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Notes

Ciotti: Preserving Federal Protection of Indian Reserved Water Rights in Montana

*Andrew Nelson**

I. INTRODUCTION

> Distance, space, affects people as surely as it has bred keen eyesight into pronghorn antelope. And what makes that western space and distance? The same condition that enforces mobility on all adapted creatures, and tolerates only small or temporary concentrations of human or other life. Aridity.[1]

As Wallace Stegner suggests, the effect of aridity in the American West is not limited to the physical landscape but is reflected in the societies inhabiting that landscape. Competition for scarce water resources is an inherent part of life west of the 100th meridian. One of the primary challenges facing western states is the equitable allocation of limited water resources among multiple competing interests. Many western states currently are engaged in extensive water rights litigation[2] in the hope that general stream adjudications can comprehensively define all state and federal water rights to individual river systems.[3] As substantial landholders in the west, Indian tribes represent a significant interest which must be considered when determining the existence and scope of water rights throughout the region.

Most water rights in the western United States are derived from the doctrine of prior appropriation. However, the unique legal status of Indian nations does not fit easily within prior appropriation schemes, making

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* J.D. expected 2000, University of Montana School of Law, Missoula, MT.

1. WALLACE STEGNER, THE AMERICAN WEST AS LIVING SPACE 27 (1987).

2. PETER W. SLY, RESERVED WATER RIGHTS SETTLEMENT MANUAL 194, app. A (1988); *See also* INSTITUTE FOR THE DEVELOPMENT OF INDIAN LAW, INDIAN WATER RIGHTS IV-1 to IV-10 (1984) (noting that negotiation and legislation may also be used to secure water rights in the American West).

3. *See* Thomas H. Pacheco, *How Big is Big? The Scope of Water Rights Suits Under the McCarran Amendment*, 15 ECOLOGY L. Q. 627 (1988).

definitive adjudication of Indian reserved water rights extremely problematic. Indian reserved water rights are impliedly reserved by the federal government in order to provide each Indian reservation with water resources sufficient to realize the purposes for which the reservation was created. Therefore, inherent in the definition of Indian reserved water rights is a reservation of water for future use. The concept of reserved water rights, which contemplates future use, is often at odds with state systems of water appropriation, which focus on the allocation of water rights for actual, present use of water. The incongruity of these concepts is particularly apparent when non-Indian landowners apply to the state for beneficial water use permits on Indian reservations.

The Montana Supreme Court dealt with precisely this problem in a recent case, *In the Matter of the Application for Beneficial Water Use Permit Nos. 66459-76L, Ciotti; 64988-g76L, Starner; and Application for Change of Appropriation Water Right No. G15152-S761, Pope*[4] (*Ciotti*). The court in *Ciotti* held that, where the overall quantity of allocable water was not certain, the existence of Indian reserved water rights precluded state court adjudication of water rights on the Flathead Reservation under the Montana Water Use Act.[5] This Note focuses on the Montana Supreme Court's strict and realistic interpretation of Indian reserved water rights in concluding that *Ciotti* preserved, at least for the moment, the federal basis of those rights in Montana.

II. INDIAN RESERVED WATER RIGHTS: FROM *MCCARRAN* TO *COLORADO RIVER*

A. Origin of Indian Reserved Water Rights

Any discussion of Indian water rights necessarily begins with the unique relationship between the federal government and the American Indians. In *Cherokee Nation v. Georgia*,[6] Chief Justice Marshall wrote that Indian tribes are "domestic dependent nations" whose relationship to the federal government is comparable to "that of a ward to his guardian."[7] While the precise scope of this federal trusteeship has not been defined, the federal government has acknowledged its "unique obligation toward the Indians."[8]

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4. 923 P.2d 1073 (Mont. 1996).

5. *Id.* at 1085. The Montana Water Use Act is codified at MONT. CODE ANN. §§ 85-2-101 to -907 (1997). In response to *Ciotti*, the Montana legislature attempted to do away with the requirement that an applicant prove that proposed water use would not interfere with Indian reserved water rights by amending MONT. CODE ANN. § 85-2-311(1) (1995). Montana Water Use Act, 1997 Mont. Laws, ch. 497, sec. 7, § 311, 2799-2802. The effect of this amendment is discussed *infra*, Part III.

6. 30 U.S. (5 Pet.) 1 (1831).

7. *Id.* at 16-17.

8. Delaware Business Comm. v. Weeks, 430 U.S. 73, 85 (1977). *See, generally*, FELIX S.

The unique obligation of the federal government toward the Indians led the Supreme Court in *Winters v. United States* to hold that the creation of Indian reservations by the federal government impliedly reserved water rights for the benefit of the Indians living on the reservation.[9] By creating water rights by implication, *Winters* effectively precluded the appropriation of reserved water under state law.[10] These federally created "Winters rights" are reserved to allow the tribe to realize the purposes for which their land was reserved.[11] Because the rights are reserved as of the date the reservation was created,[12]they are usually senior to most water rights recognized by state law.

The Supreme Court extended the *Winters* Doctrine to non-Indian federally reserved lands in *Arizona v. California*.[13] The *Arizona* decision held that establishing Indian reservations creates a concomitant reservation of water sufficient to develop, preserve, produce or sustain food and other resources, "to make the reservation livable."[14] Inherent in this definition of Indian reserved water rights is a reservation of water for future use.[15] The ongoing federal policy of promoting tribal self-government[16] suggests that tribes should enjoy full authority over Indian reserved water rights, including the rights of Indian and non- Indian allottees, subject only to federal regulation.[17] The broad scope of Indian reserved water rights and the federal nature of Indian policy both suggest that Indian reserved water rights operate outside the systems of prior appropriation traditionally utilized by western states.

B. Concurrent State and Federal Jurisdiction? The McCarran Amendment

Most western states adhere to the doctrine of prior appropriation in establishing water use rights to surface waters.[18] Montana has specifically

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COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 16-17 (Rennard Strickland ed., 1982).

9. 207 U.S. 564, 576 (1908).

10. In *Winters*, the United States sued a non-Indian appropriator of the Milk River on behalf of the Fort Belknap tribe in Montana. *Id.* at 565. By holding that the tribe possessed impliedly reserved water rights as of the date the reservation was created, the Court determined that the Fort Belknap Tribe's water rights vested in 1888, several years prior to the upstream appropriators' rights. *Id.* at 577.

11. *Id.* at 576.

12. *Id.* at 577.

13. 373 U.S. 546, 599 (1963).

14. *Id.* at 599-600. The Court has subsequently limited the scope of water rights reserved under *Winters*. Water rights reserved by implication are limited to those "necessary to fulfill the purpose of the reservation, no more." Cappaert v. United States, 426 U.S. 128, 141 (1976).

15. *Arizona*, 373 U.S. at 600-01.

16. *See* Williams v. Lee, 358 U.S. 217 (1959). Indian tribes have the right "to make their own laws and be ruled by them." *Id.* at 220.

17. COHEN, *supra* note 8, at 604.

18. Currently, all states west of the 100th Meridian utilize some version of prior appropriation.

adopted the prior appropriation doctrine by statute.[19] The "first in time, first in right" principle at the heart of the prior appropriation doctrine encounters several obstacles when applied to reserved water rights. Indian water rights are impliedly reserved on the date each reservation was created.[20] Most Indian reservations in the west were established before state appropriation systems were in place. Thus, Indian reserved water rights often predate non-Indian use, making tribal rights superior to rights of non-Indian appropriators recognized under state law.[21]

Furthermore, most prior appropriation schemes have a "use it or lose it" provision that requires appropriators to put the water to a beneficial use or risk abandonment of their unused water rights.[22] However, Indian reserved water rights include a reservation of water for future use.[23] As Justice Stevens noted in his dissent in *Arizona v. San Carlos Apache Tribe*, "[u]nlike state-law claims based on prior appropriation, Indian reserved water rights are not based on actual beneficial use and are not forfeited if they are not used."[24] The prior and preeminent nature of Indian reserved rights creates a system of recognized water rights that can be distinguished from those appropriative water rights recognized by the states and determined in general adjudications. Nevertheless, many states continue to determine Indian reserved water rights, which are federally created and contemplate future use, under state systems of appropriation, which, theoretically, are not equipped to recognize the existence of future use rights.[25]

Despite the federal basis of Indian reserved water rights, both federal and state courts can exercise jurisdiction over matters implicating these rights. Although the federal government has generally deferred to state authority in the determination of water rights,[26] this policy of deference does not extend Indian reserved water rights. The McCarran Amendment, enacted by Congress in 1952, shifted authority to the states by expressly permitting the joinder of the federal government in state suits involving the adjudication of water rights.[27] According to the United States Supreme Court, the purpose of the McCarran Amendment was to prevent

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GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 364-66 (3d ed. 1993).

19. *See* MONT. CODE ANN. § 85-2-401(1) (1997).

20. *Winters*, 207 U.S. at 577.

21. COHEN, *supra* note 8, at 599.

22. *See, e.g.*, MONT. CODE ANN. § 85-2-404 (1997).

23. *Arizona*, 373 U.S. at 600-01.

24. 463 U.S. 545, 574 (1983) (Stevens, J., dissenting)

25. *See* Pacheco, *supra* note 3, at 635-43. The most common procedure is a general stream adjudication, which judicially ascertains the inter sese rights of all claimants to a water source. The Montana adjudication provisions are found at MONT. CODE ANN. §§ 85-2-212 to -243 (1997).

26. *See generally* California v. United States, 438 U.S. 645 (1978).

27. 43 U.S.C. § 666 (1988).

"piecemeal" adjudications by requiring the determination of all water rights in a given river system in a single proceeding.[28] While Congress did not expressly limit federal protection of Indian reserved water rights in passing the McCarran Amendment,[29] the Amendment permitted state adjudications of federally created and recognized water rights.

C. The *Colorado River* Abstention Test

Federal courts have generally deferred to state determinations of Indian reserved water rights under the McCarran Amendment. In *Colorado River Water Conservation District v. United States*, the Supreme Court extended the McCarran Amendment's waiver of federal sovereign immunity to state court adjudications of Indian reserved water rights.[30] In *Arizona v. San Carlos Apache Tribe*, the Court held that the McCarran Amendment negated any limitation placed on state jurisdiction over Indian water rights by federal policy, including federal enabling acts.[31] Furthermore, the *San Carlos Apache* Court followed *Colorado River* by allowing for comprehensive adjudication of Indian water rights in state courts.[32] Central to the Court's reasoning was the McCarran Amendment's underlying policy favoring a single comprehensive adjudication of water rights.[33] The critical factor leading the Court to support state adjudication was that the federal suits in *San Carlos Apache* were not comprehensive adjudications.[34] Since *San Carlos Apache*, lower courts have adhered to *Colorado River* and its progeny and continued to allow state adjudications of Indian reserved rights.[35]

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28. United States v. District Court in and for Eagle County, 401 U.S. 520, 525 (1971).

29. Scott B. McElroy & Jeff J. Davis, *Revisiting* Colorado River Water Conservation District v. United States – *There Must be a Better Way*, 27 ARIZ. ST. L.J. 597, 601 (1995). McElroy and Davis argue that subsequent judicial interpretation is the only source for the idea that the prevention of piecemeal adjudications is the purpose of the Amendment. In their view, the Senators who passed the Amendment were more concerned with protecting state systems of water law from perceived federal encroachment. *Id.* In support of this view McElroy and Davis cite the fact that Indian water rights were scarcely mentioned during legislative hearings on the proposed bill – Senator McCarran himself stated that Indian rights would not be affected. *Id.*

30. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). The Court noted that "it is clear that a construction of the Amendment excluding those rights from its coverage would enervate the Amendment's objective." *Id.* at 811.

31. 463 U.S. at 564.

32. *Id.* at 570.

33. *Id.*

34. Donald C. McIntyre, *Quantification of Indian Reserved Water Rights in Montana:* State ex. rel. Greely *in the Footsteps of* San Carlos Apache Tribe, 8 PUB. LAND L. REV. 33, 41 (1987). McIntyre notes that the federal suits in *San Carlos Apache Tribe* related only to waters bounding or flowing through the reservation. *Id.* at 42. The court reasoned that, since only the 9,000 users named as parties in the federal suits would have been affected by a federal court adjudication, any such federal adjudication would be inconclusive and wasteful. *Id.*

35. *See, e.g.*, United States v. Oregon Water Resources Dep't, 774 F. Supp. 1568 (D. Or.

D. Post Script to *Colorado River*

In a limited sense, the issue of jurisdiction is not dispositive – state courts must apply substantive federal Indian law in water rights adjudications. Thus, the exercise of state jurisdiction is not necessarily an exercise of state regulatory control that rises to the level of a violation of tribal rights.[36] However, *Colorado River's* abstention test has inherent shortcomings. One problem with federal abstention is that states generally oppose the assertion of Indian reserved water rights, making state court adjudication of Indian rights undesirable.[37] Because the vast majority of Indian reserved rights remain unquantified, states, as self-interested economic actors, maintain a general bias toward the recognition of these reserved rights.[38] The state must compete with Tribes for scarce water resources in appropriating water for itself and its citizens.[39] To allow state courts to define and preserve Indian water rights in direct opposition to its own interests makes little sense.[40] A related problem is the role of state agencies in the state court adjudication process. The involvement of state agencies in the adjudication of water rights is of concern to Tribes because state agencies are perhaps more biased than state courts.[41] In Montana, for example, the Department of Natural Resources and Conservation (DNRC) is viewed by the Tribes as an adversary whose inclusion in the adjudication process creates a conflict of interest and violates constitutional due process guarantees.[42]

Another problem with the *Colorado River* approach is the lack of federal review. The U.S. Supreme Court believes that state courts can provide an equitable setting for the adjudication of Indian water rights.[43] However, because federal substantive law must be applied by state courts in adjudicating Indian water rights, the U.S. Supreme Court has reserved the right to review state court decisions with "a particularized and exacting

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1991).

36. McIntyre, *supra* note 34, at 47.

37. *See* Stephen M. Feldman, *The Supreme Court's New Sovereign Immunity Doctrine and the McCarran Amendment: Toward Ending State Adjudication of Indian Water Rights*, 18 HARV. ENVTL. L. REV. 433, 444-45 (1994).

38. *Id.* at 447-8. (arguing that state courts and state citizens oppose reserved rights out of the desire for economic certainty). *But see* McIntyre, *supra* note 34, at 35 (arguing that Tribes equate quantification with limitation and therefore favor uncertainty).

39. John A. Folk-Williams, *State and Indian Governments: Are New Relationships Regarding Water Possible?*, *in* INDIAN WATER 1985: COLLECTED ESSAYS 67 (Christine L. Miklas & Stephen J. Shupe eds., 1986).

40. *See* Feldman, *supra* note 37, at 450. (arguing that allowing the state to be both adversary and adjudicator "seems unfair and counterintuitive.")

41. *Id.*

42. *See* McIntyre, *supra* note 34, at 54.

43. *Colorado River*, 424 U.S. at 812.

scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment."[44] Despite the Court's assurances that federal review could cure state court deficiencies,[45] several unanswered questions remain. No general adjudication of water rights by a state court has been reviewed by the United States Supreme Court. Furthermore, Justice Stevens' dissent in *San Carlos Apache* raised serious questions about the prospect of the United States Supreme Court correcting prejudicial state court decisions.[46] The promise of Supreme Court review, even under a "particularized and exacting scrutiny" standard, of a state court decision resting upon questionable or incomplete findings of fact carries little practical weight[47] because the Supreme Court is unlikely to review findings of fact.[48]

State court bias and lack of federal review only partially explain the problem with *Colorado River*. The most compelling reason for abandoning the *Colorado River* approach is that it ignores the special relationship between the federal government and Indian tribes. The creation of *Winters* rights, rights which are federally reserved to meet the special needs of Indian reservations, seems to carry with it the implicit duty to declare the nature and scope of those rights. Federal judges who interpret *Colorado River* as allowing them to defer completely to state authority over Indian reserved water rights abandon this duty. Fortunately, not all federal judges have dropped the ball. Federal district Judge Solomon's two-track approach in *United States v. Adair* provides an excellent counter-example.[49]

E. *United States v. Adair*--An Alternative Approach

In *Adair*, the United States and the Klamath Indian Tribe sued the state of Oregon in an action for declaration of water rights on the Klamath Indian Reservation.[50] Judge Solomon gave a broad reading to the 1864

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44. *San Carlos Apache*, 463 U.S. at 571. The Montana Supreme Court supports this standard of review. State ex rel. Greely v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 219 Mont. 76, 95-96, 712 P.2d 754, 766 (1985).

45. *Colorado River*, 424 U.S. at 813.

46. 463 U.S. at 579 (Stevens, J., dissenting). Justice Stevens recognized that Supreme Court review of state-court water adjudications might undermine the entire adjudication process. "If a state-court errs in interpreting the Winters doctrine or an Indian treaty, and this Court ultimately finds it necessary to correct that error, the entire comprehensive state-court water rights decree may require massive readjustment." *Id.*

47. Peter Toren, Comment, *The Adjudication of Indian Water Rights in State Courts*, 19 U.S.F.L. REV. 27, 49 (1984).

48. *See, e.g.*, FED. R. CIV. P. 52(a) (findings of fact not set aside unless clearly erroneous).

49. 478 F.Supp. 336 (D. Or. 1979), *aff'd*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied sub nom*, Oregon v. United States, 467 U.S. 1252 (1984).

50. *Id.*

Brunot treaty which created the Klamath reservation, concluding that the "purposes of the reservation" for which water rights were impliedly reserved included water necessary to maintain fish and wildlife habitat in the Klamath Marsh.[51] By interpreting tribal water rights broadly, Solomon rejected Oregon's argument for a narrow, "primary reservation purpose" standard.[52] The broad scope of Indian reserved rights, according to Solomon, did not limit tribal claims to water for irrigation, but also protected future rights, including the preservation of hunting and fishing habitat.[53] By limiting its exercise of jurisdiction to a determination of the priority among reserved water rights arising under federal law, the *Adair* court was able to declare the nature and scope of the Klamath Tribe's reserved water rights while deferring to the state of Oregon's authority to quantify those rights. Thus, *Adair* represents an example of a federal court fulfilling its obligation to protect Indian reserved rights while still satisfying the McCarran Amendment's policy of avoiding piecemeal water rights adjudication.

III. ENTER *CIOTTI*

Justice Trieweiler's majority opinion in *Ciotti* can be interpreted as a modification of Judge Solomon's 2-track approach. At its core, the *Ciotti* decision represents the Montana Supreme Court's recognition of an *Adair*-inspired duty to declare the nature and scope of Indian reserved water rights. As such, *Ciotti* preserves the federal basis of Indian reserved water rights in Montana.

A. Factual Background

Between 1984 and 1987, four non-Tribal members owning land in fee on the Flathead Reservation in Montana filed applications with the DNRC for new water rights from sources on the Reservation.[54] In response, the Confederated Salish and Kootenai Tribes filed objections and requested

51. *Id.* at 345. *Compare Id.* (interpreting Indian reserved water rights broadly), *with* In re General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76, *aff'd sub nom.* Wyoming v. United States, 492 U.S. 406 (1989) (rejecting Special Master Roncallio's recommended Indian reserved rights awards, which rights secured instream flows for fish and wildlife, for scenic and recreational values, for industry, etc.)

52. *Adair*, 478 F. Supp. at 345. The U.S. Supreme Court adopted the narrow "primary reservation purpose" standard in holding that the creation of the Gila National Forest as a timber reserve and watershed did not impliedly reserve water rights for such later, secondary purposes of the National Forest as aesthetic, recreational, wildlife preservation, or stock watering purposes. United States v. New Mexico, 438 U.S. 696, 718 (1978).

53. *Adair*, 478 F. Supp. at 345.

54. *Ciotti*, 923 P.2d at 1075.

the applications be denied.[55] The Tribes moved to dismiss, contending that individual applications could not be granted prior to a determination of whether the DNRC has jurisdiction over water use rights on the Flathead Reservation.[56] The Tribes objections were consolidated and on April 30, 1990 the Director of the DNRC issued an order confirming DNRC jurisdiction to regulate surplus water on the Reservation.[57]

DNRC's final order confirmed the Director's preliminary finding of DNRC jurisdiction.[58] On May 15, 1992, the Tribes filed a petition for judicial review in the 1st Judicial District Court in Lewis and Clark County and a complaint for declaratory and injunctive relief in the United States District Court for the District of Montana.[59] The state District Court then stayed any action pending a federal decision. The federal court, however, ordered the federal action stayed pending state court resolution, while specifically reserving the federal claims for later review.[60] On January 12, 1995, the state District Court decided in favor of the DNRC, holding that the DNRC has jurisdiction pursuant to Montana's Water Use Act to issue new use permits prior to either a formal adjudication of existing rights or completion of compact negotiations.[61]

B. Analysis by the Montana Supreme Court

On appeal, the Montana Supreme Court reversed the state District Court and held in favor of the Tribe. The only issue addressed by the court was whether the DNRC has authority to grant water permits on the Flathead Reservation.[62] The majority opinion by Justice Trieweiler focused on the requirements for issuance of water use permits set forth in § 85-2-311.[63]

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55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* The Montana Reserved Water Rights Compact Commission has the authority to negotiate with the Indian tribes to reach a formal settlement of tribal water rights claims. *See* MONT. CODE ANN. §§ 85-2-217, 85-2-701 to -708 (1997).
62. *Ciotti*, 923 P.2d at 1075. The Tribes challenged DNRC's jurisdiction to issue new water use permits pursuant to MONT. CODE ANN. § 85-2-311 (1995). Although the Tribes challenge implicates a number of statutes, this Note focuses its discussion on MONT. CODE ANN. § 85-2-311 (1995) (amended 1997). Because the case was bifurcated prior to the DNRC hearing, the Montana Supreme Court dealt only with the dispositive issue of jurisdiction. *Id.* at 1076. This allowed the court to forego analysis of the Tribes' claims that negotiations between the Tribes and the Montana Reserved Water Rights Compact Commission pursuant to MONT. CODE ANN. § 85-2-217 suspended DNRC's authority to issue permits, as well as claims that DNRC was collaterally estopped from disputing the issue of jurisdiction by an earlier opinion of the same District Court in, United States v. Department of Natural Resources and Conservation (1st Jud. Dist. Mont. June 15, 1987), No. 50612. *Id.*
63. The discussion of both the District Court and the Supreme Court mainly concerned MONT.

The lower court had limited its analysis to subsections (a) and (b) in concluding that "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 surplus water."[64] This analysis led the lower court to determine that the term "appropriated waters" within the meaning of the statute excludes Indian reserved water rights.[65] The lower court thereby defined the problem out of existence, rendering ineffectual the Tribes' argument that an applicant cannot prove availability until the water supply has been quantified.

The key to the Montana Supreme Court's opinion lies in its distinction between state appropriative water rights and Indian reserved water rights. Justice Trieweiler relied heavily on an earlier Montana case in holding that the DNRC did not have the authority to grant water use permits on the Reservation prior to a formal adjudication of Tribal reserved rights or the completion of compact negotiations.[66] Trieweiler quoted with approval the following language from *Greely*:

> State appropriative water rights and Indian reserved water rights differ in origin and definition. State-created water rights are defined and governed by state law. Indian reserved water rights are created or recognized by federal treaty, federal statute or executive order and are governed by federal law.
>
> . . .
>
> Appropriative rights are based on actual use. Appropriation for beneficial use is governed by state law. *Reserved water rights are established by reference to the purposes of the reservation rather than to actual, present use of the water.*[67]
>
> (emphasis added.)

By underscoring the idea that the nature of Indian reserved rights, which have yet to be quantified, may preclude present use, Justice Trieweiler found it impossible for an applicant to meet the burden imposed by § 85-2-311(1)(e), namely that the applicant's "proposed use will

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CODE. ANN. § 85-2-311 (a), (b), (e) (1995), which subsections establish the criteria an applicant for a beneficial water use permit must prove by a preponderance of the evidence:

> (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;
>
> . .
>
> (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved . . . .

64. *Ciotti*, 923 P.2d at 1076-77. (citing MONT. CODE ANN. § 85-2-311(1) (1995)).

65. *Id.* at 1077.

66. *Ciotti*, 923 P.2d at 1080 (citing State ex rel. Greely v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 712 P.2d 754 (Mont. 1985)).

67. *Greely*, 712 P.2d at 762.

not interfere unreasonably with other planned uses . . . for which water has been reserved."[68] The requirement that the proposed use will not interfere with reserved rights "is critical to our conclusion in *Greely* that the [Montana Water Use] Act must be applied consistently with federal Indian law."[69]

C. Aftermath of *Ciotti*

In direct response to the Montana Supreme Court's ruling, the Montana state legislature amended the Montana Water Use Act in 1997.[70] The unofficial transcript of the legislative committee minutes reveals that the legislature specifically intended to draft statutory amendments that would allow the DNRC to circumvent *Ciotti*.[71] The amended version of § 85-2-311 includes major changes in language and adds several new subsections.[72] The most important changes included amending the language "unappropriated waters" to water "physically available," the addition of a new "legal availability" standard, and the striking out of subsection (e), which formed the basis of Trieweiler's majority opinion.[73] While the intent of the amendments is clear, their practical impact remains in doubt.

One question to be answered in light of the amended § 85-2-311 is whether the new language accomplishes the legislature's stated goal of undermining *Ciotti*. The meaning of the new "legal availability" standard is not self-evident and will be subject to judicial interpretation.[74] Regardless of legislative intent, the logic at the heart of Trieweiler's majority opinion remains unaffected by the amended version of § 85-2-311. To the extent that *Ciotti* adopted the distinction between appropriative and re-

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68. *Ciotti*, 923 P.2d at 1078 (citing MONT. CODE ANN. § 85-2-311(1)(e) (1995)) (citations omitted).

69. *Id.* at 1079-80.

70. Montana Water Use Act, 1997 Mont. Laws, ch. 497, sec. 7, § 311, 2799-2802.

71. *Hearings on S.B. 97 Before the Senate Comm. on Natural Resources*, Draft Unofficial Legislative Committee Minutes, 55th Legislature (Mont. 1997) (statement of Senator Mahlum). Senator Mahlum asked, if the bill were to pass with the proposed amendments, could the Supreme Court "throw it out like they did the last one?" *Id.* Legal counsel for DNRC, Don McIntyre, responded that the intent of the bill was "to put state law in the position that [the Supreme Court] cannot issue the same decision they did before." *Id.* (statement of Don McIntyre).

72. MONT. CODE ANN. § 85-2-311 (1997).

73. Montana Water Use Act, 1997 Mont. Laws, ch. 497, sec. 7, § 311, at 2799-2802.

74. The amended version of § 85-2-311 (a)(ii) now reads "water can be considered legally available . . . based on the records of the department and other evidence provided to the department." MONT. CODE ANN. § 85-2-311(a)(ii) (1997). In addition, § 85-2-311(1) (a)(ii)(A)-(H) provides a list of factors to consider in determining the legal availability of water. MONT. CODE ANN. § 85-2-311(1)(a)(ii)(A)-(H) (1997). Legislative Committee minutes show that members of the Committee on Natural Resources had reservations concerning the definitions of "legally available" and "physically available." *Hearings on S.B. 97 Before the Senate Comm. on Natural Resources*, Draft Unofficial Legislative Committee Minutes, 55th Legislature (Mont. 1997).

served water rights articulated in *Greely*, the modification of the statutory language has minimal effect.[75] The holding in *Ciotti* seems to preclude any (not just a properly worded) attempt by the state to appropriate water use rights prior to a judicial determination of Indian reserved rights or a termination of compact negotiations.

IV. CONCLUSION

Unfortunately, in most cases the protection of Indian reserved water rights has not fallen, as McCarran envisioned, on federal courts. Whatever the reason, federal district court judges do not want to be water masters. *Colorado River's* abstention test allows these reluctant judges to defer to state proceedings under the aegis of insuring comprehensive water rights adjudication. Ironically, it was the highest state court in Montana that recognized the *Adair*-inspired federal duty to protect Indian reserved water rights with its decision in *Ciotti*.

The impact of *Ciotti* has yet to be decided. After granting the Tribes' Writ of Supervisory Control, the Montana Supreme Court held oral arguments at a rehearing in Helena on January 7, 1999. The amended language of § 85-2-311 may lead the court to overturn its previous decision, which would indicate that the decision was based narrowly on Montana statutory law.[76]

As it now stands, the *Ciotti* decision and the Montana legislature's reactive end-run render the Montana courts and administrative agencies unable to practically or fairly resolve Indian reserved water rights under

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75. The record also reveals a paucity of understanding concerning the difference between reserved and appropriative water rights, which may cast doubt on the effectiveness of the amendments in accomplishing the legislature's stated objective of undermining *Ciotti*. Indicative of this misunderstanding are the comments of Sen. Grosfield, the sponsor of the amended bill. Grosfield stated that he considered the bill helpful to the Tribe because *the bill does not affect the federal or the tribal reserved water rights*. Grosfield also opined that the amended bill represented the first statutory recognition that federal reserved rights are existing rights under Montana law. *Hearings on S.B. 97 Before the Senate Comm. on Natural Resources*, Draft Unofficial Legislative Committee Minutes, 55th Legislature (Mont. 1997) (Statement of Senator Grosfield) (emphasis added).

76. This seems unlikely given Justice Leaphart's concurrence. *Ciotti*, 923 P.2d at 1082. Leaphart, making the argument the Tribe probably saved for federal court, begins with the idea that the McCarran Amendment waives tribal sovereign immunity only to allow a general state adjudication of water rights. *Id.* The procedure utilized by the DNRC in Montana, which grants new water use rights on a case-by-case basis, does not constitute a general stream adjudication but comes closer to agency administration of Tribal reserved rights. *Id.* at 1085. Leaphart quotes a Ninth Circuit case for the proposition that a state court cannot adjudicate the administration of water rights until it determines the extent of those rights, stating:

> Because there has been no prior adjudication of relative general stream water rights in this case, there can be no suit "for the administration of such rights" within the meaning of the McCarran Amendment.

Id. at 1084 (citing South Delta Water Agency v. United States, 767 F.2d 531, 541 (9th Cir. 1985)).

the *Colorado River* abstention test. This legislative-judicial standoff may hasten the completion of compact negotiations. More likely, the Montana Supreme Court will uphold *Ciotti*. Assuming the federal court in Montana then follows *Adair* and declares the nature and scope of Indian reserved water rights on the Flathead Reservation, the quantification of those water rights could then be "handed-off" to the state of Montana, subject to federal review. Meanwhile, the Flathead Valley continues to grow.[77] As the economic pressure for a definitive adjudication of water rights on the Flathead Reservation increases, so to does the pressure on both the state legislature and the Montana Supreme Court to fashion an equitable solution, a solution that recognizes the special status of the Confederated Salish and Kootenai Tribes without bringing the state water appropriations system to a grinding halt.

77. *See* Rob Chaney, *Population Gains Strong in Ravalli, Flathead*, MISSOULIAN, Jan. 24, 1999, at B1 (citing data on population growth in Montana collected by the Montana State University Local Government Center). From 1990 to 1996 the population of Flathead County grew by 19.9% to 70,988. *Id.*