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TAMING THE RAPIDS: NEGOTIATION OF FEDERAL RESERVED WATER RIGHTS IN MONTANA

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> . . . My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby—not even money, certainly not my soul.
>
> —Mahatma Gandhi

I. INTRODUCTION

Water, one of the West's most treasured resources, is the center of numerous volatile controversies. Water issues evoke emotional responses; ranchers, recreationists, and developers, as well as government agencies and Indian tribes, each have their own views on the best use of water. Thus, when controversies arise over water rights, disagreement and conflict over a wide range of philosophical and economical interests ensue.

This comment addresses one of the chief sources of water rights controversies, the doctrine of federal reserved water rights. This judicial doctrine, first recognized in 1908[1] to insure that lands set aside by Congress for a particular purpose had adequate water,[2] has from its inception juxtaposed private and state interests against the federal government. Traditionally, reserved rights conflicts have been resolved through litigation. But each new conflict over reserved water rights has required a turbulent journey down a course fraught with uncertainties. After nearly 80 years of shaping and defining the nature of reserved rights in the courts, many aspects of reserved rights still remain unresolved.

Since 1979, Montana has accelerated its efforts to determine water rights statewide;[3] but the scores of unquantified and unqualified reserved rights for both Indian and non-Indian federal reservations leave the state in a worrisome quandry, and threaten to stall or even bring to a stop the state's adjudicatory process. Rather than forcing the resolution of reserved rights through the courts, Montana has taken an innovative approach to solve the unresolved reserved rights by initiating negotiations between the Indian

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1. Winters v. United States, 207 U.S. 564 (1908). *See infra* notes 4-7 and accompanying text.
2. D. GETCHES, WATER LAW IN A NUTSHELL 291 (1984).
3. S. Bill 76, enacted May 11, 1979, 1979 Mont. Laws 1901 (codified at MONT. CODE ANN. § 85-2-211 to -243 (1983)).

tribes, the federal government and a state water rights compact commission. Negotiations tame the usual turbulence confronted when reserved rights are litigated because the parties can both become better educated as to their opponents' true perspective on water rights, and they can consider the options which may benefit both sides simultaneously.

This comment first briefly reviews the judicial development of the federal reserved water rights doctrine, and then describes Montana's reserved rights negotiating framework. Finally, the comment explores the opportunities and risks presented by Montana's efforts to "unite parties riven asunder" over the ill-defined doctrine of federal reserved water rights.

II. AN OVERVIEW OF FEDERAL RESERVED WATER RIGHTS

The reserved rights doctrine was originally declared as a result of a water controversy in Montana in the case of *Winters v. United States*.[4] *Winters*, a 1908 United States Supreme Court decision, held that when Congress established the Fort Belknap Indian Reservation in Montana territory, it implicitly reserved a sufficient quantity of water for Indians to irrigate their lands.[5] This concept of implied reserved water rights contrasted markedly with developing state systems of appropriative water rights in the west.[6] The Court held not only that an Indian reservation had rights to water it had never used, but also that these implied rights had priority over diversions made by settlers upstream after the reservation was created.[7]

Winters left the states and the federal government with a torrent of unresolved issues concerning these new federal rights, including: (1) application to non-Indian federal reservations; (2) priority dates; (3) quantification; (4) permissible reserved water right uses; (5) jurisdiction; and (6) administration.

The Supreme Court explicitly[8] addressed the first issue, whether

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4. 207 U.S. 564 (1908).

5. *Id.* at 577.

6. By the mid-nineteenth century, western states had begun to adopt water rights systems based on the prior appropriations doctrine. Founded upon concepts of "beneficial use," the prior appropriations doctrine granted to settlers water rights to the quantity of water they actually put to good use. Priority dates were set when the use began to give the first user of a stream seniority over later users.

7. 207 U.S. at 577-78.

8. The U.S. Supreme Court had implicitly suggested that the reservation of lands for non-Indian purposes was also an implied reservation of federal water rights for the use of those lands in Federal Power Commission v. Oregon, 349 U.S. 435 (1955). This case distinguished "public lands" which were unqualifiedly subject to sale and disposition, and "reservations," lands which had been withdrawn from the public domain for some other purpose. The Court held that the Desert Land Act did not apply to reservations; hence all reserved lands were essentially freed from state water law. *See* A. STONE, MONTANA WATER LAW FOR THE 1980's 110 (1981).

reserved rights applied to non-Indian reservations, in 1963, in *Arizona v. California*.[9] In *Arizona*, the Court assigned reserved rights to both Indian[10] and non-Indian[11] federal reservations. One year later, the decree quantifying these rights[12] treated the two types of reserved rights identically.[13] *Arizona's* extension of the *Winters* rationale is logical: if Congress reserves public land for a particular purpose which requires the use of water, the Congressional act of reserving such land, Indian or non-Indian, implies an intention to reserve sufficient water to carry out that purpose. Since *Arizona*, no question remains that the reserved rights doctrine extends to all federal reservations.

The Supreme Court appeared to settle the second issue, priority dates for Indian reserved water rights, by designating priority as of the date the reservation was created by Congress.[14] A recent Ninth Circuit case, *United States v. Adair*,[15] however, carved out an exception to the longstanding rule by extending the priority date back to time immemorial for certain Indian rights.[16] *Adair* is of little consequence for most Indian reservations created before other rights were established, since the Indian right would already have priority over other state users.[17] Priority dates for reserved water rights on non-Indian reservations have unequivocably been held to be the date the reservation was created.[18]

The third issue, quantification of federal reserved rights, has been defined and limited by courts based on the reservation's "purpose."[19] Although Congress usually fixed the purpose of a reservation at the time of creation, the quantity of water necessary to meet this purpose was not fixed. A reservation's stated purpose may be interpreted as requiring varying quantities of water; thus, quantification of reserved rights has become a

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9. 373 U.S. 546 (1963).

10. The following five Indian reservations in Arizona, California and Nevada were involved: Chemehuevi, Cocopah, Yuma, Colorado River and Fort Mohave. *Id.* at 595 n.97.

11. The following non-Indian federal reservations were involved: Lake Mead National Recreational Area, Havasu Lake National Wildlife Refuge, Imperial National Wildlife Refuge, Gila National Forest, and Boulder City, Nevada. *Id.* at 601.

12. 376 U.S. 340 (1964).

13. *Id. See also* STONE, *supra* note 8, at 112.

14. 207 U.S. at 577.

15. 723 F.2d 1394 (1984). In *Adair*, the treaty creating the Klamath Indian reservation recognized the Tribe's continued right to support its hunting and fishing lifestyle. Thus, the Ninth Circuit held that the reserved federal right's priority date was the time the use began—time immemorial.

16. *Id.*

17. Getches, *supra* note 2, at 302.

18. *See, e.g.*, Arizona v. California, 376 U.S. at 343-44.

19. Cappaert v. United States, 426 U.S. 128, 141 (1976). "The implied-reservation-of-water-rights doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more."

major issue.[20] For Indian reservations in particular, where the specific "purpose" was often unarticulated,[21] the reserved right may be potentially very large.

Even for non-Indian reservations, where the Congressional purpose was usually more explicit, quantification of reserved rights has been controversial. For example, in *United States v. New Mexico*,[22] the U.S. Supreme Court quantified reserved rights for the Rio Mimbres River in the Gila National Forest by looking to the "purposes" for creating the National Forests.[23] The United States claimed those purposes included management obligations from the Multiple Use Sustained Yield Act of 1960 (MUSYA).[24] The Court rejected this claim, holding that the purposes were limited to those expressly stated in the Organic Act of 1897 which created the National Forest system.[25]

New Mexico not only established that reserved rights do not exist for the secondary purposes of a federal reservation;[26] it also explicitly refused to grant reserved rights for instream flows on national forests.[27] Although the extent of *New Mexico's* rejection of reserved rights for instream flows continues to be tested, arguments in two subsequent non-Indian cases[28] have failed to convince courts that reserved rights can be granted for instream flow uses.[29]

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20. Getches, *supra* note 2, at 315.

21. Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

22. 438 U.S. 696 (1978).

23. *Id.* at 700.

24. Act of June 12, 1960, P.L. No. 86-517, § 1, 74 Stat. 215 (codified at 16 U.S.C. § 528 (1982)). MUSYA proscribes that "the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." *Id.*

25. 438 U.S. at 707. The Court explained that National Forests had two purposes under the Organic Act: (1) to conserve water flows; and (2) to furnish a continuous supply of timber for the people. *Id.* The majority read the first purpose, water flow, as principally expressing an intent to insure water quantities for domestic, mining and irrigation operations under state law. *Id.* at 712. The Court stated that reserved water rights claimed with a 1897 priority date for national forests must be claimed for one of these two purpose. *Id.* at 718.

26. In *New Mexico*, secondary purposes were those established by MUSYA, *see supra* note 24.

27. 438 U.S. at 705. Rights to "instream flows" preserve the flow of water within the streambed, and are generally the type of flows needed for the fish, wildlife and recreational purposes of MUSYA, as opposed to rights for diversionary or consumptive uses granted in *Arizona*.

28. Instream flows have been granted for Indian reservations where it has been established that a purpose of the reservation was to maintain a hunting and fishing way of life. *See, e.g., Walton*, 647 F.2d at 48; and *Adair*, 723 F.2d at 1410.

29. In United States v. City and County of Denver, ___ Colo. ___, 656 P.2d 1 (1982), the Forest Service tried to gain instream flow rights for recreational, scenic and wildlife protection purposes under MUSYA for several national forests arguing that the MUSYA declaration in *New Mexico* was dictum and not binding. The Colorado Supreme Court rejected this argument, claiming that they were bound by the United States Supreme Court's direct addressal of this issue in *New Mexico*. *Id.* at 24. In United States v. Alpine Land & Reservoir Co., 697 F.2d 851 (9th Cir.), *cert.*

Quantification of reserved rights involves determining not only the purpose for which the water was reserved, but also how to measure water for that purpose. In *Arizona v. California*,[30] the Supreme Court pronounced a method of using "practicably irrigable acres" to determine the quantity of reserved water for Indian reservations with an agricultural purpose. No other consistently applied methods have evolved.

The fourth issue, permissible uses, was settled for Indian situations in a 1979 Supplemental Decree to *Arizona v. California*.[31] There, the Supreme Court held that although the quantity of reserved rights for Indian reservations was based on practicably irrigable acres, this "shall not constitute a restriction of the usage of [the rights] to irrigation or other agricultural application."[32] Thus, while the purpose of the Indian reservation limits the quantity of rights reserved, once quantified, the rights may be put to uses other than those for which they were quantified.[33]

Confusion arises, however, when an Indian reserved water right is used by either a successor or lessee of the original holder. A recent case on this issue, *Colville Confederated Tribes v. Walton*,[34] held that when an Indian allottee conveyed his individual allotment to a non-Indian, the Indian also conveyed his share of the tribes' reserved water right, provided that the non-Indian purchaser used the right diligently.[35] Non-use by successors of the Indian allottee, therefore, would result in the loss of the

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denied, 104 S. Ct. 193 (1983), the Forest Service again tried to win instream flow rights for a National Forest river. This time, the Forest Service argued that instream flows for the the Carson River were necessary to fulfill purposes of the Toiyabe National Forest under the Organic Act. The Court rejected this claim, holding that the existing water rights of users located downstream of the Toiyabe National Forest alone would suffice to ensure that the national forest would have the minimal flows essential for Organic Act purposes. *Id.* at 859.

In a case currently before the United States District Court in Colorado, In re Application for Water Rights of the United States in Water Division 3, State of Colorado, No. 79-CW85 (D. Colo. filed Dec. 20, 1979), the United States is claiming reserved water rights for instream flows to national forests in the Rio Grande basin of southern Colorado. The United States claims certain flows are needed to prevent the clogging of stream channels by sediment to maintain the ability of the channels to handle high flows that might otherwise cause erosion and degrade timber resources. This time, the Forest Service hopes to have perfected hydrological field techniques which definitely quantify an instream flow need for the Organic Act purpose of conserving water flows which was identified in *New Mexico*.

30. 373 U.S. 546 (1963).

31. 439 U.S. 419 (1979).

32. *Id.* at 422.

33. In the supplemental decree to *Arizona*, the Supreme Court further indicated that once quantified, the right is fixed; changing the type of use made of the reserved water will not disturb the initial quantification. *Id.*

34. 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

35. *Id.* at 51. The Ninth Circuit has since clarified this holding in the appeal of the District Court's decision on remand. *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985). It is the *immediate* grantee of the original Indian allottee who must exercise due diligence to perfect his or her inchoate right to the allottee's share of the reserved right, not later successors. *Id.* at 402.

unused portion of his reserved right.[36] This holding potentially gives non-Indian successors of Indian allottees a superior right over homesteaders—at least to the extent that the non-Indian successor diligently uses his share of the reservation's reserved water—since homesteaders usually have priority dates later than the date the reservation was established. Although the Ninth Circuit asked the Supreme Court for a more definitive resolution of the issues before it, none have been forthcoming.[37]

The fifth issue, jurisdiction, centers on the United States' waiver of immunity in the McCarren Amendment.[38] The Supreme Court has unequivocably declared that the McCarren Amendment subjects the United States to the jurisdiction of state courts for the adjudication of federal reserved water rights.[39] Enabling Acts for some states, like Montana, however, disclaim jurisdiction over Indian lands;[40] thus, whether these disclaimer clauses remove state jurisdiction for adjudicating reserved rights on Indian lands remains to be decided. Recently, in *Arizona v. San Carlos Apache Tribe of Arizona*,[41] the Supreme Court held that even in states with these disclaimer clauses, the McCarren Amendment still allows state jurisdiction for the quantification of Indian water rights if a general stream adjudication is underway.[42]

The sixth issue, administration of reserved water rights, might also be resolved by looking to the McCarren Amendment, since section (a)(2) of the Amendment waived the United States' immunity from being joined in

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36. 647 F.2d at 51.

37. *Id.* at 54 n.18.

38. The McCarren Amendment provides in relevant part:

> (a) consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

43 U.S.C. § 666(a) (1982).

39. STONE, *supra* note 8, at 118, *citing* United States v. Dist. Court in and for the County of Eagle, 401 U.S. 520 (1971); United States v. Dist. Court in and for the Water Div. Number 5, 401 U.S. 527 (1971); and Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

40. The Federal Enabling Act for the State of Montana, Act of Feb. 22, 1889, ch. 180, § 4, part 2, 25 Stat. 676, contains a disclaimer of any state jurisdiction with respect to Indian lands. This disclaimer was incorporated into both the 1889 Montana Constitution, MONT. CONST. OF 1889, art. 1, § 2, and the 1972 Montana Constitution, MONT. CONST. art. I:

> All provisions of the enabling act of Congress.... including the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the Congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana.

Id.

41. 103 S. Ct. 3201 (1983).

42. *Id.* at 3214-15. *See also* State ex rel. Greely v. Water Court, *infra* note 67 and accompanying text.

any suit for the administration of water rights.[43] As in the jurisdictional issues, the Supreme Court has consistently deferred to state water law for administration of reserved rights for non-Indian reservations,[44] at least to the extent that it does not interfere with the purpose for which a reservation was created.

Administration of reserved water rights differs for Indian reservations, however, since it is presumed that no state regulatory powers exist over Indian reservations.[45] Although the U.S. Supreme Court never ruled on who should administer Indian reserved water rights, the Ninth Circuit Court of Appeals formulated a balancing test between state and tribal interests.[46] Factors considered in this test include: infringement on the tribe's right to self government, impact on the tribe's economic welfare, impacts from the use of reserved water off the reservation, whether the water is navigable or entirely within the reservation, and the extent to which the reservation uses water for agricultural or fishery needs.[47] Administration of reserved water rights on Indian reservations thus varies considerably depending on the facts of each situation.

Although all of the six issues which resulted from creation of the reserved rights doctrine in 1908 have at least been judicially addressed, several of the issues—quantification, permissible uses, jurisdiction, and administration—still remain unclear. Montana's approach to resolving these unclear issues through negotiation is described in the following section.

III. MONTANA'S NEGOTIATING FRAMEWORK

Since the early 1970's, Montana has undertaken massive efforts to systematically determine water rights statewide. In 1979, Montana's legislature revised the adjudication provisions of the 1973 Water Use Act,[48] by creating an independent water courts for the comprehensive adjudication of water rights in the state. Recognizing the inherent difficulties of litigating federal reserved water rights, the 1979 legislature also created the Montana Reserved Water Rights Compact Commission

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43. *See supra* note 37.

44. *New Mexico*, 438 U.S. at 701-02 n.5.

45. *See* Act of Aug. 15, 1953, ch. 505, Pub. L. No. 280, §§ 2, 4, 67 Stat. 588, 589, which excepts the grant to certain states jursidiction over water rights or the regulation thereof (codified in relevant part at 28 U.S.C. § 1360(b) and 18 U.S.C. § 1162(b) (1982)). *See also* 25 U.S.C. §§ 1321(b), 1322(b) (1982).

46. United States v. Anderson, 736 F.2d 1358, 1365 (9th Cir. 1984).

47. *Id.* at 1365-66.

48. S. Bill 76, *see supra* note 3, revised the Montana Water Use Act of 1973, 1973 *Laws of Mont.* 1121. *See* STONE, *supra* note 8, at 1-9 for the background and implementation of S. Bill 76 and the Montana Water Use Act.

(Commission)[49] to negotiate reserved water claims by Indian tribes and federal agencies in Montana. The nine permanently appointed members of the Commission have full power to negotiate and sign compacts on behalf of the state.[50]

The legislature designed the negotiating process to be an integral part of the water courts adjudications. If an Indian tribe or federal agency chooses to negotiate its claim to federal reserved water rights, adjudication is suspended in the water courts.[51] A compact, once signed by the negotiating parties, must be ratified by the state legislature and the tribal governing body and approved by the appropriate federal authority.[52] Upon ratification, the water courts will incorporate the terms of the compact into a preliminary decree for the appropriate basin.[53] Hopefully this process will expedite Montana's journey down the uncertain course of reserved rights resolution.[54]

The key to running the rapids along this course is flexibility. Montana's framework for resolving reserved rights gives the parties far greater flexibility to create options for mutual gain than are available through litigation. The next section examines these opportunities.

IV. Opportunities Presented by Negotiations

A. *Process Efficiency*

The foremost opportunity presented by the Commission's negotiation process is the chance to resolve reserved rights more efficiently. Litigation often gets mired in procedural issues; hence, many cases are tried primarily

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49. Mont. Code Ann. § 2-15-212 (1983).

50. *Id.*

51. *Id.* § 85-2-217, as amended by S. Bill 28, which was passed by the 49th Montana legislature on April 24, 1985, and signed into law on April 30, 1985. The suspension is effective until July 1, 1987.

52. *Id.* § 85-2-702(3), as amended by S. Bill 28. *See supra* note 51.

53. *Id.* S. Bill 76, *supra* note 3, segmented the state into four massive water divisions and created the Montana water court system, *see id.* §§ 3-7-101 to -502 (1983), to adjudicate water rights. All beneficial uses of water arising before 1973 were to be claimed by citizens, agencies and corporations by filing with the Department of Natural Resources and Conservation on or before June 30, 1983. *Id.* § 85-2-221 (1983). Each district's water judge is to file a preliminary decree for the district, or part thereof, *id.* § 85-2-233, and the issuance of a final decree for the district. *Id.* § 85-2-234.

54. Indeed, the Commission has decidedly pursued the course of negotiations. As of the time of this writing, May, 1985, the Commission has completed negotiations with the Assiniboine and Sioux Tribes of the Fort Peck Reservation, and is negotiating with the Northern Cheyenne Tribe, the Fort Belknap Tribes, the Chippewa and Cree Tribes of the Rocky Boy Reservation, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, and the Crow Tribe. Both the Turtle Mountain Tribe of North Dakota (which has reservation land in Montana) and the Blackfeet Tribe are considering negotiations with the Commission. In addition, the Commission has negotiated with the National Park Service, the National Forest Service, and the Bureau of Land Management. The Department of Defense has had preliminary discussions with the Commission. Interview with Marcia Rundle, May 10, 1985.

on procedural questions alone. While procedural protections are vital to fair litigation, it is the substantive issues, not the procedure, which usually motivate the parties to resort to litigation in the first place.[55] Negotiations can bypass these procedural issues inherent in litigation, and bring the parties to the substantive problems of resolving reserved rights more efficiently. Thus, bypassing procedural issues not only reduces emotional rivalry between parties, but may also result in saving court time and expenses.

Some expenses involved in resolving reserved rights, however, simply cannot be avoided. For example, accumulation of enough technical data for the parties to make a reasonable assessment of the extent of the tribe or federal agency's claim[56] is needed whether the parties negotiate or litigate. Therefore, although negotiating reserved rights may reduce court expenses, negotiating is not free of cost.

Although Montana's negotiation process could conceivably be more efficient than litigation, to date this efficiency has yet to be demonstrated. The Commission was formed in 1979, and six years later only one Indian tribe has signed a compact.[57] Since this is Montana's first attempt to settle reserved rights, the initial delay may be understandable. Time is needed to educate Commission members, gather technical data, and decide upon procedures between the negotiating tribes and agencies. While these functions of the negotiating process seem time consuming, they do add to the long-term benefits of negotiation. For example, educating opposing parties will have positive future effects. When leaders of these parties debate related issues in the future, the education gained through this negotiation process will surface, bringing unprecedented appreciation of the opposing parties' purposes.[58] Much of the time required to educate parties and collect data is now behind the Commission, the negotiating tribes and the federal agencies; the process of writing compacts is now underway. Clearly, Montana has recognized the opportunity of efficiency presented by negotiating reserved rights; the next few years will tell whether this opportunity will be fully realized.

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55. L. Patton, *Settling Environmental Disputes: The Experience with and Future of Environmental Mediation*, 14 ENVTL. L. REV. 547, 550 (1984).

56. To illustrate, the technical data needed to prove a reserved rights agricultural claim includes: a soils irrigation suitability test, tests of groundwater quantity and quality, possibility of constructing a water delivery system and the economic feasibility of agricultural development. D. GETCHES, D. ROSENFELT, C. WILKENSON, FEDERAL INDIAN LAW (Supp. 1979 at 161).

57. Fort Peck - Montana Compact, signed into law by Governor Schwinden on May 15, 1985, approved by the Tribal Executive Council on April 29, 1985.

58. Watson & Danielson, *Environmental Mediation*, 15 NAT. RESOURCES LAW 687, 714 (1983).

B. *Better Results*

Negotiating, rather than adjudicating, reserved water rights also presents the opportunity for better results. Enhanced results are possible because negotiations free parties both from strict adherence to legal precedence and from the uncertainties of the courtroom.

Although the parties rely on legal precedent to define negotiating positions, compacts reached through negotiations can deviate from the exact outcome expected in the courts—perhaps to the benefit of both parties. A look at Forest Service claims to reserved water rights in Montana illustrates this point.

If the Forest Service's reserved rights were adjudicated in Montana's water court, the court would be bound by *New Mexico's*[59] legal precedent. In *New Mexico*, conflicts between private diversionary uses caused the litigation over water rights to the Rio Mimbres River.[60] In contrast, National Forest streams in Montana are generally not overappropriated, hence conflicts over private rights are rare.[61] Despite this factual difference, the Forest Service in Montana would remain bound by *New Mexico's* denial of instream flow rights[62] for purposes of MUSYA. To win reserved rights for instream flows in Montana through adjudication, the Forest Service would have to prove the instream flow needs as one of the purposes of the Organic Act.[63] Clearly, negotiating reserved rights would benefit the Forest Service by freeing it from these confines of case law.

For the state and people of Montana, negotiating the Forest Service's reserved rights is also desirable—even though judicial precedent has thus far favored the states on non-Indian instream flow issues. First, granting instream flows for Montana's National Forests causes no hardships to the state. Even if the Forest Service is granted all the instream flows it desires, enough water will remain to satisfy most state uses.[64] Thus, the problem of infringing on upstream users' diversionary rights would be rare. Second, Montana benefits from negotiating instream flows for the Forest Service because instream flows are never diverted or "used up"; downstream users would essentially be guaranteed the amount of water reserved instream for the Forest Service. Granting reserved rights to National Forest streams

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59. 438 U.S. 696 (1978). *See supra* notes 22-29 and accompanying text.

60. *Id.* at 697 & n.1.

61. Interview with Larry Jakub, Office of the General Counsel, United States Forest Service, Missoula, Montana (Nov. 2, 1984).

62. Instream, nonconsumptive uses, *see supra* note 27, comprise over 99% of Forest Service uses. R. Russell, Federal/State/Tribal Compact Negotiation—An Opportunity to Quantify Federal Reserved and Indian Water Rights in Montana 73 (Mar. 2, 1981) (unpublished thesis, available in Environmental Studies Library, University of Montana).

63. *See supra* note 25 and accompanying text.

64. Jakub, *supra* note 61.

will also insure the protection of a large portion of the state's water resources both for public recreation and for the conservation of wildlife and aquatic life.[65]

Negotiations can also achieve better results concerning reserved rights by allowing the parties to define solid compacts, thereby avoiding the uncertainties of the courtroom caused by the imprecise nature of the reserved rights doctrine. This imprecision, however, could be considered an obstacle to negotiations because it leaves the parties ill-equipped to define bargaining positions.[66] Despite this obstacle, the parties will gain by forging ahead with negotiations of reserved rights.

For instance, one reason the reserved rights doctrine remains imprecise in Montana is because courts have never determined whether Montana's water courts are an adequate forum to adjudicate Indian reserved rights. The Montana Supreme Court's recent acceptance of a petition for a writ of supervisory control on this issue[67] has a potential effect on negotiations. The inability of the state water courts to adjudicate Indian reserved water rights would enhance a tribe's bargaining position, given the state's desire to complete adjudications in the near future. Nevertheless, even if the Montana Supreme Court rules that the water courts are inadequate, rectifying legislation will undoubtedly be introduced to resolve the water courts' jurisdictional dilemmas. In this light, the parties benefit little by awaiting the outcome of current litigation which might make the reserved rights doctrine more precise. Instead, parties can base negotiating positions on objective, non-legal criteria. Thus, by negotiating, parties can avoid both the uncertainty of judicial precedence and the likelihood of a dissatisfactory court decree and numerous appeals.

A good example of the problems caused by the uncertainty of litigation is Wyoming's litigation of Indian reserved rights for the Wind River system. In 1983, a Wyoming district court decided the nature of reserved water rights for the Arapahoe and Shoshone tribes of the Wind River Reservation.[68] The district court's ruling significantly reduced the

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65. Protection of these resources is a state water policy consideration for Montana. MONT. CODE ANN. §§ 85-1-101(5); 85-2-101(2) (1983).

66. GETCHES, *supra* note 55 at 158.

67. *See* State ex rel. Greely v. Water Court, No. 84-333 (Mont. Dec. 18, 1984) (41 St. Rep. 2373). Two distinct legal issues are currently unresolved: (1) Does a state court have subject matter over Indians' reserved water rights pursuant to the McCarren Amendment—which waived the United States' sovereign immunity for adjudication of federal water rights in river systems—or does the disclaimer provision in Montana's Enabling Act, now incorporated in the state Constitution—which disclaims jurisdiction over Indian lands—take precedent, prohibiting state water courts from adjudication of Indian water rights? (2) Can the United States adequately represent the potentially conflicting interests of both Indian and non-Indian reservations simultaneously in adjudications before the water courts?

68. The General Adjudication of All Rights to Use Water in the Big Horn River System and All

Special Water Master's recommendations for tribal water rights; simultaneously, the ruling rejected one of the state's major arguments concerning priority dates for the reserved rights.[69] Consequently, the Arapahoe and Shoshone tribes and the state of Wyoming entered into negotiations for a more agreeable solution.[70] After negotiating for eighteen months, the parties have failed to reach agreement; the court recently announced that it will grant no more extensions of time and will soon issue its decree.[71] None of the parties seem to doubt that the decree will be unsatisfactory and followed by numerous appeals.[72]

In sum, negotiating reserved rights might be both more efficient and produce better results than the traditional adjudication of these water rights. Despite these opportunities, negotiating any issue always involves a number of risks. The next section discusses these risks.

V. Risks Involved in Negotiation

A. *Failure to Settle*

Failure to settle is a visible risk of negotiations. If no compact is reached after many months and many dollars, a once positive effort transforms into what appears to be wasted time.[73]

Originally, the legislature gave the Commission only two years to complete compacts.[74] The 1981 legislature extended this deadline to 1985[75] and the 1985 legislature again extended it to 1987.[76] Clearly, Montana knows first-hand the possibility of this first risk—failure to settle.

One obstacle to settlement can be that the parties will be politically unable to compromise.[77] In negotiating reserved rights, both the state and tribes take the chance that there will be hostility within their own ranks. Tribal leaders risk allegations that they are "selling out" to the state; state officials risk allegations that the state is "giving" water rights to Indians who fail to meet the requirements of the state's appropriation system.[78] While neither of these contentions are based on fact or judicial precedent,

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Other Sources, State of Wyoming, No. 101-234 (D. Wyo. May 5, 1983).

69. *Id.*

70. Interview with Michael White, Assistant Attorney General for Wyoming (Feb. 19, 1985).

71. *Id.*

72. Appeals seem particularly likely with respect to the interpretation of the decree as it applies to the private parties involved. *Id.*

73. The Wind River negotiations, *supra* notes 67-71 and accompanying text, illustrate the risk of no settlement taken by the negotiating parties. Eighteen months of intense negotiations yielded no compromise; the parties must now act on the court's decree.

74. Ch. 697, § 27, Laws of Mont. (1979).

75. Ch. 268, § 8, Laws of Mont. (1981).

76. S. Bill 28, *supra* note 51.

77. Getches, *supra* note 55, at 85.

78. *Id.*

the emotional response that water issues evoke make such contentions realistic problems for the negotiating parties.

If these political obstacles become strong enough to preclude the possibility of finding some middle ground between the state and federal interests, the chances of reaching a compact are severely reduced. To give reserved rights negotiations a chance of success, the parties must at a minimum agree on three basic principles:

(1) The state must recognize Indian property rights in water, and Indian desires to make their reservations economically viable entities.[79]

(2) The state must recognize federal rights for instream flow uses on non-Indian federal lands.[80]

(3) The Indians and federal agencies must recognize the state's interest in upholding state water users' appropriative rights.[81]

Political divisions within either party could easily preclude mutual acceptance of these basic premises. The Commission attempts to avoid the emotional political issues by maintaining an open, cooperative negotiating environment while providing respect for each other's interests. Instead of resolving political unrest, the Commission works on resolving the practical problems of water supply and demand.[82] To date this attitude has allowed at least initial acceptance of these three basic premises by the negotiating parties and has kept talks progressing forward.

Although the risk of no settlement appears great, the negative effects of no settlement are mitigated by the education gained by the parties through the negotiating process. Even if no settlement is reached, the parties will have addressed much of the legal and technical work necessary to litigation and will have gained an inside view of the other party's concerns. Thus, the time spent on the negotiating process is never wasted time.

B. *Inability to Abide by Compacts*

A second risk in negotiations is the possibility that one of the parties will not ratify or abide by a signed agreement.[83] The Commission's initial negotiations with the Fort Peck Indian Tribe illustrate this second risk.

In early 1983, a compact between the Fort Peck Tribe and the Commission was reached. The Tribe then began securing approval for the

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79. Russell, *supra* note 61 at 85.

80. *Id.*

81. Marcia Rundle, *supra* note 54.

82. C. MARSEILLE, CONFLICT MANAGEMENT: NEGOTIATING INDIAN WATER RIGHTS 18 (Lincoln Institute of Land Policy (1983)).

83. Patton, *supra* note 55, at 551.

compact from their Council.[84] On March 4, 1983, however, the Commission decided not to seek legislative ratification. Their decision was based on several factors.

First, other state agencies—The Department of Natural Resources and Conservation (DNRC), the Attorney General's Office, and the Governor's Office, all expressed strong reservations about the jurisdiction, administration and enforcement terms in the compact. Representatives from these agencies attended the negotiation sessions, but the Commission and Fort Peck Tribe negotiators—each endowed with full negotiating powers—wrote the compact without input from the state agencies. Lacking the support of these executive agencies, the Commission felt there was little chance of getting legislative approval.[85]

Second, the state was still anxiously awaiting the United States Supreme Court decision in *Arizona v. San Carlos Apache Tribe of Arizona*.[86] *San Carlos* could have changed the bargaining positions of the parties by eliminating Montana's jurisdiction of Indian reserved water rights. Although *San Carlos* has since been decided, the jurisdictional issue remains in question in Montana.[87]

Finally, the 1983 legislative session was nearing an end. Ratification of a new compact which covered such a controversial matter was unlikely during the 1983 session.

The state's inability to ratify the 1983 Fort Peck Compact was in large part due to lack of communication between the Commission and state agencies.[88] To strengthen the cohesiveness and communication between itself and state agencies, the Commission signed a Memorandum of Understanding with the agencies after the failure of the Fort Peck Compact.[89] This agreement provides that the Commission shall give sufficient notice to the Governor, Attorney General's Office and the DNRC of all its meetings, including all strategy meetings and negotiating sessions, to insure the state agencies' participation. As a result, the agencies' representatives now actually voice their comments and advice during

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84. MARSEILLE, *supra*.

85. Interview with D. Scott Brown, Program Manager for the Water Compact Commission, Oct. 15, 1984.

86. *San Carlos Apache Tribe*, 103 S. Ct. 3201 (1983).

87. *Id.* On remand in *San Carlos*, the 9th Circuit held that whether a state court has jurisdiction as a matter of state law to adjudicate federal reserved water rights held by the U.S. in trust for Indians must be determined as a matter of first impression in state court. Northern Cheyenne v. Adsit, 721 F.2d 1187, 1188 (9th Cir. 1983). *See also Greely, supra* note 67.

88. Telephone interview with Chris Tweeten, Office of the Attorney General, Helena, Montana (Nov. 29, 1984).

89. Memorandum of Understanding, signed Oct. 10-15, 1984 (Montana Reserved Water Rights Compact Commission, Helena, Montana).

meetings and regularly submit written comments to the Commission.[90] This involvement during the entire compact process will hopefully strengthen the state's organization, provide agency input at the most opportune time, and increase the support for a negotiated settlement within state government.

Even after ratification, the risk that a compact will not be incorporated into a final decree for a water basin remains. Recent state legislation clarifying Montana's position on the treatment of a ratified compact in the water court significantly reduces this risk. This legislation better informs the negotiating tribes and federal agencies of the possible objections to the compact that the state may entertain from parties not involved in the negotiations.

Senate Bill 28, passed by the 1985 Montana legislature,[91] states that after a compact is incorporated into the preliminary decree for a water basin, the water courts have authority to hear objections to the compact by the DNRC, a person named in the preliminary decree, or any person upon a showing of good cause. If a court sustains an objection, it may declare the compact void, but the court may not modify the negotiated compact in any way except with the prior written consent of the compacting parties. Unless the water courts sustain an objection, the terms of negotiated compacts must be included in the final decree.

The extent to which negotiated compacts might be either changed through negotiations after a hearing on objections or declared void by the water courts remains unknown. Nevertheless, by creating an orderly process by which objections can be made to compacts during preliminary decree proceedings in the water courts. Montana has increased the likelihood that compacts will be incorporated into final decrees.

Despite the presence of these two risks, the Commission's steps to reduce them demonstrate that the risks are not insurmountable. Even with inherent risks, negotiating reserved rights presents clear advantages over the traditional methods of resolving the rights through court.

VI. CONCLUSION

On April 24, 1985, the Montana legislature ratified the newly written Fort Peck Compact—the first reserved water rights compact to be submitted to the state legislature. The 1985 Fort Peck Compact is solid evidence that Montana will realize the opportunities presented by negotiating federal reserved water rights. Fort Peck negotiations have avoided

90. Randle, *supra* note 84.

91. S. Bill 28, *supra* note 51, *amending* MONT. CODE ANN. §§ 85-2-217, -224, -223, -233, -234, -702, and -704 (1983).

extensive court costs and potentially yield a better result for both the Fort Peck tribe and the people of Montana.[92] In addition, the Fort Peck negotiations demonstrate that the risks of either failing to settle or to gain state ratification can be overcome.

The Commission has cleared the major hurdles in the negotiating process: much technical data is collected, formats for negotiating are designed, compacts are being drafted, and the negotiating parties are now educated on the other parties' motivations and concerns. As evidenced by the Fort Peck Compact, the Commission is now ready to form tight, feasible reserved rights compacts statewide. Clearly, the high water is subsiding; with each negotiating session, the rapids along the course of reserved rights resolution become more manageable.

92. For example, the Fort Peck-Montana Compact allows for possible future economic opportunities to the Tribes in water marketing, insures the state that the Tribes will not claim any water from the nearby and overappropriated Milk River Basin, and provides that neither party will be permitted to degrade or deplete the groundwater resource.