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December 14, 1992

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Re: In the matter of the Application for Beneficial Water Use
Permit No. 66459-76L Ciotti

No. ADV 92 745

Dear Sirs:

We no longer have an interest in obtaining a water right in our behalf because we have sold the property and no longer live at the Niarada address. Please remove our names from the case. If you need to contact us, you can write to:

Kenneth M. & Jorrie Ciotti
% Wilmes
3541 Tecumseh Dr.
Lake Havasu City, AZ 86405

Thank you for removing our names from this case.

Sincerely,

Kenneth M. Ciotti

Jorrie Ciotti

CC: John B. Carter/ Virginia G. Griffing
James Goetz

CASE #

MONTANA FIRST JUDICIAL DISTRICT COURT

LEWIS AND CLARK COUNTY

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NOS. 66459-76L, Ciotti; 63574-s76L, Flemings; 63023-s76L, Rasmussen; 64988-g76LJ, Starner, and APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G15152-S76L, Pope.	Cause No. ADV 92-745 DECISION AND ORDER

This is a petition for judicial review of a final order of jurisdiction of the Montana Department of Natural Resources and Conservation. Oral argument was held, and the matter has been fully briefed. It is submitted for decision.

BACKGROUND

On October 5, 1984, Frank Pope, a non-Tribal member who owns land in fee on the Flathead Indian Reservation (hereinafter the Reservation), filed an application for a permit to change the

point of diversion and place of use of a portion of his water right. A few years later, the remaining applicants, also non-Tribal owners of land on the Reservation, filed applications with the Department of Natural Resources and Conservation (hereinafter DNRC) for permits for new water rights from water sources on the Reservation. Petitioner Confederated Salish and Kootenai Tribes (hereinafter the Tribes) filed objections to each of these petitions.

A hearing examiner was appointed in each of the applicants' cases and initial hearing dates set. Subsequently the Tribes moved to dismiss the cases on the question of jurisdiction and requested the hearing examiner to bifurcate the jurisdictional and substantive issues. The Tribes contended that the merits of Respondent Pope's application could not be determined until it was determined whether DNRC had jurisdiction to engage in water rights proceedings on the Reservation. The hearing examiner granted the motion to bifurcate and certified the Tribes' legal objections to the director of DNRC pursuant to ARM 36.12.214.

Subsequently, the cases were consolidated, and on April 30, 1990, the DNRC director issued an order and memorandum concluding that DNRC had jurisdiction to regulate the use of excess water on the Reservation, even though the Tribal water rights have not yet been adjudicated.

The cases were then remanded to the hearing examiner to determine the merits of the applications. After the hearing examiner issued "Proposals for Decision" in each case, the Tribes filed exceptions based on the same legal arguments previously raised. The DNRC director held oral argument on the Tribes' exceptions, and on April 14, 1992, issued DNRC's Final Order on Jurisdiction, which affirmed its previous order. The final order further clarified that it applied to "new permits for surplus, non-reserved water, and to changes of surplus, non-reserved water, by non-Indians on fee lands within the exterior boundaries of the Flathead Indian Reservation."

On May 15, 1992, the Tribes simultaneously filed the present Petition for Judicial Review of a Final Agency Order and a complaint for declaratory and injunctive relief in the United States District Court for the District of Montana. The Tribes have raised state issues in this proceeding, reserving the federal questions for the federal court. In the meantime, DNRC filed a motion to affirm its final order on jurisdiction.

After considering various motions by the parties, this Court determined that the federal questions raised in the federal action needed to be resolved before the state issues could be determined, and ordered this action stayed pending resolution in the federal court. The United States District Court felt otherwise. It ordered the federal action stayed pursuant to the

abstention doctrine articulated in Railroad Commission v. Pullman Co., 312 U.S. 496 (1941), until the state issues were resolved, and permitted the Tribes to reserve the federal questions for the federal court under the doctrine of England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1963). The federal court expressly held that the Tribes had properly reserved the federal claims for the federal court.

On April 26, 1993, this Court issued an order permitting the amendment of the petition to remove one of the landowners and denying a motion by the Flathead Joint Board of Control of the Flathead, Mission and Jocko Valley Irrigation Districts to intervene.

DISCUSSION

The issues before this Court on judicial review are strictly legal. Thus, the standard for reviewing DNRC's legal conclusions is whether its interpretation of the law is correct. Steer, Inc. v. Dep't of Revenue, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990).

The primary issue before this Court is whether DNRC has authority to regulate surplus water on the Reservation. Various issues have been raised in connection with DNRC's asserted jurisdiction. The Tribes contend that under the Treaty of Hellgate they have the exclusive right to all surface waters on the Reservation, leaving nothing for the state to control; and in

any event, since the Tribal water rights have not yet been quantified, DNRC has no way of knowing the amount of surplus water, if any, to regulate, and thus lacks jurisdiction to issue new use permits under Title 85, Chapter 2, MCA (hereinafter referred as "the Water Use Act").

The Tribes' claim of exclusive rights to all water on the Reservation is a federal question, which is reserved for the federal court and which this Court declines to decide.

There is no dispute that the existing water rights have not yet been adjudicated. Nor is there any dispute that if it is ultimately determined that the Tribes have exclusive right to all of the water on the Reservation, DNRC will have no basis to grant new use permits.

Whether the Water Use Act Authorizes DNRC to Issue New Use Permits Prior to Quantification of the Water Supply

The Water Use Act governs use of water within the entire state and does not exclude Indian reservations. Section 85-2-101, MCA. Among other things, the Act provides for the application and issuance of permits for appropriation of surface water. In applying for such a permit, the applicant must establish by a preponderance of the evidence the criteria set forth in Section 85-2-311(1), MCA.

The jurisdictional dispute in this case focuses on subsections (a) and (b), the relevant portions of which read as

follows:

> (a) there are unappropriated waters in the source of supply at the proposed point of diversion . . . ;
>
> (b) the water rights of a prior appropriator will not be adversely affected . . . .

DNRC contends the applicant need only establish that there is water physically available for use at the proposed point of diversion. The Tribes contend that the existing water rights must be adjudicated and the entire water supply quantified before it can be determined if there is unappropriated water available for new use, or if water rights of a prior appropriator will be adversely affected.

Section 85-2-102(1), MCA, defines "appropriate" as to "divert, impound, or withdraw (including by stock for stock water) a quantity of water . . . ." Section 85-2-301, MCA, provides that a person may not appropriate water except as provided in chapter 2 of the Water Use Act. Section 85-2-302, MCA, states that "[e]xcept as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water . . . except by applying for and receiving a permit from the department." Section 85-2-311, MCA, sets forth the criteria for issuance of a permit. Subsection (6) provides that any appropriation contrary to the provisions of the section is invalid.

Clearly, the language of these sections leads one to

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conclude that appropriated water is water that has been allocated by the permit process provided in that chapter, and the amount of water used should reflect the amount allocated by permit.

This conclusion addresses the Tribes' contention that an applicant cannot prove the availability of unappropriated water unless the water supply has been quantified. The statutory scheme does not require it.

Counsel for the parties apparently agree that quantification of the water in any given stream is accomplished only upon adjudication of all existing water rights, pursuant to Sections 85-2-211 to -243, MCA. However, the permit process is intended to enable new use of the water prior to such adjudication, as illustrated by Section 85-2-313, MCA, which provides that such permit is provisional and subject to a final determination of existing water rights. In addition, DNRC may place conditions on any permit issued to satisfy the criteria enumerated above. Section 85-2-312, MCA. Under this procedure, no prejudice occurs to owners of existing water rights because of the provisional character of the permits.

In addition to the general adjudication procedure, Montana law recognizes the validity of compacts between the state and the Indian tribes in lieu of the adjudication procedure. Sections 85-2-701 to -706, MCA.

Thus, use of water, i.e., appropriation, is legally

recognized through new use permits, general adjudication, and compacts.

Another important consideration is Section 85-1-103, MCA, which provides:

> The object of this title is to promote the prosperity and welfare of the people of Montana through the sound management of the state's water resources, and its provisions are to be given a liberal interpretation.

All these pertinent provisions of the Water Use Act should be construed together and harmonized whenever possible. *See* Matter of W.J.H., 226 Mont. 479, 736 P.2d 484 (1987).

The Court interprets the Water Use Act to allow for issuance of new use permits prior to quantification of the entire water supply. When the existing water rights have not yet been adjudicated, the applicant need only show that there is water available at the proposed point of diversion, and thus not appropriated, giving the applicant potential, adjudicable water rights to the surplus water. To interpret the Act otherwise would entirely defeat the purpose of the permit process, denying landowners after 1973 the right to any new water use until the adjudication process is completed. Twenty-two years later, adjudication of Montana's water supplies is nowhere near completion.

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Whether Section 85-2-217, MCA, Suspends DNRC's Jurisdiction to Issue New Use Permits

The Tribes contend that DNRC's authority to issue permits is suspended until the compact between the state and the Tribes is final, pursuant to Section 85-2-217, MCA. That section provides in part:

> **Suspension of adjudication.** While negotiations for the conclusion of a compact under part 7 are being pursued, all proceedings to generally adjudicate reserved Indian water rights and federal reserved water rights of those tribes and federal agencies which are negotiating are suspended.

The process of issuing new use permits under the Water Use Act is not an adjudication, and thus is not subject to suspension under Section 85-32-217, MCA. *See* Section 85-2-213, MCA, which provides that a permit is only provisional and subject to a final determination of existing water rights; Sections 3-7-101 and 3-7-501, MCA, vesting the water courts with exclusive jurisdiction to adjudicate water rights; Mildenberger v. Galbraith, 249 Mont. 161, 166, 815 P.2d 130, 134 (the jurisdiction to interpret and determine existing water rights rests exclusively with the water courts); Matter of Dep't of Natural Resources, 226 Mont 221, 229, 740 P.2d 1096, 1100 (the role of DNRC in the adjudication process is to provide the water judge with necessary information and assistance, to establish information and assistance programs to aid claimants in the

filing of claims, and to conduct field investigations in claims). *See also* United States v. Dist. Court, 242 P.2d 774, 777 (Utah 1952), where the Supreme Court of Utah, addressing water use statutes similar to those in Montana, specifically noted that granting a water use permit does not adjudicate water rights. The statute merely requires an approval or rejection of the application and, if approved, authorizes the applicant to proceed with the proposed water diversion or other project. It leaves the adjudication of water rights to a different proceeding.

Whether This Court is Bound by the Don Brown Case

The Tribes next contend that this Court is bound by the district court decision in United States and Montana Power Co. v. DNRC, Cause No. 50612, First Judicial District of the State of Montana, Lewis and Clark County (1987), otherwise known as the Don Brown case. In that case, the district court interpreted various sections of the Water Use Act as it existed, specifically Section 85-2-311(1), MCA, holding, *inter alia*, that actual quantification of existing rights must be accomplished before it can be determined if unappropriated water rights exist in a source of supply. That decision was issued prior to many legislative modifications to the Water Use Act. Nor was the decision appealed to the Montana Supreme Court. The decision, although certainly worthy of careful consideration, is not

binding on this Court.

In summary, this Court concludes that DNRC has jurisdiction under the Water Use Act to issue new use permits prior to formal adjudication of existing water rights or completion of compact negotiations. Nor is its jurisdiction to issue such permits suspended by Section 85-2-217, MCA. Finally, this Court is not bound by the holding in the Don Brown case.

ORDER

The final order of DNRC with respect to jurisdiction is AFFIRMED.

DATED this 12 day of January, 1995.

District Court Judge

pc: John B. Carter/Daniel F. Decker
James H. Goetz
Joseph P. Mazurek/Harley R. Harris
Donald D. MacIntyre/Tim D. Hall
Jon Metropoulos

Ciotti.d&o

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONFEDERATED SALISH; KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,
Plaintiffs-Appellees,
v.
MARK SIMONICH,*
Defendant-Appellant.

No. 93-35103
D.C. No. CV-92-00054-CCL
OPINION

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted
March 7, 1994—Seattle, Washington

Filed July 15, 1994

Before: Procter Hug, Jr., Cynthia Holcomb Hall and David R. Thompson, Circuit Judges.

Opinion by Judge Thompson

*Mark Simonich is substituted for his predecessor, Karen Barclay Fagg, as Director of Montana's Department of Natural Resources and Conservation. Fed. R. App. P. 43(c)(1).

SUMMARY

Civil Litigation and Procedure/Jurisdiction/Appeals

The court of appeals dismissed an appeal in part and affirmed a district court order in part. The court held that it had no jurisdiction to hear an appeal of a district court's interlocutory order denying *Younger* abstention.

Non-Tribal members owning land on the Flathead Indian Reservation filed applications with the Montana Department of Natural Resources and Conservation (DNRC) for a permit to change the point of diversion and place of use of a portion of a water right and for permits for new water rights from sources on the Reservation. Appellees Confederated Salish and Kootenai Tribes of the Flathead Reservation (Tribes), requested the applications be denied, contending the state lacked jurisdiction to administer new water uses on the Flathead Reservation prior to the quantification of federal and Tribal reserved water rights. The then-director of the DNRC issued an order, concluding that Montana's regulatory jurisdiction over surplus water extended to fee land on the Reservation.

The Tribes filed a complaint against appellant Mark Simonich, the Director of the DNRC, in the district court, presenting only federal claims. The Tribes asked the district court to 1) determine that, under federal law, the DNRC lacked jurisdiction to apply Montana law to regulate new or existing uses of water on the Flathead Reservation, and 2) enjoin the DNRC from granting new use or modification permits on Tribal lands. The Tribes also moved, under the *Pullman* abstention doctrine, for an order staying the federal proceeding until the state court proceedings were completed. In addition, they sought, under the *England* reservation doctrine, an order permitting them to return to federal court to litigate their federal claims after they concluded their litigation in state

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court. Immediately after filing their complaint and motions, the Tribes filed a state court action, challenging the jurisdiction of the DNRC.

The defendants moved in federal court to dismiss the federal action on the ground that the district court should abstain under *Younger*. The district court denied the motion, concluding that abstention under *Younger* was improper. The court granted the Tribes' motions to stay the federal proceedings under *Pullman*, and to reserve the Tribes' federal claims under *England*. Simonich appealed the district court's three interlocutory orders.

[1] The district court's order that it would not abstain under *Younger* and dismiss the case was not a final decision foreclosing further proceedings. [2] In *Cohen v. Beneficial Indus. Loan Corp.*, the Supreme Court recognized a "small class" of decisions appealable although not terminating the underlying action. Pursuant to *Cohen*, the court of appeals has jurisdiction to hear an appeal of a district court's interlocutory order if the order meets three requirements, including being "effectively unreviewable on appeal from a final judgement."

[3] On appeal from a final judgment, a court of appeals can review a district court's refusal to abstain under *Younger*, without implicating the mootness doctrine, even though the district court has decided the merits of the case and all state proceedings have been completed. Thus, Simonich's *Younger* claim would not be lost if the district court rendered a final decision on the Tribes' federal claims. Because Simonich's *Younger* claim could be reviewed adequately on appeal from a final judgment, the *Cohen* collateral order test was not satisfied. [4] Thus, there was no jurisdiction to hear Simonich's appeal of the district court's interlocutory order denying *Younger* abstention.

[5] Simonich also argued that even if there was no jurisdiction to entertain his appeal of the district court's order refus-

ing to abstain under *Younger*, a writ of mandamus should be issued, compelling the district court to abstain. [6] However, at this juncture in the proceedings, it could not be said that the district court clearly erred in refusing to abstain under *Younger*. [7] Thus, Simonich's right to issuance of a writ of mandamus was not clear and indisputable.

[8] The district court's *England* reservation order did not have the practical effect of an injunction. Thus, there was no jurisdiction to entertain Simonich's appeal of that order.

[9] There was jurisdiction to hear an interlocutory appeal of a district court's order granting a stay pursuant to the *Pullman* abstention doctrine. [10] The district court did not abuse its discretion by granting the Tribes' motion for a stay under *Pullman*.

COUNSEL

Harley R. Harris, Assistant Attorney General; Donald D. Macintyre and Tim D. Hall, Special Assistant Attorneys General, Montana Department of Natural Resources and Conservation, Helena, Montana, for the defendant-appellant.

John Carter, Tribal Legal Department, Pablo, Montana, and James Goetz, Goetz, Madden & Dunn, Bozeman, Montana, for the plaintiffs-appellees.

OPINION

THOMPSON, Circuit Judge:

Confederated Salish and Kootenai Tribes of the Flathead Reservation (Tribes) filed a complaint in the United States District Court for the District of Montana challenging Mon-

tana's right to regulate the use of water on the Flathead Reservation. Contemporaneous with this filing, the Tribes filed motions requesting the district court to (1) stay the federal proceedings pursuant to *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941), and (2) reserve their right to litigate their federal claims in federal court pursuant to *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), pending resolution of a related state court action filed by the Tribes later that day. The defendants, the Director of Montana's Department of Natural Resources and Conservation (DNRC), and Frank Pope, Kenneth Ciotti, Jorrie Ciotti, Patricia Starner, and John Starner, non-Indian applicants for water use permits, responded by moving the district court to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), and dismiss the federal action.

The district court denied the defendants' motion to abstain and dismiss under *Younger*. It granted the Tribes' motions to stay the federal proceedings under *Pullman* and reserve the federal issues under *England*. The defendants appeal these three interlocutory orders.

We lack jurisdiction to hear the appeal of the order denying the motion to abstain under *Younger*, and we decline to issue a writ of mandamus. We also lack jurisdiction to hear the appeal of the order granting the Tribes' motion to reserve their federal claims under *England*. We have jurisdiction, however, to hear the appeal of the order staying federal proceedings under *Pullman*, and we affirm that order.

FACTS

The Montana Water Use Act, 1973 Mont. Laws, ch. 452 (codified at Mont. Code Ann. Tit. 85, ch. 2 (1991)), provides that, after July 1, 1973, "a person may not appropriate water . . . except by applying for and receiving a permit from [the Montana DNRC]." Mont. Code Ann. § 85-2-302(1) (1991). Additionally, "[a]n appropriator may not make a change in an

appropriation right except as permitted [by the Water Use Act] and with the approval of [the DNRC]." Mont. Code Ann. § 85-2-402(1) (1991). The Water Use Act also establishes an administrative procedure by which the DNRC is to consider such applications. A person adversely affected by the proposed appropriation or change may enter an objection, which then is resolved in an administrative hearing. Mont. Code Ann. § 85-2-309 (1991). Final DNRC orders are subject to review in the state trial court, Mont. Code Ann. §§ 2-4-701 through 711 (1991), and to appeal to the Montana Supreme Court. Mont. R. App. P. 1(b)(1).

In 1984, defendant Pope, a non-Tribal member owning land in fee on the Flathead Indian Reservation, filed an application for a permit to change the point of diversion and place of use of a portion of his water right. In 1986, defendants Kenneth Ciotti, Jorrie Ciotti, Patricia Starner, and John Starner, also non-Tribal members owning land in fee on the Flathead Reservation, filed applications with the DNRC seeking permits for new water rights from sources on the Reservation. Following notice of each of these applications, the Tribes filed objections and requested the applications be denied in their entirety. The Tribes contended the state lacked jurisdiction to administer new water uses on the Flathead Reservation prior to the quantification of federal and Tribal reserved water rights.

This jurisdictional question was bifurcated and certified to the then-director of the DNRC, Karen Barclay Fagg (Fagg), who issued an order April 30, 1990 concluding that

> Montana has regulatory jurisdiction over water in excess of that needed for federal reserved rights. Given the State's strong interest in comprehensive water regulation, Montana's jurisdiction over surplus water extends to fee land on the Reservation. Tribal or federal water rights, although not yet adjudicated,

are adequately protected by the DNRC permit process.

Following remand of the cases, the hearing examiner issued a "Proposal for Decision." Again, the Tribes objected and raised their jurisdictional argument. After a hearing, Fagg issued DNRC's "Final Order on Jurisdiction" on April 14, 1992 affirming the April 30, 1990 order.

The Tribes then filed their complaint in this action. In this complaint they presented only federal claims. They asked the district court to (1) determine that, under federal law, the DNRC lacked jurisdiction to apply Montana law to regulate new or existing uses of water on the Flathead Reservation, and (2) enjoin the DNRC from granting new use or modification permits on Tribal lands. They also moved, under the *Pullman* abstention doctrine, for an order staying the federal proceeding until the state court proceedings were completed. In addition, they sought, under the *England* reservation doctrine, an order permitting them to return to federal court to litigate their federal claims after they concluded their litigation in state court.

Immediately after filing their complaint and motions in the United States District Court, the Tribes filed a "Petition for Judicial Review of a Final Agency Order" in the District Court for the First Judicial District of the State of Montana. In this state court action, the Tribes raised only issues of state law challenging the jurisdiction of the DNRC. They also informed the state court of their intention to reserve federal issues for determination by the federal court pursuant to *England.*

The defendants then moved in federal court to dismiss the federal action on the ground that the district court should abstain under *Younger.* The district court denied this motion. It concluded that at the time the federal complaint was filed there was "no ongoing action in state court," and therefore

abstention under *Younger* was improper. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). The district court granted the Tribes' motions to stay the federal proceedings under *Pullman*, and to reserve the Tribes' federal claims under *England*. The present DNRC director, Mark Simonich, appeals.

We consider the question of our appellate jurisdiction as it pertains to each of the district court's three interlocutory orders.

A. Order Denying the Defendants' *Younger* Abstention Motion

1. 28 U.S.C. § 1291

"The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." 28 U.S.C. § 1291 (1991). A district court's decision is appealable under § 1291 only when the decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 (1988) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). When *Younger* abstention is applicable, the district court "must dismiss the action." *Partington v. Gedan*, 880 F.2d 116, 120 (9th Cir. 1989) (internal quotation omitted), *rev'd and vacated in part on other grounds*, 923 F.2d 686 (9th Cir. 1991).

[1] A district court order abstaining under *Younger* and dismissing the case ends the litigation. It is a final appealable order. *Id.* In contrast, the district court's order in the present case that it will *not* abstain under *Younger* and dismiss the case is not a final decision foreclosing further proceedings. Rather, it "ensures that litigation will continue in the District Court." *Gulfstream*, 485 U.S. at 275. Simonich argues that although the district court's order is not a final order, it is nevertheless immediately appealable under the collateral-

order exception to § 1291 set forth in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

[2] In *Cohen*, the Court recognized a "small class" of decisions appealable under § 1291 although not terminating the underlying action. *Id.* at 546. Pursuant to *Cohen*, we have jurisdiction to hear an appeal of a district court's interlocutory order if the order (1) "conclusively determine[s] the disputed question"; (2) "resolve[s] an important issue completely separate from the merits of the action"; and (3) is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (footnote omitted).

In *Gulfstream*, the Supreme Court applied the first prong of the *Cohen* test and held a district court's refusal to stay or dismiss federal proceedings, pursuant to the abstention doctrine established in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), is not an immediately appealable order. *Gulfstream*, 485 U.S. at 278. The Court noted that while an order *granting* a *Colorado River* stay " 'necessarily contemplates that the federal court will have nothing further to do in resolving any substantive part of the case' . . . an order *denying* a motion to stay or dismiss an action pursuant to *Colorado River* . . . leads to a different result." *Gulfstream*, 485 U.S. at 277-78 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Const. Co.*, 460 U.S. 1, 18 (1983)) (emphasis added). When a district court denies a motion to stay or dismiss under *Colorado River*, it

> does not "necessarily contemplate" that the decision will close the matter for all time. In denying such a motion, the district court may well have determined only that it should await further developments before concluding that the balance of factors to be considered under *Colorado River* . . . warrants a dismissal or stay . . . . Thus, whereas the granting of a *Colorado River* motion necessarily implies an expec-

> tation that the state court will resolve the dispute, the denial of such a motion may indicate nothing more than that the district court is not completely confident of the propriety of a stay or dismissal at that time.

Gulfstream, 485 U.S. at 278.

The factors a district court considers in adjudicating a motion to abstain under *Younger* differ substantially from those a court considers in adjudicating a motion to stay proceedings in federal court under *Colorado River*. In deciding whether to grant a stay request under *Colorado River*, a district court considers, among other factors that may be relevant, the relative comprehensiveness, convenience and progress of the state court and federal court actions. *See, e.g., Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 569-70 (1983). By applying the *Colorado River* factors, a district court that refuses to stay proceedings in federal court can monitor the development of the state and federal court proceedings. In so doing, its perspective of refusing to grant a *Colorado River* stay may change over time. *See Gulfstream*, 485 U.S. at 278.

Deciding whether to abstain under *Younger* involves different factors. In making this determination, a district court considers whether there is an ongoing state judicial proceeding, whether the state proceeding implicates important state interests, and whether there is an adequate opportunity in the state proceeding to raise federal constitutional challenges. *See Middlesex*, 457 U.S. at 432. In the *Younger* context, these factors are static. A district court's perception of the appropriateness of abstaining will not be affected by the progress of the state court proceeding. *See Gibson v. Berryhill*, 411 U.S. 564, 577 & n.15 (1973) ("*Younger v. Harris* contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts."). When abstention under *Younger* is appropriate,

> a district court cannot refuse to abstain, retain jurisdiction over the action, and render a decision on the merits after the state proceedings have ended. To the contrary, *Younger* abstention requires dismissal of the federal action.

Beltran v. State of California, 871 F.2d 777, 782 (9th Cir. 1988).

Here, the district court refused to abstain under *Younger*. This was a conclusive determination of the particular issue in dispute—whether to abstain under *Younger*. The first prong of the *Cohen* collateral-order test is satisfied. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 376-77 (1981); *Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1481 (9th Cir. 1991) (regarding the conclusive nature of factual and legal determinations).

The second prong of *Cohen*'s collateral-order test is also satisfied: the question of *Younger* abstention "plainly presents an important issue separate from the merits." *Moses H. Cone*, 460 U.S. at 12 (discussing the second prong in a *Colorado River* decision).

The third prong of *Cohen*, however, is not satisfied. "Only in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims" has the Court found an interlocutory order appealable. *United States v. Ryan*, 402 U.S. 530, 533 (1971). *See also, Firestone*, 449 U.S. at 377-78; *United States v. MacDonald*, 435 U.S. 850, 860 (1978) (jurisdiction to hear an interlocutory appeal appropriate only where the "legal and practical value of [an asserted right] would be destroyed if it were not vindicated before trial"). The Court has permitted interlocutory appeals prior to criminal trials where a defendant claims a violation to his constitutional right to bail, *Stack v. Boyle*, 342 U.S. 1 (1951), or that he will be subjected to double jeopardy. *Abney v. United States*, 431 U.S. 651 (1977).

The Court has not, however, permitted interlocutory appeals of pretrial discovery orders, *Ryan*, 402 U.S. 530, rulings on attorney conflict of interest, *MacDonald*, 435 U.S. 850, or orders involving class certification. *Coopers & Lybrand*, 437 U.S. at 469.

Simonich argues that if review of the district court's refusal to abstain under *Younger* is "left to the end of this litigation, the interference—a federal trial and decision on the underlying merits—will have already occurred [before federal appellate review is possible] and the issue will effectively be moot." We reject this argument.

[3] On appeal from a final judgment, a court of appeals can review a district court's refusal to abstain under *Younger*, without implicating the mootness doctrine, even though the district court has decided the merits of the case and all state proceedings have been completed. *See, e.g., Beltran*, 871 F.2d at 782-83; *Kitchens v. Bowen*, 825 F.2d 1337, 1341 (9th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988). Thus, Simonich's *Younger* claim will not be lost if the district court renders a final decision on the Tribes' federal claims.[1] Because Simonich's *Younger* claim can be reviewed adequately on appeal from a final judgment, the third prong of the *Cohen* collateral order test is not satisfied.

[4] We conclude we lack jurisdiction under § 1291, and

[1]Nor is there any apparent hardship to Simonich if we review the *Younger* issue on appeal from the district court's final judgment on the merits. *See Beltran*, 871 F.2d at 782-83. *Cf. Abney*, 431 U.S. 651; *Stack*, 342 U.S. 1. There also is no harm to comity or federalism, the policies underlying *Younger* abstention. *Fresh Int'l Corp. v. Agricultural Labor Relations Bd.*, 805 F.2d 1353, 1356 (9th Cir. 1986). Because the district court stayed federal proceedings pursuant to *Pullman*, and reserved resolution of the Tribes' federal claims pursuant to *England*, there will be no federal interference with pending state proceedings. Moreover, in this case, if the Tribes win in state court on their state law claims, their federal claims will become moot.

under the *Cohen* exception, to hear Simonich's appeal of the district court's interlocutory order denying *Younger* abstention.

2. 28 U.S.C. § 1292(a)(1)

Simonich argues the district court's order denying his *Younger* motion is appealable under 28 U.S.C. § 1292(a)(1). We have jurisdiction under § 1292(a)(1) to hear appeals from district court orders "that have the practical effect of granting . . . injunctions and have 'serious, perhaps irreparable, consequence[s].' " *Gulfstream*, 485 U.S. at 287-88 (quoting *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981)).

Simonich does not explain, and we do not perceive, how the district court's refusal to abstain under *Younger* has the effect of an injunction. *Cf. Reynaga v. Cammisa*, 971 F.2d 414, 416-17 (9th Cir. 1992). Moreover, Simonich has not shown any serious harm or irreparable consequences by our refusal to entertain his appeal at this time. *Federal Land Bank v. L.R. Ranch Co.*, 926 F.2d 859, 864 (9th Cir. 1991).

3. 28 U.S.C. § 1651

[5] Simonich's fallback position is that even if we lack jurisdiction to entertain his appeal of the district court's order refusing to abstain under *Younger*, we should issue a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651 (1991),[2] and compel the district court to abstain.

[2]28 U.S.C. § 1651 provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nici may be issued by a justice or judge of a court which has jurisdiction.

The writ of mandamus is an extraordinary remedy. *Valenzuela-Gonzalez v. United States Dist. Court*, 915 F.2d 1276, 1278 (9th Cir. 1990). Only "exceptional circumstances amounting to a judicial usurpation of power will justify the issuance of the writ." *Gulfstream*, 485 U.S. at 289 (internal quotations omitted). To issue the writ, we must be "firmly convinced that the district court has erred." *Valenzuela-Gonzalez*, 915 F.2d at 1279 (internal quotation omitted). Additionally, the party seeking mandamus must establish that its right to issuance of the writ is " 'clear and indisputable.' " *Gulfstream*, 485 U.S. at 289 (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953)).

In *Bauman v. United States Dist. Court*, 557 F.2d 650 (9th Cir. 1977), we adopted five "objective principles," *United States v. Harper*, 729 F.2d 1216, 1221 (9th Cir. 1984), to guide our determination of whether to issue a writ of mandamus. We consider whether

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires.
>
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.
>
> (3) The district court's order is clearly erroneous as a matter of law.
>
> (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.
>
> (5) The district court's order raises new and important problems, or issues of law of first impression.

Bauman, 557 F.2d at 654-55.

In analyzing these principles—which are sometimes referred to as "the *Bauman* factors"—no single factor is determinative and all five need not be satisfied. *Valenzuela-Gonzalez,* 915 F.2d at 1279. In fact, the five factors " 'are not meant to supplant reasoned and independent analysis by appellate courts' . . . . Rather, they 'serve only as a useful starting point, an analytic framework for determinations regarding the propriety of mandamus relief.' " *Harper,* 729 F.2d at 1222 (quoting *In re Cement Antitrust Litigation,* 688 F.2d 1297, 1301 (9th Cir. 1982), *aff'd sub nom. Arizona v. United States Dist. Court,* 459 U.S. 1191 (1983)). *See also Star Editorial, Inc. v. United States Dist. Court,* 7 F.3d 856, 859 (9th Cir. 1993).

Here, the first two *Bauman* factors are not applicable. Simonich has an adequate means to obtain the relief he desires by direct appeal, and he will not be damaged or prejudiced in a way not correctable on appeal.

With regard to the fourth and fifth factors, there is no showing that courts frequently err in applying the *Younger* doctrine, and although the issue raised by the district court's order—whether *Younger* is applicable in the present circumstances—is one of first impression, it is a fact-specific inquiry with limited application beyond this case. *Cf. Harper,* 729 F.2d at 1222.

The third factor is more troubling. We recently stated: "[I]t is clear that the third factor, the existence of clear error as a matter of law, is dispositive." *Executive Software N. Am., Inc. v. United States Dist. Court,* No. 93-70679, slip op. at 5091 (9th Cir. May 16, 1994). Having made this statement, we went on to examine whether the other factors in the mandamus calculus indicate that the writ should issue to correct the district court's errors. *Id. See also Admiral Ins. Co. v. United States Dist. Court,* 881 F.2d 1486, 1491 (9th Cir. 1989) (examining all of the factors although the district court clearly erred).

In *Survival Systems of the Whittaker Corp. v. United States Dist. Court*, 825 F.2d 1416 (9th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988), we stated: "Although several indicators are specified for consideration in *Bauman*, one factor is determinative in this case. When the district court's order is correct as a matter of law, it is obvious that the writ of mandamus should not be issued." *Id.* at 1418.

[6] In the present case, whether the district court's ruling is "correct" as a matter of law is a question that can be resolved on appeal from a final judgment. Suffice it to say at this juncture in the proceedings we are not persuaded the district court clearly erred in refusing to abstain under *Younger*.

Younger abstention is proper where (1) there are ongoing state judicial proceedings, (2) that implicate important state interests, and (3) there is an adequate opportunity in the state proceedings to raise federal questions. *Middlesex*, 457 U.S. at 432.

Contrary to the district court's conclusion, there was an ongoing state judicial proceeding. Although the state complaint was filed after the federal complaint, no proceedings of any substance had occurred in the federal action before the Tribes filed their state complaint. *See Hicks v. Miranda*, 422 U.S. 332, 348-50 (1975) (no substantial proceedings where criminal charges filed after the filing of the federal complaint, but before any federal hearings); *Polykoff v. Collins*, 816 F.2d 1326, 1332 (9th Cir. 1987) ("Whether the state proceedings are 'pending' is not determined by comparing the commencement dates of the federal and state proceedings. Rather, abstention under *Younger* may be required if the state proceedings have been initiated 'before any proceedings of substance on the merits have taken place in the federal court.' ") (quoting *Hicks*, 422 U.S. at 349). The first prong of the *Younger* abstention doctrine is satisfied.

With regard to the second and third prongs, the ongoing judicial proceeding in Montana state court implicates impor-

tant state interests, *see United States v. Anderson,* 736 F.2d 1358 (9th Cir. 1984), and there will be an adequate opportunity in that proceeding to raise federal questions. *See* Mont. Code Ann. § 2-4-704(2) (1991).

At first blush, it would seem the district court should have abstained under *Younger*. However, here, the ongoing state proceeding is a civil action. Civil-*Younger* abstention has been upheld only where a party seeks to invoke federal jurisdiction for the purpose of "restraining state proceedings or invalidating a state law." *United States v. Adair,* 723 F.2d 1394, 1402 n.5 (9th Cir. 1983), *cert. denied sub nom. Oregon v. United States,* 467 U.S. 1252 (1984) (considering whether a federal district court had jurisdiction over the declaration of Indian water rights on a reservation). *See, e.g., Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1 (1987); *Juidice v. Vail,* 430 U.S. 327 (1977); *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975); *Mobil Oil Corp. v. City of Long Beach,* 772 F.2d 534, 542 (9th Cir. 1985).

We are unaware of any decision upholding civil-*Younger* abstention where the plaintiffs sought relief similar to that sought here. The Tribes do not seek by their federal court action to restrain any ongoing state proceeding. Although they assert the Montana Water Use Act cannot be used to regulate their water rights, they do not argue the Act is facially unconstitutional or invalid. Rather, they contend they are constitutionally exempt from the Act's provisions. Whether *Younger* abstention is appropriate in these circumstances is unclear. *But see Fresh Int'l Corp. v. Agricultural Labor Relations Bd.,* 805 F.2d 1353, 1356 (9th Cir. 1986) (abstention is warranted whenever there exists an important state interest).

In sum, the first two *Bauman* factors are not applicable, facts to support the fourth and fifth factors do not exist, and our consideration of the third factor leaves us unconvinced the district court's order refusing to abstain under *Younger* was clearly erroneous as a matter of law.

[7] We conclude Simonich's right to issuance of a writ of mandamus is not clear and indisputable, and we decline to issue the writ.

B. Order Granting the Tribes' *England* Reservation Motion

When *England* reservation is granted, a party left to litigate claims in state court under *Pullman* may return to federal court to litigate his or her federal claims. *England*, 375 U.S. 411 at 421-22; *Wicker v. Board of Educ.*, 826 F.2d 442, 443 (6th Cir. 1987). Such an order does not end the litigation on the merits. *Gulfstream*, 485 U.S. at 275. Rather, the federal court awaits the completion of the state court litigation, and then, if necessary, decides the federal claims in light of the state court's rulings. The order is not a final judgment immediately appealable under 28 U.S.C. § 1291. *See Goldberg v. Carey*, 601 F.2d 653, 656 (2nd Cir. 1979) (holding the denial of an *England* reservation motion is not a final decision under § 1291).[3]

As we stated previously, however, we have jurisdiction under 28 U.S.C. § 1292(a)(1) to hear an appeal of a district court order that has the practical effect of granting an injunction and creates harmful consequences. *Gulfstream*, 485 U.S. at 287-88. Simonich argues the district court's order granting the Tribes' motion to reserve the federal issues under *England* has the practical effect of an injunction. He contends that, under *England*, the federal court will not accord *res judicata* effect to any state court determination of federal claims, and this effectively enjoins the state court from considering the federal claims conditionally put before it. We reject this argument.

The state court is not enjoined from hearing and deciding the federal claims. The *England* reservation order simply

[3]Simonich does not argue the collateral-order exception is applicable to the district court's order granting the Tribes' *England* motion.

reserves to the federal court jurisdiction to decide the federal claims. It gives the Tribes the option of presenting all their claims to the state court or waiting and presenting their federal claims to the federal court after the state litigation ends. *See Lurie v. California*, 633 F.2d 786, 788-89 (9th Cir. 1980), *cert. denied*, 451 U.S. 987 (1981).

[8] We conclude the district court's *England* reservation order does not have the practical effect of an injunction. Thus, we have no jurisdiction under 28 U.S.C. § 1292(a)(1) to entertain Simonich's appeal of that order. *Cf. Goldberg*, 601 F.2d at 658 ("when a temporary injunction has been sought and a stay has been granted to permit a state court to determine pertinent issues under *England*, the order operates as a denial of a temporary injunction and is thus appealable under § 1292(a)(1)"). *See also Agcaoili v. Gustafson*, 844 F.2d 620, 623 (9th Cir. 1988) (finding jurisdiction where "the stay [was] part and parcel of the district court's order denying [a summary judgment motion for] injunctive relief"), *withdrawn on other grounds*, 870 F.2d 462 (9th Cir. 1989).

C. Order Granting the Tribes' Motion for a Stay under *Pullman*

[9] We have jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1) to hear an interlocutory appeal of a district court's order granting a stay pursuant to the *Pullman* abstention doctrine. *Moses H. Cone*, 460 U.S. at 9 & n.8; *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2 (1962); *Moses v. Kinnear*, 490 F.2d 21, 24 (9th Cir. 1974). We review for abuse of discretion. *Partington*, 880 F.2d at 120; *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983).

Pullman abstention is appropriate when (1) the case touches on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open, (2) constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate

the controversy, and (3) the possible determinative issue of state law is uncertain. *Cinema Arts, Inc. v. County of Clark*, 722 F.2d 579, 580 (9th Cir. 1983); *Canton v. Spokane Sch. Dist.*, 498 F.2d 840, 845 (9th Cir. 1974).

Applying this test to determine whether a stay should be granted under *Pullman*, the district court found,

> the issues raised by the Tribes involving water use touch upon sensitive areas of social policy. The jurisdictional questions arise under both state and federal law, and resolution of the state law questions could obviate the need to address the federal constitutional issues. . . . Finally, the court finds that the particular statutes at issue have not been interpreted in the context of the circumstances presented here and that the ultimate outcome concerning their interpretation is in doubt.

We agree with these findings. The issue of Montana's regulation of water usage touches upon important state issues. In their state complaint, the Tribes assert state jurisdictional arguments potentially dispositive of the federal issues, and whether the Tribes can win on their state law claims is uncertain. *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984).

Simonich makes no argument with regard to the above-stated test. Nor does he cite any case interpreting the particular state statutes as applied to the present circumstances. *See Orr v. Orr*, 440 U.S. 268, 278 n.8 (1979). Rather, he argues the district court should have abstained under *Younger*, and, therefore, should have dismissed the federal case entirely rather than grant a stay under *Pullman*.

We reject this argument. As we stated previously, we do not have jurisdiction to hear the appeal of the district court's order denying *Younger* abstention; and, in considering

Simonich's petition for a writ of mandamus, we cannot say the district court clearly erred by refusing to abstain.

[10] The district court did not abuse its discretion by granting the Tribes' motion for a stay under *Pullman*.

CONCLUSION

We dismiss for lack of jurisdiction Simonich's appeal of the district court's denial of *Younger* abstention, and of the district court's reservation of the Tribes' federal claims under *England*. We deny Simonich's petition for a writ of mandamus.

We have jurisdiction to hear Simonich's appeal of the district court's order granting the Tribes' motion under *Pullman* staying all federal proceedings until resolution of the related state case. We affirm that order.

Appeal DISMISSED in part and AFFIRMED in part. The appellees shall recover all of their costs on appeal.

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NOS. 66459-76L, Ciotti; 63574-s76L, Flemings; 63023-s76L, Rasmussen; 64988-g76LJ, Starner; and APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G15152-S76L, Pope.	)	FINAL ORDER ON JURISDICTION

* * * * * * * * * * * * * * * * *

BACKGROUND

The Confederated Salish and Kootenai Tribes ("Tribes") and the United States Department of Interior ("United States") appeared in the above-captioned proceedings to contest the Montana Department of Natural Resources and Conservation's ("DNRC") jurisdiction to issue water use permits for the use of non-reserved water by non-Indians on fee lands on the Flathead Reservation. The Tribes petitioned the Department to bifurcate the matter in order to first obtain a determination of the DNRC's jurisdiction.

The motion to dismiss for lack of jurisdiction requesting bifurcation was certified to the Director of the DNRC pursuant to Mont.Admin.R. 36.12.214.

On April 30, 1990, DNRC Director Karen L. Barclay (now Karen Barclay Fagg) ordered, for the reasons outlined in an accompanying twelve-page memorandum, that the DNRC "has regulatory jurisdiction over new appropriations of non-reserved water by non-Indians on fee lands within the [Flathead] Reservation." [copy attached.]

The Director's conclusion in the memorandum attached states:

> In conclusion, under federal law Montana has regulatory jurisdiction over water in excess of that needed for federal reserved rights. Given the State's strong interest in comprehensive water regulation, Montana's jurisdiction over surplus water extends to fee land on the Reservation. Tribal and federal water rights, although not yet adjudicated, are adequately protected by the DNRC permit process.

The Tribes on July 9, 1990, objected to the Director's Order and requested the opportunity for oral argument "opposing the finalization of the April 30, 1990 interlocutory Order..." Tribes' "Objection to Proposal for Decision and Order" at 1.

The Tribe classified its objection into three categories as follows:

> 1. The McCarran Amendment, 43 U.S.C. § 666, requires a general inter sese water rights adjudication before the state may arguably enter into any administration of water rights on the Flathead Indian Reservation. Rather than abide by the plain meaning of the in seriatim requirement of McCarran, the state is engaging in a piecemeal administration of water claims without first determining by general inter sese adjudication the existence of any water rights, reserved or otherwise; and

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> 2. The suspension statute, 85-2-217, MCA, requires a stay of "all proceedings to generally adjudicate" Indian reserved water rights while the State and Tribes are in negotiation under 85-2-702, MCA. The Tribe and State are presently in negotiation, yet the State, as evidenced by these proceedings, is ignoring the suspension statute and merrily conducting proceedings under the Act on the Reservation that directly impact the senior and unquantified Indian aboriginal and reserved water rights on the Reservation; and
>
> 3. The State is barred by the operation of both federal and state case law from imposing the Water Use Act on the Flathead Indian Reservation unless Congress expressly authorizes such an extension of state jurisdiction, which Congress has not seen fit to do.

Tribes' "Objection to Proposal for Decision and Order" at 3-4.

In addition to the Tribes, only the United States also requested oral argument on the issue of jurisdiction.

Oral argument before DNRC Director Karen L. Barclay was held in this matter on September 26, 1991, at Polson, Montana.

The Tribes were represented by John Carter.

The United States was represented by John C. Chaffin.

The Joint Board of Control was represented by Jon Metropoulos.

Frank Pope, a change applicant, was represented by Walter E. Congdon.

FINAL ORDER ON JURISDICTION

The Department through its Director affirms the "Director's April 30, 1990, Order" and adopts it, in addition to and consistent with this supplemental memorandum, as the Department's Final Order or jurisdiction in this consolidated proceeding.

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SUPPLEMENTAL MEMORANDUM TO APRIL 30, 1990, ORDER

Since the "Director's April 30, 1990, Order" already addresses the applicability of the McCarran Amendment, the suspension statute and other matters, this memorandum, in order to avoid repetition, will be limited to responding to new matters raised by exceptions to that Order or at oral argument.

Don Brown

The Tribe and the United States both criticize the Department for not following or distinguishing the district court Don Brown decision. U.S. and M.P.C. v. DNRC, Cause No. 50612, First Judicial District of the State of Montana, Lewis and Clark County (1987). In that case Judge Bennett made several rulings concerning the interpretation and implementation of the Montana Water Use Act, specifically Mont. Code Ann. § 85-2-311 (1989).[1]

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[1] Mont. Code Ann. § 85-2-311 (1989) as it existed at date of Bennett's decision read in pertinent part:

> (1) Except as provided in subsections (2) through (4), the department shall issue a permit if the applicant proves by substantial credible evidence that the following criteria are met:
>
> (a) there are unappropriated waters in the source of supply;
>
> (i) at times when the water can be put to the use proposed by the applicant;
>
> (ii) in the amount the applicant seeks to appropriate;
>
> (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
>
> (b) the water rights of a prior appropriator will not be adversely affected....

1985 Mont. Laws, Ch. 573, § 4.

That decision was not appealed by the Department as part of a three-way agreement among the DNRC, the United States, and the Montana Power Company that allowed new water usage to continue in the Upper Missouri River Basin under certain conditions.

The significance of the Don Brown decision, however, has been eroded by subsequent legislative changes to the Water Use Act. At the time of Don Brown Mont. Code Ann. § 85-2-227 (1989) provided that a claim of existing rights was prima facie proof of its content.[2] The United States and the Montana Power Company argued that claims of existing rights were prima facie proof of their underlying water right not only in the adjudication proceedings, but in the Water Use Act permit proceedings as well. Subsequent to Don Brown, the statute was amended to provide that the prima facie status is for the "purposes of adjudicating rights pursuant to this part,"[3] i.e., part 2 ("Adjudication of

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[2] Mont. Code Ann. § 85-2-227 (1989) at the time of Judge Bennett's decision read:

> A claim of an existing right filed in accordance with 85-2-221 constitutes prima facie proof of its content until the issuance of a final decree.

1979 Mont. Laws, Ch. 697, § 15.

[3] Mont. Code Ann. § 85-2-227 (1991) now reads:

> **For purposes of adjudicating rights pursuant to this part**, a claim of an existing right filed in accordance with 85-2-221 or an amended claim of existing right constitutes prima facie proof of its content until the issuance of a final decree. For purposes of administering water rights, the provisions of a temporary preliminary decree, as modified after objections and hearings, supersede a claim of existing right until a final decree is issued.

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Water Rights") of Title 85 ("Water Use"), and therefore not part 3 ("Appropriations, Permits, and Certificates of Water Rights"), which is the relevant part in the present proceeding. Therefore, Judge Bennett's ruling as to the affect of the prima facie statute on permit proceedings has been superseded by legislative amendment.

Other legislative changes took place as well. Mont. Code Ann. § 85-2-311 (1989) was amended in 1989[4] to change "(a) there are unappropriated waters in the source of supply" to "there are unappropriated waters in the source of supply at the proposed point of diversion", and to change (a)"(iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available" to "during the period in which the applicant seeks to appropriate, the amount requested is reasonably available." (emphasis added).

In the DNRC's opinion these are significant legislative changes that allow the Department to continue its water right permitting process simultaneously with the continuation of the statewide general stream adjudication. Additionally, the Don Brown case involves the Upper Missouri River Basin and not the Clark Fork River Basin of which the Flathead River and its tributaries are a part. The DNRC continues to offer a forum to individuals in the Clark Fork River Basin in which they can appear and file objections to new proposed uses of water.

(emphasis added).

[4] 1989 Mont. Laws, Ch. 432, § 2.

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Despite all the references to the Don Brown decision, though, since the Tribes and the United States emphasize that the present case is one of jurisdiction only, the application of the Don Brown decision as they suggest would still not solve the jurisdictional issue, and so it is not dispositive of the present controversy.

Bracker and Brendale

The Tribes and the United States object to any reference to, or reliance on, the cases of Bracker and Brendale, and would like all references to them excised from the Final Order. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989).

Reference to these cases is entirely proper. Bracker was referenced to and relied on by the Ninth Circuit in both Colville Confederated Tribes v. Walton, 647 F.2d. 42 (9th Cir. 1981), cert. denied, 454 U.S. 1092 (1981), and United States v. Anderson, 736 F.2d. 1358 (9th Cir. 1984).[5] The Brendale decision was decided subsequent to both of those cases. Although it is true Brendale is a zoning case and Bracker was a taxation case, both cases involve the issue of state jurisdiction versus that of the Tribes or the federal government. The Ninth Circuit

[5]See the memorandum accompanying the"Director's April 30, 1990, Order" at 4-12 for the discussion of these cases.

in Walton and Anderson certainly did not find it objectionable to refer to Bracker simply because it was not a water rights case.

Despite finding the reference to Bracker and Brendale objectionable, the Tribes assert the type of analysis required by Bracker and Brendale has not and cannot be undertaken in this case because it is factual in nature, and a factual hearing has not taken place in this purely jurisdictional case.[6]

But the Bracker analysis actually involves a determination of whether the exercise of state authority would violate federal law - such a determination is something this administrative agency is not only equipped to do, but must do. That inquiry is described by the Supreme Court as follows:

> More difficult questions arise where, as here, a state asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

448 U.S. at 145-146. (emphasis added).

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[6] At oral argument, in response to a question on this matter, the Tribe did not seek an opportunity to present a factual presentation that it asserts is necessary in a Bracker or Brendale analysis.

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The present jurisdictional case is certainly "an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." And in this proceeding the Department will not allow parties to argue that it is futile to present facts until the jurisdictional issue is resolved,[7] and at the same time argue the jurisdictional issue cannot be decided because no facts have been presented. Therefore, this Department will make a jurisdictional ruling based on the record and arguments before it. The DNRC has undertaken an inquiry as to whether federal law will be violated, and that legal analysis along with the existing presumption from Montana means the absence of an evidentiary hearing is not fatal.[8]

In Montana v. United States, 450 U.S. 544 (1981), the Supreme Court discussed the "general principle" that "the exercise of tribal power beyond what is necessary to protect

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[7] In its July 9, 1990, "Objection to Proposal for Decision and Order," at 5-6, the Tribe states:

> The Tribes' jurisdictional objections to the DNRC process are fundamentally threshold in nature. If DNRC has no jurisdiction to engage in on-Reservation permitting activities then there is no probative value served in presenting facts to an agency without authority to address those facts. Until such time as the Tribes' threshold questions have been finally answered DNRC must abstain from any activity affecting the Tribes' water rights on the Flathead Reservation. For that reason, the Tribes have not presented a factual case in these proceedings.

[8] It is important to note that the Tribes and the United States have made known throughout this proceeding the concerns they have with state jurisdiction through briefs filed, exceptions and oral argument.

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tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. Even those Justices who disagree with that Supreme Court ruling that creates a reversal of the usual presumption and results in "a presumption against tribal civil jurisdiction over non-Indians absent express congressional delegation," recognize they cannot "excise the decision from our jurisprudence." Brendale, 492 U.S. at 456.

Therefore, the Tribes' argument that reference to Bracker and Brendale be excised from the Final Order is misplaced, and the DNRC can decide whether the exercise of state authority would violate federal law.

Scope of Final Order

In its exceptions and at oral argument, the United States stated that it felt there was a conflict between the "Director's April 30, 1990, Order" and the accompanying memorandum as to the exact scope of the Department decision on jurisdiction. For clarification, this Final Order applies to new permits for surplus, non-reserved water, and to changes of surplus, non-reserved water, by non-Indians on fee lands within the exterior boundaries of the Flathead Indian Reservation.

As to new water uses, if any, the Department's decision goes no farther beyond what was set out by the Ninth Circuit in

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Anderson:

> The state may regulate only the use, by non-Indian fee owners, of excess water. Any permits issued by the state would be limited to excess water. If those permits represent rights that may be empty, so be it.

736 F.d at 1365.

NOTICE

This Final Order of the Department may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

DONE AND DATED this 14th day of April 1992.

Karen Barclay Fagg

Karen Barclay Fagg, Director

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 14th day of April, 1991 as follows:

Kenneth M. and Jorrie Ciotti
P.O. Box 14
Niarada, MT 59852

Clayton Matt
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CASE #

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CASE #

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMITS NOS. 66459-76L, Ciotti; 62935-s76LJ, Crop Hail Management; 63574-s76L, Flemings; 64965-s76LJ, Gray; 63023-s76L, Rasmussen; 64988-g76LJ, Starner; and APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G15152-S76L, Pope.	ORDER

* * * * * * * * * * * *

The Confederated Salish and Kootenai Tribes and the United States Department of Interior have appeared in the seven captioned proceedings to contest the jurisdiction of the Montana Department of Natural Resources and Conservation to issue water use permits for the use of non-reserved water by non-Indians on fee lands on the Reservation. Their motion to dismiss for lack of jurisdiction was certified to the Director, pursuant to ARM 36.12.214.

ORDERED that, as described in the attached Memorandum, the Montana Department of Natural Resources and Conservation maintains that it has regulatory jurisdiction over new appropriations of non-reserved water by non-Indians on fee lands within the Reservation.

DATED this 30th day of April, 1990.

Karen L. Barclay
Director

CASE #

BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA

* * * * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMITS NOS. 66459-76L, Ciotti; 62935-s76LJ, Crop Hail Management; 63574-s76L, Flemings; 64965-s76LJ, Gray; 63023-s76L, Rasmussen; 64988-g76LJ, Starner; **and** **APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G15152-S76L, Pope.**	**MEMORANDUM**

* * * * * * * * * * * *

The Confederated Salish and Kootenai Tribes ("Tribes") and the United States Department of Interior ("United States") have appeared in the seven captioned proceedings to contest the Montana Department of Natural Resources and Conservation ("DNRC") jurisdiction to issue water use permits on the Flathead Reservation.

Among the arguments raised by the Tribes and the United States are:

- because the DNRC permit process involves a piecemeal adjudication of existing rights, the DNRC lacks jurisdiction under the McCarren Amendment, 43 U.S.C. § 666; further, state statutes have suspended the DNRC permit process while negotiation of federal reserved rights is pending;
- federal law requires that federal reserved rights be finally adjudicated before Montana can regulate surplus water on the Reservation; and,
- absent express Congressional authorization, Montana's water use statutes are inapplicable on the Reservation.

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Having carefully considered the arguments and authorities offered by the Tribes and the United States, the DNRC continues to assert its regulatory jurisdiction over the use of non-reserved water by non-Indians on fee lands within the Reservation.

1. The McCarren Amendment is not applicable because the DNRC permit process is not an adjudication of existing rights.

In the McCarren Amendment Congress consented to the joinder of the United States in any suit for the "adjudication of rights to the use of water of a river system or other source". The Amendment requires Indian Tribes, and the United States as trustee for tribes, to submit claimed federal reserved water rights to a state's general water rights adjudication. See Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983). Contrary to the assertions of the Tribes and the United States, the McCarren Amendment does not apply to the DNRC water use permit process. Montana statutes make a clear distinction between the DNRC process and the State's general water rights adjudication.

Montana's general water rights adjudication applies only to "existing" water rights, which are those with a priority date earlier than July 1, 1973. Mont. Code Ann. § 85-2-102(9). Formal adjudication of the priorities, scope, and extent of existing rights is the exclusive function of district court water judges. See Mont. Code Ann. Title 3, Chapter 7. Montana's general adjudication is currently pending in the Montana state

courts. Mont. Code Ann. §§ 85-2-201 et seq. Federal reserved rights are included in the adjudication process and will either be decreed by the state court or negotiated with the Reserved Water Rights Compact Commission. Mont. Code Ann. § 85-2-217.

In contrast to the adjudication of existing rights, the DNRC permit process is a method of reviewing proposed new uses of water. Since July 1, 1973, a person planning to appropriate water must apply for and receive a permit from the DNRC. Mont. Code Ann. § 85-2-302. To obtain a permit, the applicant must demonstrate, among other things, that there is unappropriated water at the point of diversion, and that the water rights of prior appropriators will not be adversely affected. Mont. Code Ann. § 85-2-311.

Contrary to the Tribes' argument, in determining whether there is unappropriated water the DNRC does not adjudicate existing water rights, but simply requires the applicant to present evidence of water physically available at the proposed point of diversion. See Mont. Code Ann. § 85-2-311(1)(a). Similarly, the DNRC does not determine the validity of existing rights when it reviews for adverse effect on existing water rights. If a question is raised concerning the validity of an existing right, the DNRC may certify the question to a water judge. Mont. Code Ann. § 85-2-309(2). This distinction between the adjudication and the DNRC process is also clearly shown by Mont. Code Ann. § 85-2-313, which provides that permits issued by the DNRC are "provisional", and are subject to the final determination of existing rights by a water judge.

Thus, because the DNRC permit process is not an "adjudication", the provisions of the McCarren Amendment are inapplicable. The clear distinction between the DNRC process and the adjudication also makes inapplicable the statute suspending "proceedings to generally adjudicate" federal reserved water rights while negotiation of those rights is pending. Mont. Code Ann. § 85-2-217.

2. **The State of Montana has regulatory jurisdiction over the use of non-reserved water by non-Indians on fee land within the Reservation. The State has a strong interest in developing a comprehensive water regulation system for state citizens. By contrast, the Tribes have no regulatory interest over surplus waters on Reservation fee lands. Tribal or federal water rights are given adequate protection in Montana's permitting process, even though the federal rights have not been finally adjudicated.**

DNRC water use permits are issued only for surplus water, which is water available after existing rights, including reserved rights, are satisfied. Federal courts have long recognized that the state has jurisdiction over water in excess of that needed for federal reserved rights. See, eg: Conrad Investment Co. v. United States, 161 F. 829, 834 (9th Cir. 1908); United States v. Ahtanum Irrigation District, 236 F.2d 321, 327 (9th Cir. 1956). The more specific question of when a state may exercise its jurisdiction over surplus water on a reservation has been addressed in two recent federal decisions: Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) and United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984). These cases adopted a balancing test to weigh the state, federal, and

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tribal interests involved in extending state regulatory jurisdiction onto a reservation:

> [Where] a state asserts authority over the conduct of non-Indians engaging in activities on the reservation [the court must make a] particularized inquiry into the nature of the state, federal and tribal interests at stake, an inquiry designed to determine whether in the specific context, the exercise of state authority would violate federal law.

Anderson, supra at 1365, quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980).

Both the Walton and Anderson courts recognized that states have a strong interest in developing a comprehensive water regulation system for state citizens. Congress also has recognized this interest, and has adopted a policy of deference to state water law:

> In a series of Acts culminating in the Desert Lands Act of 1877, ch. 107, 19 Stat. 377, Congress gave the states plenary control of water on the public domain. California - Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-64, 55 S.Ct. 725, 731, 79 L. Ed. 2d 1356 (1935). Based on this and other legislation, the Supreme Court concluded that Congress almost invariably defers to state water law when it expressly considers water rights. United States v. New Mexico, 438 U.S. 696, 702, 98 S. Ct. 3012, 3015, 57 L.Ed.2d 1052 (1978).

Walton, supra, at 53. See also: Anderson, supra, at 1365.

Walton and Anderson also established that a state's interest in water regulation does not necessarily end at a reservation boundary. The weight of the state's on-reservation regulatory interest depends on the extent to which on-reservation water use has off-reservation effects. See Anderson, supra, at p. 1366. In Walton, the stream in question was small, non-navigable, and began and ended entirely on the Reservation. 647 F.2d at 52. The court found that tribal control of the stream would have "no

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impact on state water rights off the reservation." Id at p. 53. Accordingly, the Walton court concluded that the state's regulatory interest was limited and that the policy of federal deference to state water law did not apply. The court also noted that validation of the state permits at issue could have jeopardized the agricultural use of downstream tribal lands as well as the existence of the tribal fishery. Id at p. 52.

In Anderson, on the other hand, the stream in question formed a reservation boundary, and was a tributary to the Spokane and Columbia Rivers. 736 F.2d at p. 1366. This fact gave the state a strong interest in extending its regulatory authority to surplus waters on-reservation. Id. at 1304. The court then considered whether tribal rights would be adversely affected by state regulation, and found that tribal water rights were adequately protected by quantification in a federal decree and oversight by a federal master. Id at p. 1365, 1366. Finally, the court noted that some of the affected non-Indian lands on-reservation had been opened for settlement under the Homestead Act. Id at pp 1365-66. These factors led the court to rule in favor of state jurisdiction on-reservation.

Of the seven DNRC permits and change authorizations at issue here, three projects are entirely off-reservation. Crop Hail Management, Permit Application No. 62935-s76LJ; Gray, Permit Application No. 64965-s76L; Rasmussen, Permit Application No. 63023-s76L. None of the legal authorities cited by the Tribes or the United States suggests that the DNRC lacks jurisdiction to issue these off-reservation water use permits.

The three remaining permit applications and one change authorization application all have points of diversion on fee land on the Reservation. In each case, the diversion is from a tributary of the Flathead River system, one of the major river systems in northwest Montana, which in turn is a major tributary of the Clark Fork of the Columbia River. None of the streams involved has the unusual closed-basin hydrology that led the Walton court to depart from the federal rule of deference to state water regulation. Because these on-reservation streams are tributary to waterways that transcend the reservation boundaries, the state has a strong regulatory interest in this case, pursuant to Anderson. This case also resembles Anderson in that the Flathead Reservation contains substantial lands opened to non-Indian settlement under homestead laws. See Joint Board of Control of Flathead, Mission v. U.S. 646 F.Supp. 410, (D. Montana 1986), rev'd on other grounds 832 F.2d 1127 (9th Cir. 1987).

By contrast, the Tribes have no regulatory interest over surplus waters on Reservation fee lands. Tribal power to regulate the conduct of non-Indians on land no longer owned by or held in trust for the Tribes has been impliedly withdrawn as a necessary result of tribal dependent status. Montana v. United States, 450 U.S. 544, 564 (1981). Absent express Congressional delegation, the Tribes lack authority to regulate non-Indian activities on fee land. Brendale v. Confed. Tribes and Bands of Yakima Indian Nation, 57 USLW 4999, 5005 (1989). Even where tribal interests are affected, tribes have been directed to seek

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recognition and protection of their rights in the state forum, rather than to challenge the jurisdiction of that forum. Id.

In this case, tribal or federal interests are adequately protected by Montana's permitting process. In the first place, DNRC permits are issued only for surplus water available after federal reserved rights are satisfied. The permits contain the following condition subordinating them to Indian water rights:

> This permit is specifically made subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes in the source of supply. The permittees are hereby notified that any financial outlay or work they may choose to invest in their project pursuant to this Permit is at their own risk, since the possibility exists that water may not be available for their project once tribal reserved water rights are quantified by a forum of competent jurisdiction.

Montana statutes also emphasize that DNRC permits are subject to existing water rights. See Mont. Code Ann. §85-2-313. Both by express condition and by statute, then, DNRC permits are valid only to the extent that the prior federal reserved rights are adequately protected. Thus, as a matter of law, federal reserved rights will not be harmed by the DNRC permitting process.

Second, actual conflicts with existing uses of federal rights can be screened in the DNRC permit process. Advance public notice is given of every proposed permit, and claimants of existing water rights have the opportunity to present evidence to the DNRC concerning the specific requirements of their senior water use. The DNRC may not issue the permit unless the applicant proves that the water rights of prior appropriators will not be adversely affected. Mont. Code Ann. § 85-2-311(1)(b). The United States in fact presented evidence in two

of the instant permit application hearings. In Flemings, supra, the BIA offered data about instream flows needed to sustain a claimed tribal fishing right. In Rasmussen, supra, the BIA testified concerning the proposed permit's effect on the water requirements of the Flathead Irrigation Project. Under the Supreme Court's recent decision in Brendale, the availability and flexibility of the DNRC process makes it the preferred forum to regulate use of non-reserved waters on reservation fee lands.

Contrary to the argument of the United States, federal law does not require final adjudication of reserved rights before states can exercise their authority over surplus water on-reservation. Although the Anderson court indicated that quantification of federal rights and their administration by a federal master was "central" to its decision, later decisions in the Ninth Circuit have not shared that concern. Holly v. Totus, 655 F.Supp. 548 (E.D. Wash. 1983), aff'd in part unpub. opin., 749 F.2d 37 (9th Cir. 84); and Holly v. Conf. Tr. and Bands of Yakima Indian Nation, 655 F. Supp. 557 (E.D. Wash. 1985), aff'd unpub. opin. 812 F.2d 714 (9th Cir. 1987), cert. den. 108 S.Ct. 85 (1987). In Holly, the court held that the Yakima Tribe lacked jurisdiction to regulate non-Indian use of surplus water on fee land on-reservation. The court declined to rule whether the state had such jurisdiction, finding that the absence of the United States as a party precluded a "particularized inquiry into the nature of the state, federal, and tribal interests at stake". 655 F. Supp. at 599. As in Montana, the tribal and federal water rights in Holly were still in the process of a state

adjudication. See 655 F. Supp. at 554-55; 655 F.Supp. at 559 n.2. Significantly, however, the Holly court did not treat the lack of a final adjudication as increasing the tribal regulatory interest or as jeopardizing tribal water rights. This suggests that federal courts may not require a final adjudication, but will consider other mechanisms that protect federal rights. In this case, adequate protection is provided by subordination of DNRC permits to senior federal rights, and by the case-by-case review of the DNRC permit process. Thus, both Holly and the present case show the artificiality of the adjudication "requirement."

Under state law as well, federal rights need not be adjudicated before they can participate in the DNRC permit process. Most existing water rights in Montana are still only in the preliminary stages of adjudication. Nevertheless, the DNRC has been reviewing existing rights in permit proceedings since 1973, pursuant to the State Water Use Act. See Mont. Code Ann. Title 85, ch. 2. The drafters of the Act recognized that the DNRC process rarely requires that the ultimate scope of an existing right be known. Rather, the DNRC review focuses more upon specific operation practices of existing rights, such as normal diversion rates and schedules, field rotations, and location and timing of return flow. This detailed information is not considered in the adjudication, but it is the primary basis for determining whether a new water use is compatible with practices of existing users. Thus, state law is designed to allow the permit and adjudication processes to run concurrently.

3. Congressional approval is not required for Montana water use statutes to apply to surplus water on the Reservation.

The Tribes and the United States also argue that, absent express Congressional authorization, Montana's water use statutes are invalid on the Reservation. The parties cite language to that effect in United States v. McIntire, 101 F.2d 650, 654 (9th Cir. 1939), and United States v. Alexander, 131 F.2d 359, 360 (9th Cir. 1942). However, the cited language is derived from very early Supreme Court cases, e.g., Worcester v. Georgia, 31 U.S. 515 (1832), and is no longer a correct statement of federal Indian law. The present rule is that Indian reservations are subject to state jurisdiction except as preempted by federal law or by tribal sovereignty. As outlined above, federal courts now use a balancing test to determine whether federal, state, or tribal regulatory interests are paramount. White Mountain Apache Tribe v. Bracker, supra, 448 U.S. at 143. See also, Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973). If Walton appeared to endorse the McIntire rule, it has been implicitly overruled on that point by the analysis in Anderson, supra.

In any event, a closer reading of McIntire shows its actual holding to be that Montana appropriation statutes do not apply to reserved water on the Reservation. The issue concerned the validity of a state notice of appropriation filed by an Indian allottee while the allotted land was still in trust status. See 22 F. Supp. at 319, 101 F.2d at 652. Federal law is clear that

General Allotment Act allotments, while still in trust status, share in the tribal reserved rights. United States v. Powers, 305 U.S. 527 (1939), 25 U.S.C. § 331 et seq. Consequently, the attempted state appropriation of reserved water was invalid. Later federal decisions confirm that the McIntire ruling pertained to reserved water rather than surplus water. United States v. Alexander, 131 F.2d 359, 361 (9th Cir. 1942); United States v. Ahtanum Irr. Dist., supra at 340. See also, In re Rights to Use Water in Big Horn River, 753 P.2d 76, 114 (Wyo. 1988), cert. den. 109 S.Ct 3265 (1989).

As emphasized above, the DNRC is not asserting jurisdiction over reserved water, but only over surplus water available when reserved rights are satisfied. Federal courts have long recognized that such surplus water falls under state jurisdiction. Conrad Investment Co., supra.

CONCLUSION

In conclusion, under federal law Montana has regulatory jurisdiction over water in excess of that needed for federal reserved rights. Given the State's strong interest in comprehensive water regulation, Montana's jurisdiction over surplus water extends to fee land on the Reservation. Tribal and federal water rights, although not yet adjudicated, are adequately protected by the DNRC permit process.

CASE #

BB

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 66459-76L BY KENNETH M. AND JORRIE CIOTTI	))))	CERTIFICATION TO DIRECTOR

* * * * * * * *

WHEREAS, Objector U.S. Department of Interior has moved that this Application be dismissed alleging that the Department of Natural Resources and Conservation has no jurisdiction to issue Water Use Permits within the exterior boundaries of the Flathead Indian Reservation;

WHEREAS, the Examiner has heretofore proposed denial of the motion; and

WHEREAS, the motion involves a controlling question of law which if finally determined would materially advance the ultimate termination hereof,

NOW, THEREFORE, the Examiner hereby certifies the motion together with briefs filed thereon to the Director for final determination.

Dated this 7th day of November, 1989.

Robert H. Scott

Robert H. Scott, Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Certification to Director was duly served upon all parties of record at their address or addresses this 8th day of November, 1989, as follows:

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Kalispell, Montana

Irene V. LaBare
Legal Secretary

CASE #

BB

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 66459-76L BY KENNETH M. AND JORRIE CIOTTI	))))	PROPOSAL FOR DECISION

* * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on May 19, 1989, in Polson, Montana.

Applicants Kenneth M. and Jorrie Ciotti appeared pro sese. Applicants introduced three exhibits. Applicants' Exhibits A (a photo), B (a photo), and C (a list of Mill Creek flow readings) were admitted.

Objector Flathead Irrigation Project, United States Department of Interior, Bureau of Indian Affairs (hereafter, "Objector Interior") appeared by and through John Chaffin, attorney for the Office of the Solicitor. Mr. Chaffin called witness Doug Oellerman and introduced one exhibit. Objector's Exhibit 1 (a seven page document entitled "Ciotti Hearing") was admitted.

Untimely Objector Flathead Irrigation Project, Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts (hereafter, "Objector JBC") appeared by and through Jon Metropoulos of Browning, Kaleczyc, Berry, and Hoven, P.C., attorneys at law.

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Objector Confederated Salish and Kootenai Tribes (hereafter, "Objector Tribes") waived factual hearing of its objection, and did not appear at the hearing.

Charles Brasen, Manager of the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC") Kalispell Water Rights Bureau Field Office appeared as Department staff witness. There was no objection to any of the contents of the Department file.

The record was left open at the end of the hearing for receipt of a brief by Untimely Objector JBC responding to Objector Interior's Motion to Dismiss. The record closed on November 10, 1989.

PRELIMINARY MATTERS

At the hearing in this matter the Examiner proposed denial of Objector Interior's Motion to Dismiss. The Examiner subsequently certified the motion to the Director pursuant to ARM 36.12.214. The final Department disposition of the motion was its denial. See attached Memorandum.

FINDINGS OF FACT

1. The captioned Application, duly filed on August 4, 1987, at 5:00 p.m., requests 20 gpm up to 1.5 acre-feet per annum from an Mill Creek, a tributary of the Little Bitterroot River, withdrawn by means of an hydraulic ram in the SW¼NW¼NW¼ of Section 21, Township 24 North, Range 24 West, Sanders County, Montana, for year round domestic use in the SW¼NW¼NW¼ of above-said Section, Township and Range.

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2. The pertinent facts of the Application were published in the Plainsman, a newspaper of general circulation in the area of the source, on September 10, 1987. Timely Objections to the Applications were received from Objector Interior and Objector Tribes. Both Objectors assert that the Department does not have jurisdiction to issue Water Use Permits within the exterior boundaries of the Flathead Indian Reservation. The former also asserts that the requested appropriation would impair the water rights of the Flathead Irrigation Project and the instream fishery flows of the Salish and Kootenai Tribes.

3. Untimely Objector JBC does not dispute the jurisdiction of the Department to issue Water Use Permits on the Flathead Indian Reservation, but objects asserting there is insufficient unappropriated water.

4. Objector Interior has filed general adjudication claims claiming rights to divert a total of at least 2,118,600 acre-feet per year of water from the Little Bitterroot and its tributaries (including Mill Creek) under the name "Flathead Irrigation Project". Flathead Irrigation Project (hereafter, "Project") provides 13,162 acres with irrigation water. Untimely Objector JBC has also filed general adjudication claims for the same 2,118,600 acre-feet of water from the Little Bitterroot, its tributaries and specifically Mill Creek under the name "Flathead Irrigation Project". (Department Records.) Apparently each entity claims exclusive control of the same underlying irrigation water rights supplying the Project. Regardless, their

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nonjurisdictional objections are the same; i.e., that there is insufficient unappropriated water in the source to supply both the existing water rights on the source and the use here applied for.

5. Applicants require 2 gpm up to 1.5 acre-feet per annum to supply their consumptive needs. This 2 gpm is pumped to a storage tank by means of an hydraulic ram and pipe. Water is then drawn from the tank as needed. 18 gpm is necessary to operate the hydraulic ram; however, the 18 gpm is returned to the source immediately.

6. Applicants have withdrawn and used the water here applied for without color of entitlement for almost 15 years. Flathead Irrigation Project and the Salish and Kootenai Tribes have been aware of such diversion and use throughout this time; however, although Objectors Interior and JBC now assert that existing uses require all water in the source (at least during the irrigation season), neither the Project nor the Tribes nor any other appropriator have ever in any way attempted to obtain the water which Applicants have been using.

7. Objectors have presented evidence showing that the maximum reservoir system fill (Little Bitterroot Lake, Hubbart Reservoir, Upper and Lower Dry Fork Reservoirs) has over the past six years averaged only 31,700 acre-feet in an attempt to show there is not enough water in the source even to satisfy existing demands. However, storage is only part of the Project's actual supply. The storage figures do not include direct diversion

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rights from the Little Bitterroot River and its tributaries. Objectors have understated the magnitude of the supply.

8. Objectors have utilized the number of claimed irrigated acres, net irrigation requirements for those acres, and allowances for inefficiencies as a basis on which to calculate demand. However, this merely shows theoretical maximum demand. Actual existing demand may be less.

9. Actual existing burden on the source is better reflected in the past actions of the water users thereon, than by the incomplete figures presented by the Objectors. If the most junior user on the source (in this case, the Ciottis) is called for water every year, the magnitude of actual demand is approaching the magnitude of the supply. If however, the most junior appropriator is never called, it is reasonable to infer that there is sufficient water in the source to meet all actual existing demands.

10. Objectors have been aware of Applicant's diversion, but have never called Applicants for water in the past 15 years. If instream flow and existing uses have really required the water Applicants have been diverting, it is reasonable to expect that Objectors would have, either orally or in writing, demanded such water. The fact that this has never been done is strong evidence that there has been sufficient water in the source to supply Applicants' needs and other existing uses, while the incomplete figures presented by the Objectors regarding supply and demand fail to counter such evidence. Accordingly, the Examiner finds

that in most years there is sufficient water in the source to both satisfy existing uses and supply 2 gpm up to 1.5 acre-feet per annum to Applicants.

11. There is always water at the point of diversion. The lowest measured flow of Mill Creek at that point is 672 gpm.

12. Department records show no other planned uses or developments of Mill Creek water for which a Permit has been issued or water reserved pursuant to the provisions of the Water Use Act.

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter is properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the criteria set forth in § 85-2-311(1), MCA, are met.

4. In order to meet the criterion set forth in § 85-2-311(1)(a), MCA, Applicants must prove by substantial credible evidence that, at least in some years, sufficient unreserved water will be physically available at the point of diversion to supply their needs throughout the period of

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diversion, and that, at least in some years, no legitimate calls for that water will be made by a downstream senior appropriator. In the Matter of the Application for Beneficial Water Use Permit No. 60662-76G by Wayne and Kathleen Hadley, Proposal at p. 9 (Final Order, May 31, 1988). In other words, Applicants must prove not only that in at least some years sufficient water will be physically present at the point of diversion throughout the period Applicants seek to appropriate, but also that such water will then be legally available for their use.

The evidence shows that there is always sufficient water physically available at the point of diversion (Finding of Fact 11) to supply the amounts requested, and further shows that Applicants will be able to divert that water in most years throughout the year without being called, as in past years there has apparently been sufficient water in the source to supply both the existing rights and their use. Findings of Fact 6, 7, 8, 9, and 10. Accordingly, the Examiner concludes that § 85-2-311(1)(a) has been met.

5. Domestic use is a beneficial use of water. Section 85-2-102(2), MCA.

6. Objector Interior alleged that this Permit would "impair" instream fishery flows and Project irrigation rights; however, Objector was not specific as to how these rights would

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be impaired, i.e., adversely affected.[1] However, any asserted adverse effect must be specifically alleged in order that Applicant be sufficiently apprised thereof to respond. Because adverse effect was not specifically alleged, Applicants' burden regarding same was met by the fact that the description of their proposed appropriation does not affirmatively show adverse effect to other water rights.

7. The means of diversion, construction, and operation of the appropriation works are adequate. Finding of Fact 6.

8. Assuming **arguendo** that instream flows are considered "reserved" water within the meaning of § 85-2-311(1)(e), because Ciottis can be called to cease appropriating at such times as water may be needed to satisfy the reserved instream flow requirements, there will be no unreasonable interference with such reserved water.

9. As there are no other planned developments of Mill Creek water, or § 85-2-316 reservations of such water, there can be no interference with same. Finding of Fact 12.

WHEREFORE, the Examiner proposes the following:

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[1] As demonstrated at the hearing, Objectors' sole allegation (other than jurisdictional) was that there is not sufficient unappropriated water in the source to supply an additional use. Were there not sufficient unappropriated water in the source, the effect of granting a Permit to divert water therefrom would simply be that the seniors would have to call the source more often. However, merely having to call for water is not an adverse effect to a water right. (Senior appropriators having to make excessive calls is prevented by the requirement that Applicant prove there is unappropriated water in the source.)

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ORDER

That subject to the terms, conditions, restrictions and limitations set forth below, Beneficial Water Use Permit No. 66459-76L be granted to Kenneth M. and Jorrie Ciotti to appropriate 20 gpm up to 1.5 acre-feet per annum, said water to be withdrawn from Mill Creek, a tributary of the Little Bitterroot River, in the SW¼NW¼NW¼ of Section 21, Township 24 North, Range 24 West, Sanders County, Montana, as follows: 2 gpm up to 1.5 acre-feet per annum to be withdrawn by means of an hydraulic ram for year round domestic use in the SW¼NW¼NW¼ of above-said Section, Township and Range; 18 gpm to be diverted to power the hydraulic ram, said 18 gpm to immediately return to the source after exiting the hydraulic ram. The priority date is August 4, 1987 at 5:00 p.m.

The Permit in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittees to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittees' liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this

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Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittees shall allow the waters to remain in the source of supply at all times when the water is not reasonably required by the Permittees' Permit uses.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, briefs.

Dated this 7 day of May, 1990

Robert Scott, Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6834

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was duly served upon all parties of record, at their address or addresses this 7th day of May, 1990 as follows:

Kenneth M. and Jorrie Ciotti
P.O. Box 14
Niarada, Montana 59852

Clayton Matt
Water Administrator
Confederated Salish and Kootenai Tribes
P.O. Box 278
Pablo, Montana 59855

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Irene V. LaBare
Irene V. LaBare
Legal Secretary

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