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. 64988-g76LJ BY JOHN A. AND PATRICIA A. STARNER	))))	ORDER

* * * * * * * *

The objections of the Confederated Salish and Kootenai Tribes and United States Department of the Interior asserting that the Department of Natural Resources and Conservation (DNRC) has no jurisdiction hereto is resolved in favor of DNRC jurisdiction. (See attached memo.) There being no other objection hereto,

IT IS HEREBY ORDERED that this file be returned to the Water Rights Bureau Processing Unit for such other and further consideration as an Application without objection must receive.

Dated this 7 day of May, 1990

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

CASE # 64988

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Order was duly served upon all parties of record, at their address or addresses this 7th day of May, 1991 as follows:

John A. and
Patricia A. Starner
South Shore
Polson, MT 59860

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

John Metropoulos
Browning, Kaleczyc,
Berry & Hoven, P.C.
P.O. Box 1697
Helena, MT 59624

John C. Chaffin
U.S. Department of Interior
Office of the Solicitor
P.O. Box 31394
Billings, MT 59107-1394

Alan W. Mikkelson
Joint Board of Control
P.O. Box 639
St. Ignatius, MT 59865

Chuck Brasen, Field Manager
Kalispell Field Office
P.O. Box 860
Kalispell, MT 59903-0860

Irene V. LaBare
Legal Secretary

CASE # 64988

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 # 64988

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.

CASE # 64988

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.

CASE #64988

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

CASE # 64988

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

CASE # 64988

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.

CASE # 64988

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

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.

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. 64988-g76LJ BY JOHN A. AND PATRICIA A. STARNER	))))	CERTIFICATION TO DIRECTOR

* * * * * * * *

WHEREAS, Objector Confederated Salish and Kootenai Tribes 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; 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 9th 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

CASE # 64988

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 27th day of November, 1989, as follows:

John A. and
Patricia A. Starner
South Shore
Polson, MT 59860

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

John Metropoulos
Browning, Kaleczyc,
Berry & Hoven, P.C.
P.O. Box 1697
Helena, MT 59624

John C. Chaffin
U.S. Department of Interior
Office of the Solicitor
P.O. Box 31394
Billings, MT 59107-1394

Alan W. Mikkelson
Joint Board of Control
P.O. Box 639
St. Ignatius, MT 59865

Chuck Brasen, Field Manager
Kalispell Field Office
P.O. Box 860
Kalispell, MT 59903-0860

Irene V. LaBare
Legal Secretary

CASE # 64988