FREEMAN, THE COLORADO RIVER 169 (1923).

> because of the *reservation* or *Winters Doctrine* which provides that each time the federal government sets aside land from the public domain for a federal purpose, including Indian reservations, it implies a reservation of water resources to meet the needs of that land. . . .
>
> Under the reservation doctrine, Indian tribes potentially control large quantities of water in the West. Since most Indian lands were set aside in the nineteenth century, Indian water rights are sometimes referred to as "prior and paramount." . . . [M]any of the surface sources of water for energy development flow through or border reservations. If Indians are ultimately found to hold prior and paramount rights, existing allocations and appropriations among and within western states could be seriously affected. . . .[2]

In this context arose the case of *Colorado River Water Conservation District v. United States* and *Akin v. United States,*[3] its companion case. The decision is already well over a year old, yet debate continues as to the meaning behind the case and the impact it will ultimately have on western water litigation.

Akin, as the two cases will be referred to here, presents the important question of which court, state or federal, has power to adjudicate Indian water rights, known as Winters Doctrine rights. Water was originally acquired by the federal government as part and parcel of lands ceded to it or obtained by conquest. Although much of this land has subsequently been transferred to the states, the right of the federal government to reserve water rights sufficient to service the land retained was settled long ago and has not been seriously questioned in recent years. As early as 1899 the Supreme Court held in *United States v. Rio Grande Dam and Irrigation Company*[4] that there were strict limitations on a state's power to appropriate the water on land ceded to it by the federal government. The Court stated that "in the absence of specific authority from Congress a state cannot, by its legislation, destroy the right of the United States, as owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government's property."[5]

Winters rights were first recognized in 1908 in *Winters v. United States.*[6] Unlike most water rights, Winters rights are federal rather than state in origin, having been implied in treaties, statutes, or exec-

2. Environmental Protection Agency, III Energy from the West: A Progress Report of a Technology Assessment of Western Energy Resource Development 998 & 1000 (1977).
3. 424 U.S. 800 (1976).
4. 174 U.S. 690 (1899).
5. *Id.* at 703.
6. 207 U.S. 564 (1908).

utive orders granting lands to Indian tribes. The recognition of the Winters Doctrine provided the basis for later judicial decisions acknowledging other "types" of federal reserved rights. In *Arizona v. California*,[7] the Supreme Court for the first time held that the United States could retain water in streams or other sources for the benefit of national forests, monuments, or parks. And although the precise extent and nature of reserved rights has yet to be determined, it is clear that they are not created in accordance with state law. Therefore they have been held to have a priority date as of the time the particular reservation or enclave was created, regardless of the state requirements of diversion and beneficial use. These rights continue to exist whether used or not, with the amount of the right to be determined by the purpose of the federal reservation. All federal reserved rights have been judicially created, but only the Winters Doctrine rights have been given an expansive and liberal construction by the courts.[8]

Akin arose when the United States, seeking adjudication of various reserved water rights in the San Juan River and its tributaries in Colorado, instituted suit in United States District Court for the District of Colorado against numerous water users. This area is included in Colorado's Water Division Seven. Under Colorado's Water Rights Determination and Administration Act,[9] the state is divided into seven divisions, each encompassing one or more drainage basins of the larger rivers in the state. Adjudication of water claims in the divisions is carried on continuously,[10] with referees ruling on applications or referring them to a water judge.[11] Engineers in each division are responsible for the distribution of water in accordance with the decisions of the referees or judges.[12]

Soon after the federal suit was initiated, one of the defendants filed an application in state court in Water District Seven, seeking to make the United States a party to state proceedings in the division for the purpose of adjudicating the same water rights which were at issue in the federal suit. The United States was served pursuant to 43 U.S.C. § 666, commonly referred to as the McCarran Amendment,[13] and several of the defendants in the federal proceeding moved the district court to dismiss on the grounds that the McCarran

7. 373 U.S. 546 (1963).

8. *See* Ranquist, *The Winters Doctrine and How it Grew: Federal Reservation of Rights to the Use of Water*, 3 B.Y.U. L. REV. 639 (1975).

9. COLO REV. STAT. § § 37-92-101 *et seq.* (1974).

10. *Id.* at § § 37-92-302 to 37-92-303.

11. *Id.* at § 37-92-303.

12. *Id.* at § 37-92-301.

13. *See* note 16, *infra*.

Amendment left that court without jurisdiction to hear the case. The district court granted dismissal on the basis of abstention. On appeal, the United States Court of Appeals for the 10th Circuit reversed, holding that the federal suit was appropriate under 28 U.S.C. § 1345[14] and that the doctrine of abstention was not properly applied.[15] The Supreme Court granted certiorari to determine whether the McCarran Amendment had withdrawn the jurisdiction of federal courts to adjudicate reserved water rights and whether the district court's dismissal was appropriate. In a 6-3 decision, the Court held that state and federal courts had concurrent jurisdiction, i.e., the McCarran Amendment did not abolish existing federal jurisdiction to hear water cases initiated under 28 U.S.C. § 1345. Nonetheless, the dismissal of the suit by the district court was appropriate, although for reasons other than abstention.

The interpretation of the McCarran Amendment,[16] passed by Congress in 1952, is the focus of the controversy in the *Akin* case. According to the Senate Report accompanying the bill, which closely follows the actual wording of the law, the purpose of the legislation was to

> permit the joinder of the United States as a party defendant in any suit for the adjudication of rights to the use of water of any river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of

---

14. Title 28 U.S.C. § 1345 (1970) provides:
"Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

15. 504 F.2d 115 (10th Cir. 1974).

16. The McCarran Amendment, 66 Stat. 560, 43 U.S.C. § 666 (1970), as codified, provides in full text:

> (a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and that the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: PROVIDED, That no judgment for costs shall be entered against the United States in any such suit.
>
> (c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

> acquiring water rights by appropriation under state law, by purchase, exchange, or otherwise, and that the United States is a necessary party to such suit.[17]

Congress sought to achieve this goal by a waiver of the United States' sovereign immunity to suit when comprehensive adjudication of water rights is involved. This means that the United States can be served and joined in any general adjudication suit in state or federal court.[18] Initially, only federal water rights obtained under state law were presumed to be included in the scope of § 666, but *United States v. District Court In And For Eagle County*,[19] and *United States v. Water District No. 5*,[20] held that the McCarran Amendment applied to federal reserved rights as well—except those that benefited Indians.[21]

In finding that state courts have jurisdiction over Indian Winters Doctrine rights under § 666, the majority in *Akin* relied on the decision in *Eagle County* and *Water District No. 5*. In so doing, the Court stated that:

> Though *Eagle County* and *Water District No. 5* did not involve reserved rights on Indian reservations, viewing the government's trusteeship of Indian rights as ownership, the logic of these cases clearly extends to such lands. Indeed, *Eagle County* spoke of non-Indian and Indian rights without any suggestion that there was a distinction between them for purposes of the amendment.[22]

By relying on what can only be described as dicta in these earlier cases, the Court in *Akin* bypassed any serious discussion of the actual origin and nature of Winters rights and their relationship to other reserved rights. Yet, as is clearly documented in earlier judicial decisions and policies, Winters Doctrine rights are qualitatively different from reserved rights held for other purposes. The significant differences include, first, the fact that water rights set aside for Indian tribes, unlike other reserved rights, are held in trust by the federal government. This distinction was discussed in the final report of the National Water Commission, entitled *Water Policies for the Future.*

17. S. REP. NO. 755, 82nd Cong., 1st Sess. 2 (1951).
18. Rank v. Dugan, 372 U.S. 609 (1963), held the McCarran Amendment applicable only to general adjudications, as distinguished from suits to determine only specified or limited rights.
19. 401 U.S. 520 (1971).
20. 401 U.S. 527 (1971).
21. The Court in these cases did not address the question of the application of the McCarran Amendment to Indian rights. It found that other federal rights were intended to be included in the scope of the Amendment where the United States was "otherwise" the owner of water.
22. *Supra* note 3, at 810.

Indian water rights are different from federal reserved rights for such lands as national parks and national forests, in that the United States is not the owner of the Indian rights but is a trustee for the benefit of the Indians. While the United States may sell, lease, quit claim, release, or otherwise convey its own federal reserved water rights, its powers and duties regarding Indian water rights are constrained by its fiduciary duty to the Indian tribes who are beneficiaries of the trust.[23]

The scope of this federal trust responsibility has been discussed in many cases.[24] It has been said that "[u]nder a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, [the United States] has charged itself with moral obligations of the highest responsibility and trust. Its conduct . . . should therefore be judged by the most exacting fiduciary standards."[25] The Court in *Akin* seemingly failed to consider the duty that this relationship imposed on Congress in enacting the McCarran Amendment and on the courts in reviewing and construing it.

The problem that the Amendment creates lies with the detrimental effect that state adjudications may have on Indian water rights. With the recent spurt in western growth and the increasing demand for exportation of western energy, states are becoming increasingly jealous of their control over water.[26] But with the reserved rights doctrine firmly embedded in the law, the next best thing to state ownership is complete state jurisdiction over and adjudication of water rights. With state governments and citizenry anxious over feared loss of precious water to Indian tribes, what some have termed the "Indian scare theory of jurisprudence," it is only reasonable to question the neutrality of state courts in water adjudications. After having fought for years to deny Indians water rights, states are now asked to determine and protect these same rights. In recent hearings on Indian water problems, Senator Edward Kennedy stressed this need for fair and uniform water adjudications.

Indian water rights—no matter how critical to a tribe's future, no matter how well inventoried, no matter how brilliantly defended by government attorneys, cannot receive full protection in state court

23. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 477 (1973).

24. Seminole Nation v. United States, 316 U.S. 286 (1941); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Choctaw Nation v. United States, 119 U.S. 1 (1886); United States v. Creek Nation, 295 U.S. 103 (1934).

25. Seminole Nation v. United States, *supra* note 24, at 296-97.

26. *Supra* note 2, at 997.

> forums, for the security of Indian water rights rests not only upon a full commitment from the Executive and the complete support of Congress, but also upon the availability of an independent and dispassionate federal judiciary to adjudicate these rights. The *Akin* case may make this impossible.[27]

There are many statutes and court cases emphasizing the need to protect important federal interests from the biases of state courts[28] whose elected judges are more subject to political pressure than judges sitting in federal courts. Given the importance to Indian tribes of a fair and even generous interpretation of their water rights, the Court should have found that delegation of jurisdiction to state courts was a violation of the trust responsibility of Congress. Authority to support this position stems from the long-held tenet that statutory constructions are to be resolved liberally on behalf of Indian Tribes.[29] Such a rule obviously draws support from the trust responsibility owed by all branches of government—including the courts.

To the objection that continued federal jurisdiction of Indian reserved rights would be too confusing and burdensome on the district courts, it seems obvious that this burden would be no more so than would be imposed on state courts, especially with the use of a federal water master. It would not be necessary to join all holders of rights on a given stream in a federal suit. As has been correctly pointed out, only the Indian claims need be settled in federal court, perhaps making the state a class-action defendant. The resulting determination could then be incorporated into the findings of a state adjudication.[30] This would allow for uniformity of construction of Indian rights, avoiding the potential of different interpretations by courts of some fifteen western states. In addition, such a method would more fully assure unbiased fact finding. The *Akin* opinion states that since Indian water rights present a federal question reviewable by the Supreme Court, there should be no problems of state adjudications "imperil[ing] those rights."[31] But since the most important purpose of any trial court is the fact-finding process and since factual determinations of trial courts are rarely disturbed on appeal, the Court's rationale appears lacking in substance. The fact of historical federal guardianship of Indian interest should have raised

27. *Indian Water Rights: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary*, 94th Cong. 2nd Sess. 2 (1976).

28. Smith v. Kansas City Title and Trust Co., 255 U.S. 180 (1921).

29. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1972); United States v. Hibner, 27 F.2d 909 (E.D. Idaho 1928).

30. *Supra* note 27, at 6 (Statement of Peter R. Taft).

31. *Supra* note 3, at 812.

some presumption in favor of continued federal protection, absent express Congressional intent to terminate it.

A second difference between federal reserved rights and Winters rights is that the Indian rights are private in nature, only being held in trust by the United States, whereas other federal reserved rights are public rights. This has significant implication for the United States, both as trustee of the private Indian rights, and as holder of the public rights—especially when the two conflict. As was pointed out in recent hearings before the Senate Subcommittee on Administrative Practice and Procedure, the government has a much higher responsibility toward Winters rights than other federal reserved rights.

> Just as a private trustee, the United States has a duty of undivided loyalty, which has been called the most fundamental duty owed to the beneficiary by his trustee or a ward by his guardian. Another important duty is the obligation to preserve and protect the trust property, which includes taking all reasonable steps to enforce the beneficiary's legal claims relating to the property. And just as a conflict between the private trustee's fiduciary duty of loyalty and his own personal interests would be intolerable if it interfered with performance of his trust responsibility, a conflict between the rights of Indian beneficiaries and the public purposes embodied in federal programs with adverse interests must not impede the effective discharge of the United States' fiduciary obligation to protect private Indian property rights.
>
> The conflict . . . is not one which properly can be resolved through the process of balancing conflicting interests. Such a balancing procedure . . . is desirable where competing *public* policies are being balanced; this of course, is the method by which public policy is formulated. But private rights, which the United States is obligated as a fiduciary to defend, cannot be so balanced against conflicting public purposes. The government's relationship to the Indians is, in this respect, unique in character.[32]

This emphasis on the importance of judicial review and enforcement of the trust responsibility is well founded.[33] States and their voters, wary of the assertion of Indian interests, are beginning to take a narrower view of such rights. A case in point is the recent recommendation by the Western Conference of the Council of State Governments to prohibit Indians from voting in state elections unless

32. *II Federal Protection of Indian Resources; Hearings Before the Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary*, 92nd Cong., 1st Sess. 236 (1971) (Paper presented by Reid Peyton Chambers).

33. *See* Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1215 (1975).

they surrender jurisdiction over their lands and persons to the states.[34] The courts must respond to this backlash by reviewing governmental actions in light of their strict responsibility to protect and preserve Indian rights.

Implied in the nature of Winters rights and the fact that they are held in trust for Indians is a third major difference. This is that Winters reserved rights, unlike other reserved rights, are meant to concretely benefit a people, rather than land. They provide a means of livelihood and sustenance for those living on reservations. As the Court states in *Arizona v. California:*

> It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the nation. It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this nation created the other reservations they were unaware that most of the lands were of the desert kind–hot, scorching sands–and that *water from the river would be essential to the life of the Indian people* and to the animals they hunted and the crops they raised . . . (emphasis added).[35]

Finally, because the Winters Doctrine benefits a people, it has been construed more broadly than other reserved rights. This is evident from the amounts of water that have been allocated to the two types of federal rights. To date the Winters right has been held to allow sufficient water to supply all "practicably irrigable acreage" on a reservation, even should such acreage require water far in excess of the average irrigated land in a state.[36] Contrariwise, other federal reserved rights have been held to minimal allotments. In *Cappaert v. United States*[37] involving water reserved for a national monument, the Court stated that:

> the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool as the natural habitat of the species sought to be preserved. The District Court *thus tailored its injunction, very appropriately, to the minimal need,* curtailing pumping only to the extent necessary to preserve an adequate water level at Devil's Hole . . . (emphasis added).[38]

The deciding point in *Akin,* however, was the weight given to the policy of the McCarran Amendment. Legislative history shows that

---

34. The New Mexican (Santa Fe), Sept. 28, 1977, at 1, col. 4.
35. *Supra* note 8, at 598-99.
36. *Id.* at 600.
37. 426 U.S. 128 (1976).
38. *Id.* at 141.

the statute was enacted to aid in the unified adjudication of water rights in river systems in the various states.[39] The majority felt that Colorado's "all-inclusive statute" provided such a comprehensive adjudication and that to allow reserved rights held by the federal government on behalf of Indian tribes to elude jurisdiction would vitiate the amendment's purpose.[40] Considered *in vacuo* this reasoning is doubtless sound. However, there are other long-recognized principles of law which, when included in the weight of the deliberations, might have counseled a different outcome.

One is the strong countervailing policy of allowing Indian tribes to be free of state jurisdiction except in specific and limited situations. This policy, as recounted earlier, stems from the long-standing power struggle between tribes and states—the states' jealousy of Indian tribal sovereignty and the often vehement opposition of tribes to state jurisdiction over their persons and property. Tribal immunity from state jurisdiction has of course been recognized in case law as far back as *Worcester v. Georgia,*[41] and as recently as *Bryan v. Itasca County*[42] and *Santa Rosa Band of Indians v. Kings County.*[43] Why the Court did not at least address the relationship of this long-standing and oft-relied on policy against state court jurisdiction is not clear, especially in light of those cases which hold that congressional approval of state jurisdiction over Indians must be specific and explicit.

The treaties and laws of the United States contemplate Indian territory as separate from that of the states and provide that, for the most part, all intercourse with Indians shall be carried on and regulated exclusively by the federal government. It is clear that state laws cannot, without express congressional consent, adversely affect real property rights of Indian tribes.[44] As water carries with it the type of vested rights associated with real property, it seems that states' power to affect water rights should be subject to the same restrictions. As a dependent sovereign people Indians have traditionally been subject only to the jurisdiction of the federal government, except in those specific and limited situations where Congress delegates its authority or declares otherwise. The Court has repeatedly recognized that "the policy of leaving Indians free from state jurisdiction

39. *Supra* note 17, at 5.
40. *Supra* note 3, at 811.
41. 31 U.S. (6 Pet.) 515 (1832).
42. 426 U.S. 373 (1976).
43. 532 F.2d 655 (9th Cir. 1975).
44. Oneida Indian Nation of N.Y. v. County of Oneida, N.Y., 414 U.S. 661 (1974).

and control is deeply rooted in the nation's history."[45] How it could have found Indian rights to be included in the innocuous wording of the Amendment as encompassing rights obtained "otherwise" by the government is, without more elaboration, incomprehensible.

Although the Court specifically held that the McCarran Amendment provides for concurrent state and federal jurisdiction, the exaggerated weight given to the policy of the amendment as endorsing comprehensive adjudications may well have the practical effect of withdrawing federal jurisdiction.[46] The affirmance of the district court's dismissal will no doubt supply precedent for state attorneys in future cases, although until *Akin* almost all adjudications affecting federal rights were filed in federal rather than state courts—even after passage of the McCarran Amendment.[47] In addition, the Court's allusion to the fact that the state adjudication should take preference because "the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts"[48] will undoubtedly be latched onto by states as confirmation of their adjudication procedures as continuous, ongoing procedures. This could allow them to defeat earlier filings for federal adjudication, although many western states have very irregular adjudications, years and miles apart in time and continuity.

McCARRAN AND PUBLIC LAW 280

Another incongruous aspect of the decision in *Akin* is the Court's interpretation of the McCarran Amendment in light of the policy enunciated in what is commonly referred to as Public Law 280. The majority found that the McCarran Amendment was a "specific statute" that granted state jurisdiction to adjudicate tribal water rights, even though such jurisdiction was never mentioned in the amendment, while it found Public Law 280, which specifically excluded water rights from its otherwise broad grant of jurisdiction to the states, to be of a general nature and therefore not controlling.[49] The effect of such an interpretation is better understood if prefaced with a short explanation of Public Law 280.

Congress originally passed P.L. 83-280, 25 U.S.C. § § 1321 *et seq.* (1970) in 1953, being purportedly the most general and unprece-

45. McClanahan v. Arizona Tax Comm'n, *supra* note 29, at 168, quoting Rice v. Olson, 324 U.S. 786, 791 (1945).

46. *Supra* note 27, at 5 (Statement of Peter R. Taft).

47. *See* New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), *cert. denied* 45 L.W. 3564 (1977); United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956).

48. *Supra* note 3, at 818. *But see* dissent of Justice Stewart, at 822 & 823.

49. *Supra* note 3, at 812 n. 20.

dented surrender of federal jurisdiction over Indian affairs ever undertaken. Section 1322(b), which is known as the "savings clause," limits the states as follows: first, nothing in Public Law 280 allows for the "alienation, encumbrance, or taxation of any real or personal property, *including water rights*..." belonging to any Indian or Indian tribe; second, Public Law 280 does not confer upon the states subject matter jurisdiction of such property or any interest therein.[50]

Recent federal cases that have considered the application of Public Law 280 in two of the six states originally covered by the Act, California and Minnesota, have construed the delegation of authority narrowly against the states. In *Santa Rosa Band of Indians v. Kings County*[51] the court held invalid a county zoning ordinance affecting Indian trust lands on the grounds that such an ordinance was not a state law of general application and constituted an "encumbrance" proscribed by the statute. *Santa Rosa* was cited with approval in *Bryan v. Itasca County*,[52] wherein the United States Supreme Court held invalid the application of a state personal property tax on Indian lands held in trust by the United States. There, the Court denied one Public Law 280 state's bid to exercise broad regulatory power through its tax laws. Writing for the Court, Justice Brennan indicated that states would not be heard to argue that consent by the federal government pursuant to Section 1322(a), in light of the listed exceptions in 1322(b), meant that exercise of state regulatory power was impliedly authorized. While Congress provided that states might obtain civil and criminal jurisdiction over Indian country, it laid down strict procedural requirements, e.g., disclaimer provisions in state constitutions or statutes are to be modified and, after 1968, tribal consent is required. Further, the delegation by Congress to the states was not broad, but limited in nature and was designed to cover only criminal actions and civil causes arising within Indian country.

Thus Colorado, a state free from the impediment of a constitutional disclaimer provision, would be allowed to extend its state civil and criminal jurisdiction into the state's only two reservations, the Southern Ute and the Ute Mountain Ute, if tribal consent were to be obtained from the two tribal governments. Colorado would not, however, be able to exercise its administrative and regulatory powers over Indian water rights, despite its recent victory before the United States Supreme Court in *Akin.* Such an exercise of broad regulatory

50. In 1968 Public Law 280 was amended to require that the consent of affected tribes be obtained before the exercise of state jurisdiction. 25 U.S.C. § 1321(a) (1970).

51. *Supra* note 43.

52. *Supra* note 42.

power would be inconsistent with the express limitations of 25 U.S.C. § 1322(b). "Nothing in this section shall authorize the . . . encumbrance . . . of any real or personal property, *including water rights* . . . (emphasis added)."

A final objection to the decision is found in the Court's review of the legislative history of the McCarran Amendment. "Participants for the Department of Justice and the Department of the Interior," the Court said, "made clear that the proposal would include water rights reserved on behalf of Indians."[53] Both appeared in opposition to the Amendment, yet it is a general rule of statutory construction that the testimony of opponents of legislation is not credible evidence of statutory intent.[54] There appears to be no other reference in the legislative history that the inclusion of Indian or federal reserved rights was contemplated.

CONCLUSION

It is clear that in arriving at its decision the Court had to reach far to support its findings of state jurisdiction. Justice Stewart, writing a dissent with which Justices Blackmun and Stevens concurred, recognized this ruse:

> The Court says that the United States District Court for the District of Colorado clearly had jurisdiction over this lawsuit. I agree. The Court further says that the McCarran Amendment "in no way diminished" the District Court's jurisdiction. I agree. The Court also says that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." I agree. And finally, the Court says that nothing in the abstention doctrine "in any of its forms" justified the District Court's dismissal of the government's complaint. I agree. These views would seem to lead inevitably to the conclusion that the District Court was wrong in dismissing the complaint.[55]

But with the decision in *Akin* apparently inscribed in the law books, our primary concern should be to determine the logic behind the opinion, to test its conclusiveness on various issues, and thereby to determine its overall affect on federal Indian water rights in the West. While doing this an overriding consideration to keep in mind is the general tightening up of district court jurisdiction that is being affected by the present Court, and the role that this action may have had on the decision.

---

53. *Supra* note 3, at 813.
54. Mastro Plastics Corp. v. N.L.R.B., 350 U.S. 270 (1956).
55. *Supra* note 3, at 821.

For all its rationalization, the Court's opinion leaves many unaddressed questions, primary among these is the effect the decision will have in future years. In its narrowest interpretation, it is applicable only to the facts as they appear in the case. Such a narrow reading is unlikely, but the Court made clear that variation in any of several factors could counsel a different outcome.[56] Of these the most important is Colorado's "all-inclusive" adjudication system. If a less comprehensive system were involved the Court could not rely so heavily on unity and continuity of adjudication as demanding federal presence in the state court. In this respect it is important to note that Colorado is one of only a few western states that does not have an enabling statute or constitutional provision disclaiming jurisdiction over Indian lands. The presence of such a disclaimer may restrict courts in other states, although its importance has been discounted in some decisions.[57]

Most important for the future of western water litigation is the question of whether the opinion in *Akin* may be said to exclude the possibility of the tribes filing adjudication suits in federal courts, rather than the United States doing so as their trustee. This particular point was not addressed in the opinion, and many feel it to be quite tenuous; but it seems likely that such a suit should necessarily be allowed. Under 28 U.S.C. § 1362[58] district courts are given original jurisdiction of civil actions that are brought by recognized tribes and that involve questions of federal law. Because the Court acknowledges reserved rights involve a federal question,[59] district court jurisdiction seems quite compelling. The McCarran Amendment refers to joinder in state suits of "the United States where it appears that the United States is the owner or is in the process of acquiring water rights. . . ."[60] It can be seriously argued that this wording does not grant state court jurisdiction over the tribes themselves, especially in light of the historical immunity of tribes from state control.[61] And given this immunity, the argument of the majority in *Akin* that another forum exists for such cases would lose much of its force.

Similar principles have been recognized by many courts, most

56. *Id.* at 820.

57. New Mexico v. Lewis, 88 N.M. 636, 545 P.2d 1014 (1976).

58. Title 28 U.S.C. § 1362 (1970) provides:

"The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

59. *Supra* note 3, at 813, quoting United States v. District Court In and for Eagle County, 401 U.S. 520 (1971).

60. *Supra* note 14.

61. McClanahan v. Arizona Tax Comm'n, *supra* note 26.

recently the Tenth Circuit Court of Appeals. In *New Mexico v. Aamodt*,[62] a case involving water rights of Pueblo Indians, the court stated that "[t]he obligation of the United States to fulfill its fiduciary duties to the Pueblos does not diminish the rights of the Pueblos to sue on their own behalf."[63] As tribes become increasingly independent and develop their own legal talent, it is likely that they will institute more of their own legal actions. Though some close observers of the *Akin* case think that such tribal independence and sovereignty will not soon be recognized by the federal courts, much will depend on the position taken by the state courts in water adjudications involving Indians, which in turn may depend on the attitudes and opinions of the state's voters toward Indian claims.

JEFF TAYLOR and DUANE BIRDBEAR

62. 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 45 L.W. 3564 (1977).
63. *Id.* at 1107.