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INDIAN RESERVED WATER RIGHTS, FEDERALISM AND THE TRUST RESPONSIBILITY

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INTRODUCTION

On June 26, 1989, an equally divided Supreme Court affirmed the adjudication of reserved rights to the Shoshone and Arapaho Tribes of the Wind River Reservation.[1] While no opinion of the Court accompanied that affirmance, observers appear convinced that the reserved rights doctrine, particularly the quantification measure of practicably irrigable acreage, hangs in the balance of the Court's equal division.

The reserved rights doctrine is based on judicial decisions. It was expressed first in *Winters v. United States*,[2] and further developed in *Arizona v. California*,[3] *Cappaert v. United States*,[4] and *United States v. New Mexico*,[5] as well as a number of lower court decisions.[6]

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1. Wyoming v. United States, 492 U.S. 406 (1989), *aff'g by an equally divided Court, In re* The Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys. & All Other Sources, State of Wyoming, 753 P.2d 76 (Wyo. 1988) [hereinafter *Wyoming adjudication*].

2. 207 U.S. 564 (1908).

3. 373 U.S. 546 (1963), 376 U.S. 340 (1964) (decree), 439 U.S. 419 (1979) (supplemental decree), 460 U.S. 605 (1983) (omitted land and disputed boundary land claims), 466 U.S. 144 (1984) (second supplemental decree).

4. 426 U.S. 128 (1976).

5. 438 U.S. 696 (1978).

6. Conrad Inv. Co. v. United States, 161 F. 829 (9th Cir. 1908); Skeem v. United States, 273 F. 93 (9th Cir. 1921); United States v. Parkins, 18 F.2d 642 (D. Wyo. 1926); United States *ex rel* Ray v. Hibner, 27 F.2d 909 (E.D. Idaho 1928); United States v. Walker River Irr. Dist., 104 F.2d 334 (9th Cir. 1939); United States v. Ahtanum Irr. Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957); United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984); Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984); Colville Confederated Tribes v. Walton, 752 F.2d 397 (9th Cir. 1985); Joint Board of Control of Flathead v. United

In summary form, the doctrine provides that when an Indian reservation is established by treaty, statute or executive order, sufficient water is impliedly reserved from then unappropriated sources appurtenant to the reservation in an amount necessary to fulfill the purpose of the reservation. The right vests at the creation of the reservation. The government holds title to the right in trust for the benefit of the Indians. It cannot be lost by nonuse. Its priority is the date of reservation establishment. The right does not depend on state law or procedure for its existence, though it may be adjudicated in properly constituted state court proceedings. The purpose of an Indian reservation generally is to provide a permanent home for the Indians who reside there. The quantification measure for the reserved right includes the amount of water needed to supply water to the practicably irrigable lands of a reservation and related municipal, domestic and stockwater requirements. The right may also be quantified in amounts to protect and develop reservation natural resources and treaty entitlements to hunt and fish. The means used to quantify adjudicated water rights is not a restriction on the use of that water.

The *Wyoming adjudication* should have been an easy one for the Court, which had its quarter-century-old precedent on practicably irrigable acreage, *Arizona v. California*,[7] as a guide. The Court deadlock raises fears that the reserved rights doctrine and the principle of *stare decisis* will give way to dominant political and economic interests in the non-Indian community. Whether in a future case the Court will tip the scales for or against the reserved rights doctrine, or the quantification measure, can only be guessed. Whether Indian tribes will be able to enjoy the full economic value of adjudicated reserved water rights is also problematic. The outcome depends in no small part on the persistence of opponents to reserved water rights, the effectiveness of tribal advocacy, and the loyalty of the federal trustee to the reserved rights doctrine and the value it holds for Indian tribes. This article uses the *Wyoming adjudication* as a backdrop to discuss: (1) the reserved rights doctrine in terms of jurisdiction, federalism, and the McCarran Amendment; (2) opposition to Indian reserved rights and the practicably irrigable acreage quantification measure; (3) advocacy of reserved rights by the federal trustee and the tribal beneficiary; and (4) Indian water rights in evolving western economies.

THE RESERVED RIGHTS DOCTRINE: JURISDICTION, FEDERALISM AND THE MCCARRAN AMENDMENT

Ever since the McCarran Amendment's enactment in 1952,[8] states rights advocates have enjoyed a steady stream of judicial decisions upholding their claims that the McCarran Amendment not only

States, 832 F.2d 1127 (9th Cir. 1987).

7. 373 U.S. at 595-601.

8. 43 U.S.C. § 666 (1986).

waived federal immunity to properly constituted suits to adjudicate reserved water rights in both state and federal court, but also that federalism required deference by the federal judiciary to state court adjudications.[9] Tribal and federal opponents to state jurisdiction have argued, for example, that federal Indian policy traditionally operates to insulate tribes from state interference; state forums are inhospitable to Indians; the McCarran Amendment did not waive tribal immunity even though it waived federal immunity to suit in general adjudications; reserved water rights are based on federal not state law; and reserved rights can be adjudicated independent of claims under state law.[10]

The Supreme Court found understandable, but unacceptable, the tribal and federal arguments against state court jurisdiction. The Court was persuaded that the risk of duplicative and conflicting adjudications in state and federal forums should be avoided, and that the state courts could get the job done expertly and fairly, subject to careful Supreme Court review. The Supreme Court professed that the McCarran Amendment decisions did not amount to giving the fox jurisdiction over the henhouse. It made clear that the state courts have a solemn obligation to follow the federal law of reserved water rights. Any state court decision alleged to abridge Indian water rights will be subject to "particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment."[11]

In view of the massive and lumbering adjudications proliferating in the West, it is time to reconsider whether *anyone's* interest is well-served by federalism as applied by the Supreme Court in those cases.[12] Perhaps the first problem in the Supreme Court's McCarran

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9. United States v. District Court in and for the County of Eagle, 401 U.S. 520 (1971); United States v. District Court in and for Water Div. No. 5, 401 U.S. 527 (1971); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545 (1983).

10. *San Carlos Apache Tribe*, 463 U.S. at 566-67.

11. *Id.* at 571.

12. For example, the 1976 Supreme Court decision holding that the McCarran Amendment authorized the adjudication of Indian reserved water rights in state water courts (*Colorado River Water Conservation Dist., supra*) involved the Ute Mountain Ute and Southern Ute Tribes in southwest Colorado whose claims to water had been filed in 1972. Nineteen years later the adjudication is still pending. In 1988, Congress implemented a conditional settlement of the tribes' water rights. Pub. L. 100-585, 102 Stat. 2973 (1988). One condition to the settlement provides that, if the Animas-LaPlata Reclamation Project, which was a catalyst for the settlement, is not completed by 2000, the Indian tribes have the option to relitigate their reserved water rights on the Animas and LaPlata Rivers. Colorado Ute Indian Water Rights, Final Settlement Agreement (December 10, 1986) Article III.A.2.f(ii) and III.B.1.f(ii), *reprinted in* H.R. Rep. No. 932, 100th Cong., 2d Sess. 31 (1988).

In addition, South Dakota has concluded that the McCarran Amendment decisions were a mixed blessing. In 1980, the state filed a general adjudication of the Missouri River within the boundaries of South Dakota. After the case was filed, state planners concluded that the political and financial costs associated with joining all water users on the Missouri River outweighed the benefits of an adjudication and dismissed

Amendment decisions is their assumption that state courts are better equipped than federal courts to manage a general stream adjudication. It appears that the Court misjudged the experience and ability of states to do so.

States generally issue water rights to individuals in an administrative process. Resolution of conflicts over those rights is reactive and particular. Affected water users bring problems to the district engineer or water master or resort to self-help.[13] In contrast, water system adjudications are judicial and comprehensive; they require detailed and active management, not by state administrative agencies, but by state courts. Thus, because water adjudications and water management are essentially different processes, the McCarran Amendment decisions have forced state water courts into intensive on-the-job training. The oft-repeated charge that reserved water rights adjudications are costly, burdensome and time-consuming is partly the result of non-Indian arguments and victories causing a radical change in state water management.

There is nothing about the reserved right that cannot be fully and more simply resolved consistent with principles of federalism in a federal court declaratory judgment action, if the parties were willing to see it done that way. For example, the National Water Commission made the following recommendation before the Supreme Court decided that Indian reserved rights are subject to the McCarran Amendment:

> Jurisdiction of all actions affecting Indian water rights should be in the U.S. District Court for the district or districts in which lie the Indian Reservation and the water body to be adjudicated. Indian tribes may initiate such actions and the United States and affected tribes may be joined as parties in any such action. The jurisdiction of the Federal district court in such actions should be exclusive, except where Article III of the Constitution grants jurisdiction to the U.S. Supreme Court. In such actions, the United States should represent the Indian tribes whose water rights are in issue, unless the tribe itself becomes a party to the action and requests permission to represent itself. Any State in which the reservation lies and any State having water users that might be affected by an Indian water rights adjudication may initiate an adjudication and may intervene in an adjudication commenced by others, including adjudications initiated by the United States and

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the case. *In re* the General Adjudication of All Rights to Use Water and Water Rights on the Missouri River System, State of South Dakota, Civ. No. 80-100 (Cir. Ct., 6th Jud. Cir. Oct. 5, 1983) (Order granting South Dakota's motion to dismiss without prejudice). Wyoming also appears to have lost its enthusiasm for general adjudications. *See infra* note 19.

13. Water rights advocates have been known to emphasize the seriousness of their mission with apocryphal tales of vengeful farmers who blocked ditches with the corpses of offending appropriators.

> Indian tribes. Upon such appearance by the State, the State may move to represent its non-Indian water users *parens patriae*, and the motion should be granted except as to non-Indian water users as to whom the State has a conflict of interest.[14]

In any event, the case for federalism in the context of Indian water rights is overstated. While the McCarran Amendment decisions are a product of federalism, the Supreme Court has made it clear that reserved water rights are not.[15] Both Congress and western states have acknowledged this in numerous compacts over interstate waters in which states have consistently disclaimed any adverse interest in Indian water rights.[16] Congress and the Executive consistently have opposed attempts by states to interfere with Indian water rights. For example, the federal government has declined for twenty years to ratify a compact allocating water from interstate streams between California and Nevada because of a provision which would adversely affect Indian water rights.[17]

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14. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE, FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES OF AMERICA 478-79 (1973).

15. "[D]etermination of reserved water rights is not governed by state law but derives from the federal purpose of the reservation . . . Federal water rights are not dependent upon state law or state procedures and they need not be adjudicated only in state courts . . . Nor . . . is the McCarran amendment a substantive statute, requiring the United States to 'perfect its water rights in the state forum like all other land owners.' " Cappaert v. United States, 426 U.S. 128, 145-46 (1976).

16. *E.g.*, Snake River Compact, art. XIV A.1, ch. 73, 64 Stat. 29 (1950); Upper Colorado River Basin Compact, art. XIX(a), ch. 48, 63 Stat. 31 (1949); Colorado River Compact, art. VII, ch. 42, 45 Stat. 1057 (1928); Rio Grande Compact, art. XVI, ch. 155, 53 Stat. 785 (1939).

17. California-Nevada Interstate Compact, CAL. WATER CODE §§ 5975-5976 (West 1971), NEV. REV. STAT. §§ 538-600 (1986). The following bills were introduced to confirm that compact, none of which was enacted: S. 3703, 92d Cong., 2d Sess. (1972); S. 668, 95th Cong., 1st Sess. (1977); S. 1554, 96th Cong., 1st Sess. (1979); S. 1558, 99th Cong., 1st Sess. (1985); S. 2457, 99th Cong., 2d Sess. (1986); and H.R. 5161, 99th Cong., 2d Sess. § 609 (1986). *See also* Letter from Secretary of the Interior Cecil D. Andrus to Senator Howard W. Cannon (Jan. 21, 1980); Letter from Phillip D. Brady, Acting Assistant Attorney General, Office of Legislative and Intergovernmental Affairs to Senator Strom Thurmond, Chairman, Committee on the Judiciary (Nov. 5, 1985); Letter from Deputy Assistant Secretary Joseph T. Findaro to Orrin G. Hatch, Chairman, Subcommittee on the Constitution of the Committee on the Judiciary (Aug. 11, 1986); and STATEMENT OF ADMINISTRATION POLICY, (SENATE), COMMERCE, JUSTICE AND STATE APPROPRIATION BILL, H.R. 5161, 99th Cong., 2d Sess. 2 (1986):

> [T]he Administration strongly opposes general provision 609 that would ratify the California-Nevada compact for the apportionment of the Carson, Truckee, Walker rivers and provide that the Federal Government agrees to be bound by its terms. The compact unilaterally abrogates Federal rights and responsibilities to Indian tribes and other entities. Ratification is acceptable only if it includes language proposed by the Administration specifically protecting the Federal obligations and responsibilities.

Id.

Portions of the California-Nevada Interstate Compact ultimately were ratified conditionally by the Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618, tit. II, 104 Stat. 3294 (1990). That act, among other things, vests the Pyramid Lake Paiute Tribe with the power to veto the compact by expressly requiring the settlement of

OPPOSITION TO INDIAN RESERVED RIGHTS

The Wyoming Adjudication

Wyoming v. United States both evolved from and contributed to the McCarran Amendment debates about jurisdiction and federalism. Following the Supreme Court's decision in 1976, that the McCarran Amendment waived federal sovereign immunity to adjudication of Indian reserved water rights in state court, the Wyoming State Legislature spent the remaining months of that year drafting a bill meant to comply with the jurisdictional criteria established by the Supreme Court. It was introduced as Original House Bill 188 on January 14, 1977. The bill made its way through the legislative process in eight days and was signed by the Governor on Saturday, January 22, 1977.[18] The State filed the adjudication in Water Division 3 on the following Monday, January 24. Of the four water divisions in Wyoming, Water Division 3 is one of the least populous, the site of the State's only Indian reservation, and the only water division undergoing a general adjudication.[19]

Once the adjudication was underway, the State assumed nearly the entire litigation burden of opposing the United States and the Tribes. The State responded to the Supreme Court's strict injunction—that state courts adjudicating Indian water rights have a solemn obligation to follow federal law—by challenging in its state court every aspect of the federal law of reserved rights.

The United States and the Tribes claimed that the reserved right should be measured by the amount of water needed for a number of independent uses, including irrigation, in order for the reservation to be the permanent home contemplated by the Tribes in the 1868 Treaty of Fort Bridger.[20] The State responded to the federal and Indian claims with a general denial that reserved rights existed in Wyoming.[21] The State followed its general denial with a fifty-point argu-

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Indian claims to water as a condition to its ratification. *Id.* § 210.

18. WYO. STAT. § 1-37-106 (1988 & Supp. 1991).

19. Telephone Interview with S. Jane Caton, Wyoming Assistant Attorney General (Feb. 15, 1990) [hereinafter *Caton interview*]. Ms. Caton reported that the State has no plans to adjudicate water rights in any of the State's other water divisions.

20. 15 Stat. 673 (1869).

21. State of Wyoming's Response to the United States' Statement of Claims and to the Statement of the Shoshone and Arapaho Tribes Concerning the Measurement of Tribal Reserved Water Rights (July 16, 1980); *Wyoming adjudication*, Civ. No. 4993 (Dist. Ct., 5th Jud. Dist. 1983) *reprinted in* Reply Brief of Tribal Respondents, Appendix A, Wyoming v. United States, 492 U.S. 406 (1989). One argument alone that betrayed the error and extremism in the State's advocacy was that the admission of Wyoming as a state on an equal footing with existing states pursuant to U.S. CONST. art. IV, § 3, barred the creation of federal reserved rights. That argument was rejected by the Supreme Court when the reserved rights doctrine was announced in Winters v. United States, 207 U.S. 564, 577 (1908). It was rejected again in Arizona v. California, 373 U.S. 546, 596-98 (1963), and United States v. District Court for Eagle County, 401 U.S. 520, 522 (1971). Moreover, Wyoming's attorney in the adjudication had earlier served as a special master in a Colorado adjudication and had concluded in that case

ment that, if the reserved rights doctrine applied generally in Wyoming, the circumstances of the Wind River Reservation required that the doctrine's application in this case be modified or eliminated. Wyoming persisted with this argument in the Supreme Court even after it had settled by a consent decree the reserved water rights claims for non-Indian federal programs in 1983.[22] Finally, the State argued that any reserved right that may exist for the Wind River Reservation must be quantified only in terms of the amount of water needed to irrigate the practicably irrigable acreage on the reservation.[23]

Many observers have overlooked the fact that in its 1980 pretrial response to the federal and Indian claim to water for irrigation use, Wyoming stated that there were 101,931 practicably irrigable acres on the 2.5 million acre Wind River Reservation.[24] After eight years of litigation, the Wyoming Supreme Court adjudicated an award of water for 108,221 practicably irrigable acres. That difference, 6,290 acres, represents six percent of the Indian claim. The State reports that it has spent $8,586,860 in twelve years litigating over 6,290 acres of land; that is, six percent of the Indian claim.[25] That figure does not include the litigation expenses of individual water users, water districts and municipalities.

Given this litigation posture by the executive branch of the State government, the Wyoming district court was unable to rely on the State's putative specialized resources and experience in water rights to implement the newly enacted adjudication statute. Instead, the district court had to contend with the State as the dominant antagonist to its effort to comply with federal law in the adjudication.

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that the equal footing doctrine could not prohibit the creation of reserved rights, before or after statehood. *Wyoming adjudication*, Civ. No. 4993 (Dist. Ct., 5th Jud. Dist., Dec. 15, 1982) (Report of Teno Roncalio, Special Master, at 64).

22. *Wyoming adjudication*, Civ. No. 4993 (Dist. Ct., 5th Jud. Dist., Feb. 9, 1983) (Partial Interlocutory Decree Covering the United States' Non-Indian Claims).

23. Wyoming's brief in opposition to the reserved rights claims for the Wind River Reservation summarized the State's position:

> Wyoming affirmatively asserts that there are no reserved water rights for the Wind River Indian Reservation. Even if the Court decides there are such rights they must be limited to water sufficient to meet Indian agricultural needs. The right must be quantified on the basis of practicably irrigable acreage, and the priority dates must vary depending on the circumstances.

Wyoming's Brief in Support of its Response to the Claims for Water Rights of the United States and the Shoshone and Arapaho Tribes (July 16, 1980), *Wyoming adjudication*, Civ. No. 4993 (Dist. Ct., 5th Jud. Dist. 1983), *reprinted in* Brief for Tribal Respondents, Appendix D, Wyoming v. United States, 492 U.S. 406 (1989).

24. Appendix A to "State of Wyoming's Response to United States' Statement of Claims," (July 11, 1980); *Wyoming adjudication*, Civ. No. 4993 (Dist. Ct., 5th Jud. Dist. 1983). *See also supra* note 21.

25. *Caton interview, supra* note 19. The point was not lost on the Supreme Court where it was raised at oral argument. In response, the State argued that the lands in dispute were not the same and that it also had a disagreement about the water duty asserted for those lands. Transcript of Proceedings in the Supreme Court of the United States at 6-7, Wyoming v. United States, 492 U.S. 406 (1989) (No. 88-309).

The case was tried to a special master,[26] reviewed twice by different judges in the Wyoming district court, and then decided in the Wyoming Supreme Court. The Wyoming Supreme Court acceded to the State's arguments to the extent of rejecting all of the reserved rights claims to water except those based on practicably irrigable acreage. The Shoshone and Arapaho Tribes were awarded approximately 500,000 acre feet of water annually. While quantified only in terms of practicably irrigable acreage, the Court ruled that the water could be applied to a number of beneficial uses.[27]

The *Wyoming adjudication* appeared to vindicate the western states' arguments about and the United States Supreme Court's construction of the McCarran Amendment: the State system can work fairly. But Wyoming was concerned with the result of the case, not the system that produced it. Wyoming changed its position. It repudiated its insistence that practicable irrigability is the measure of the reserved right and sought review of the case on a petition for a writ of certiorari in the United States Supreme Court.[28]

Of all the questions raised in petitions and cross-petitions for review by the parties, the United States Supreme Court accepted only Wyoming's challenge to the use of that Court's own measure of practicably irrigable acreage.[29] Why did Wyoming, joined by ten reclamation states,[30] as well as a host of municipalities and water districts,[31]

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26. However faithfully the State believed it had complied with the McCarran Amendment in drafting its adjudication statute, it was sufficiently persuaded that the State Board of Control could not play a judicial role in the adjudication and agreed to negotiate with the federal government and the Tribes for the appointment of a special master to try the reserved water right claims. The court accepted the parties' recommendation of Teno Roncalio, an attorney and former congressman from Wyoming. *See supra* note 21.

27. Apparently recognizing that an agricultural economy cannot exist if water use is limited to crop irrigation, the Wyoming Supreme Court ruled that municipal, domestic, commercial and livestock uses were subsumed in the award of water for practicably irrigable acreage. *Wyoming adjudication*, 753 P.2d 76, 99 (Wyo. 1988).

28. Petition for a Writ of Certiorari to the Supreme Court of Wyoming, Wyoming v. United States, 492 U.S. 406 (1989) (No. 88-309).

29. The Supreme Court's order stated: "The petition for a writ of certiorari to the Supreme Court of Wyoming is granted limited to Question 2 presented by the petition." Wyoming v. United States, 488 U.S. 1040 (1989). Question 2 in the petition was:

> In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in the presence of substantial state water rights long in use on the Reservation, may a reserved water right be implied for all practicably irrigable lands within a Reservation set aside for a specific tribe?

Id. at (i). The non-Indian cross-petitioners were municipalities, irrigation districts, and corporate and individual water users. Cross-petition for a Writ of Certiorari to the Supreme Court of Wyoming, Wyoming v. United States, 492 U.S., 406 (1989) (No. 88-309).

30. The following are among the briefs filed in Wyoming v. United States, 492 U.S. 406 (1989) (No. 88-309): Brief of the States of Montana, New Mexico, Nevada, North Dakota, South Dakota, and Washington in Support of Petition for a Writ of Certiorari (Oct. 28, 1988), Brief *Amicus Curiae* of the State of California and the Metropolitan Water District of Southern California in Support of Petitioner (Mar. 9, 1989), Brief of *Amici Curiae* States of Arizona, Idaho, Montana, Nevada, Utah, and Washington in Support of Petitioner (Mar. 9, 1989).

31. The following *amici curiae* briefs were filed in Wyoming v. United States, 492

attack the decision of the Wyoming Supreme Court? And why did the United States Supreme Court take the case when: (1) the United States and the Shoshone and Arapaho Tribes opposed the petitions for a writ of certiorari; (2) the Wyoming Supreme Court's decision appeared consistent with its "solemn obligation to follow federal law"; and (3) Wyoming's fallback position was that practicable irrigability was the proper measure of the reserved right?

In the McCarran Amendment cases, the Supreme Court had professed its determination to protect Indian claims from being abridged by state court decisions and promised "particularized and exacting scrutiny" of any allegations that such was occurring.[32] The United States as trustee and the Indian tribes themselves were the beneficiaries of that pronouncement, not their adversaries. The federal government and the Tribes opposed review of the *Wyoming adjudication* because they were persuaded that while the decision was erroneous in at least one major respect—the Wyoming court had refused to quantify the reserved right in terms other than irrigation use, such as mineral development and instream flows for fisheries—as a whole it was acceptable.[33]

The equally divided United States Supreme Court in the *Wyoming adjudication* wrote no opinion when it affirmed the Wyoming Supreme Court. No good reason appears why the Supreme Court would tout the judicial economy of state court adjudications, and then, when presented with a result acceptable to the federal and tribal interests, elect to put the Indian tribes to the additional cost and risk associated with litigating in the Supreme Court, an attempt by the State to dismantle the decision of its own courts and Supreme Court precedent. In the absence of an opinion, the only means to divine the Court's views is from the questions raised at oral argument. Excerpts from the transcript reveal antagonism in some quarters of the United States Supreme Court toward its own precedent, and reluctance to uphold an essential incident of the reserved right, its inability to be lost by nonuse.[34]

U.S. 406 (1989) (No. 88-309): The County of Chaves, the County of Lincoln, the City of Roswell, the Village of Ruidoso Downs, and twenty-two community acequias, all within the State of New Mexico; the Metropolitan Water District of Southern California; the Salt River Project Agricultural Improvement and Power District; and the City of Phoenix.

32. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983).

33. The Tribes filed a conditional cross-petition which the United States supported. Cross-Petition for a Writ of Certiorari to the Supreme Court of Wyoming and Brief for the United States in Opposition, Wyoming v. United States, 492 U.S. 406 (1989) (No. 88-309).

34. In the following excerpts from the transcript, the Justice asking the question is not identified by the reporter. Jeffrey P. Minear, Assistant to the Solicitor General, argued on behalf of the United States.

QUESTION: —you don't want the reserved right to ever be subject to diminution for non-use?

MR. MINEAR: That's — well, that is in the very nature of a reserved water right.

QUESTION: Well, it doesn't have to be.

The Practicable Irrigability Measure

The Supreme Court's decision to review the Wyoming Supreme Court's endorsement of the "value of the certainty inherent in the practicably irrigable acreage standard"[35] created a crisis among Indian tribes because it provided opponents of the reserved rights doctrine a long awaited opportunity to attack the Supreme Court's adoption of the practicable irrigability standard in *Arizona v. California*.[36] Leading the opposition were beneficiaries of the federal reclamation program. They challenged the economic foundation of the practicable irrigability standard even though it is based on reclamation law.[37] Perhaps with the Bureau of Reclamation's construction function in decline, the opponents believed they had nothing to lose by attacking economic feasibility analyses for Indian projects that were more strict than those for the reclamation program.

MR. MINEAR: I think —
QUESTION: It certainly doesn't.
MR. MINEAR: I think that that has been the clear implication.
QUESTION: Well, it doesn't have to be.
. . . .
QUESTION: But, of course, the whole — the whole Winters Doctrine is just an implication to Congress. Congress never said in so many words, we're reserving a water right. That's just what this Court said Congress must have intended. So, Congress has never even spoken.
MR. MINEAR: But I think Congress —
QUESTION: And they certainly haven't spoken with —
MR. MINEAR: — has relied on every decision since the — has been relying on every decision since the 1908 Winters decision, including the Powers decision, including Arizona I. In fact, the present congressional activity indicates that sort of reliance.
. . . .
QUESTION: But the PIA standard as set in the Master's Report in Arizona I, isn't that a legal principle? Do we usually defer to Special Masters on legal principles?
MR. MINEAR: I think that when a Special Master's Report has been incorporated into existing law to the extent that the Special Master's Report has here, I think it's very important to recognize the element of certainty that it has created.

Transcript of Proceedings in the Supreme Court of the United States at 39-41, Wyoming v. United States, 492 U.S. 406 (1989).

35. *Wyoming adjudication*, 753 P.2d 76, 101 (Wyo. 1988).

36. 373 U.S. at 600.

37. As noted by the government in its brief to the Supreme Court in the *Wyoming adjudication*, the determination of practicable irrigability is conceptually similar to that employed by the Bureau of Reclamation. The concept of practicable irrigability developed in response to the Reclamation Act of 1902, ch. 1093, sec. 4, 32 Stat. 389, which provided in relevant part (emphasis added):

> [u]pon the determination by the Secretary of the Interior that any irrigation project is *practicable*, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be *practicable* to construct and complete as parts of the whole project . . . and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question.

See 43 U.S.C. 419. Thus the western States and their water users—the primary beneficiaries of the reclamation laws—are familiar with the principles. Brief for the United States at 41-42 n.38, Wyoming v. United States, 492 U.S. 406 (1989) (No. 88-309).

Amici supporting Wyoming argued to the Supreme Court the "utter unreality and futility associated with an attempt to predict the economic feasibility of future hypothetical Indian irrigation projects" as was done in *Arizona v. California*.[38] Others acknowledged the propriety of economic feasibility analyses, but not where Indian water rights are concerned. The New Mexico *amici* stated that "the 'proof' of an Indian right in recent cases has consisted of a benefit-cost analysis of a given proposed project. Benefit-cost analysis is the public sector counterpart to the financial feasibility tests customarily performed by private sector investors prior to undertaking long-term capital investments."[39] The New Mexico *amici* then went on to argue that in Indian cases the United States reduces economic analyses to "a tool of advocacy", a contrivance. "Typically, the United States manufactures idealized projects and skews each of the elements of the analysis in order to arrive at a favorable benefit-cost ratio. It is common knowledge that these projects will never be constructed."[40] However, that argument seems invalid given the fact that, for example, following the 1963 decision in *Arizona v. California*, irrigation development on the Colorado River more than doubled—from 30,000 to 70,000 acres under decreed water rights.[41]

Practicable irrigability analyses for Indian lands are subject to more strict economic review than those for reclamation projects. Practicable irrigability is determined in the crucible of litigation. All agronomic, engineering, water supply and economic conclusions of experts in support of a finding of practicable irrigability are cross-examined and otherwise challenged far more rigorously than occurs in any decision-making process regarding the authorization of a reclamation project. In addition, after nearly a century of reclamation activity, sufficient data now exists on which to base assessments of practicable irrigability. Some existing reclamation projects which today use water claimed by Indian tribes would not be able to meet the new criteria.[42] Yet those criteria today are used in part to determine whether Indian lands are practicably irrigable and thus entitled to a reserved water

38. Brief *amicus curiae* of the State of California and the Metropolitan Water District of Southern California at 15-16, Wyoming v. United States, 492 U.S. 406 (1989) (No. 88-309).

39. *Amici curiae* brief of the County of Chaves, the County of Lincoln, the City of Roswell, the Village of Ruidoso Downs, and Twenty-Two Community Acequias, all within the State of New Mexico at 3, Wyoming v. United States, 492 U.S. 406 (1989) (No. 88-309).

40. *Id.*

41. BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, SPECIAL IRRIGATION REPORT AND RECOMMENDATIONS 29 (1988) (Prepared for the Deputy to the Assistant Secretary—Indian Affairs (Trust and Economic Development)).

42. For example, Congress has appropriated millions of dollars for the Riverton Project, whose claims to water are also at issue in the *Wyoming adjudication*, to ameliorate the problems of poor drainage, alkaline soils, and environmental damage caused by the irrigation of lands which the government had represented were suitable for sustained irrigation. *See* Act of March 10, 1964, Pub. L. No. 88-278, 78 Stat. 156; Act of September 25, 1970, Pub. L. No. 91-409, 84 Stat. 861.

right.[43]

The requirement of a feasibility determination for project construction evolved with the experience of the reclamation program. Section 4 of the 1902 Reclamation Act merely required the Secretary of the Interior to make "the determination that any irrigation project is practicable."[44] The Fact Finders' Act of December 5, 1924, required the recommendation of the Commissioner of Reclamation as well as the Secretary of the Interior, and the approval of the President before a project could be constructed.[45] Subsection B of that act required of the Secretary "information in detail . . . concerning the water supply, the engineering features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States."[46]

Thus, it was not until nearly a quarter century after the inception of the federal reclamation program that the basis for feasibility determinations was laid. By then, as found by Congress in the Omnibus Adjustment Act of May 25, 1926,[47] numerous projects had been constructed which already had fallen into financial and physical difficulty, and many of which diverted water supplies away from Indian reservations.[48] Land that had deteriorated from irrigation was deleted from reclamation projects and repayment costs associated with them essentially forgiven.[49]

The Reclamation Project Act of 1939,[50] required that lands be reclassified every five years as to irrigability and productivity, but only at the project landowners' request.[51] The 1939 Act required the Secretary to make more detailed findings of feasibility and report them to the Congress as a precondition to construction. If the project was feasible and benefits equaled the costs, the project could be constructed. Significantly, even if the costs exceeded the benefits of a proposed project, it could be constructed with specific further authorization from Congress.[52] In sharp contrast, the reserved rights doctrine offers

43. H.S. Burness et al., *United States Reclamation Policy and Indian Water Rights*, 20 NAT. RESOURCES J. 807 (1980).
44. 43 U.S.C. § 419 (1986).
45. Ch. 4, 43 Stat. 672, 685.
46. 43 U.S.C. § 412 (1986).
47. Ch. 47, 44 Stat. 636.
48. *E.g.*, Milk River Project, Fort Belknap Indian Reservation, *id.* § 19; Newlands Project, Pyramid Lake Paiute Indian Reservation, *id.* § 23; and Umatilla Project, Umatilla Indian Reservation, *id.* § 35.
49. *Id.* §§ 41-44.
50. 43 U.S.C. § 485g (1986).
51. 43 U.S.C. § 485g(a), (b) (1986). *But see* 43 U.S.C. § 390a (1986) (No appropriated funds may be expended on project construction unless land classification and irrigability determinations have been certified by the Secretary of the Interior to the Congress.).
52. 43 U.S.C. § 485h(a) (1986).

no such latitude; a reserved right for practicably irrigable acreage requires that the benefits equal or exceed the costs of irrigation development.[53]

Reclamation project construction has been based generally on interest free repayment, calculating irrigation repayment on the farmers' ability to repay, the opportunity cost of using reclamation project hydropower for irrigation instead of other higher value uses, and the subsidy available to farmers who grow surplus crops with reclamation water. One commentator has estimated that the combined legislative and administrative subsidies that have been furnished to non-Indian beneficiaries of federal reclamation projects constructed between 1902 and 1986 amount to 86 percent of total construction costs.[54]

The Supreme Court's affirmance of the Wyoming Supreme Court's decision means that for now, practicable irrigability will remain the principal quantification measure in contention in other adjudications. In preparing reserved water rights claims for irrigation, the government and Indian tribes have recognized that their strength depends on accurate, persuasive technical analyses. Because of the adversarial context of adjudications, those who present Indian claims must be prepared to meet higher standards of economic feasibility and environmental acceptability than have traditionally been applied to authorization and construction of non-Indian reclamation projects.

Economic and Political Context of Indian Reserved Rights

The turmoil over the McCarran Amendment decisions and the *Wyoming adjudication*, for the most part, is not really about federalism, judicial economy and state expertise in water matters. It is about the political and economic power that the reserved rights doctrine represents for Indian tribes, and the competition for that power from

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53. *See Wyoming adjudication*, 753 P.2d 76, 103-106 (Wyo. 1988).

54. RICHARD W. WAHL, MARKETS FOR FEDERAL WATER, 1989 RESOURCES FOR THE FUTURE 36 (1989). Wahl offers a number of reasons for the growth of the reclamation subsidy.

> (1) Congress did an inadequate job in specifying a program that would be viable. (2) The Bureau of Reclamation developed projects in locations where soil conditions were not conducive to long-term irrigation. (3) The hardships that settlers had to endure, whether from inexperience, drought, or poor project design, undoubtedly aroused the sympathies of members of Congress as well as Bureau of Reclamation personnel administering the program. (4) Once federal dollars had been committed to specific irrigation projects, the federal government was vulnerable to arguments that additional financial concessions were necessary to make continued farming viable on project lands. (5) Inflation considerably enhanced the value of interest-free repayment. (6) Once the precedent of the interest subsidy had been established, there was little inclination on the part of Congress to modify it.

Id. at 38-39. *See also* STAFF OF HOUSE SUBCOMM. ON GEN. OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON INTERIOR AND INSULAR AFFAIRS, 100TH CONG., 2D SESS., DEP'T OF THE INTERIOR'S EFFORTS TO ESTIMATE THE COST OF FEDERAL IRRIGATION SUBSIDIES: A RECORD OF DECEIT (Comm. Print No. 9, 1988).

the non-Indian community that has resulted from federal policies which encouraged non-Indians and Indians to rely on the same water sources. If one may mark the turn of the 20th century by the massive expropriation of Indian lands,[55] then the turn of the 21st century is the era when the Indian tribes risk the same fate for their water resources.

The history of the Wind River Reservation is typical of the pattern of cession and diminishment that occurred with Indian lands in the 19th century. The creation of the Wind River Reservation by treaty in 1868 actually had the effect of reducing the Shoshone's aboriginal land base.[56] By the time the treaty had been ratified and the reservation confirmed by Congress, the pressures to reduce the reservation had already begun to build. In less than three years, the government acted to reduce the reservation to accommodate the miners and settlers who had trespassed into the gold bearing region in the vicinity of Lander. The 1872 agreement to reduce the reservation submitted for approval by the Congress was straightforward in explaining that its purpose was neither to prosecute nor forgive, but to legitimize the trespassers:

> [W]hereas, previous to and since the date of said treaty, mines have been discovered, and citizens of the United States have made improvements within the limits of said reservation, and it is deemed advisable for the settlement of all difficulty between the parties, arising in consequence of said occupancy, to change the southern limit of said reservation . . . .[57]

Thereafter, the Wind River Indians ceded another 55,000 acres including the Big Horn Hot Springs at the northeast corner of their reservation.[58] A further cession, larger than the combined area of the first two, was approved by the Act of March 3, 1905.[59] But the latter cession was only a brokerage agreement. The United States agreed to sell the land as trustee for the Indians if buyers appeared, but would not guarantee to find a purchaser. No buyers were found for the greater part of that cession and the undisposed land was fully restored to the Indians.[60]

The foot soldiers of manifest destiny were the federal agents

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55. For a graphic depiction of the reduction in Indian territory by the end of the 19th century through treaties and agreements between Indians and the United States, *see* CHARLES ROYCE, INDIAN LAND CESSIONS IN THE UNITED STATES, 18TH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY 1896-1897 Part 2 (1899).

56. Treaty with the Eastern Band Shoshoni and Bannock, July 3, 1868, art. 2, 15 Stat. 673 ("said Indians . . . will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.").

57. Act of December 15, 1874, ch. 2, 18 Stat. 291.

58. Act of June 7, 1897, ch. 3, § 12, 30 Stat. 62.

59. Ch. 1452, 33 Stat. 1016.

60. *See* Report of Teno Roncalio, Special Master, *supra* note 21, at 33-37.

charged with separating the non-Indians from the Indians, and the Indians from their lands. An agent whose charge was securing land for non-Indian settlement in the Pacific Northwest captured the essence of this policy in a single sentence on the occasion of his apparent success in containing the Coast Indians: "Being satisfied that no other section, offering so few attractions to the whites, combine more facilities to the comfort and subsistence of the Indians, I have selected this tract and recommend that it be made a permanent Indian reserve."[61] Congress never approved the recommendation.

A common and melodramatic view of Indian affairs in western history is of the dark forces of manifest destiny having a tragic impact on the primitive lifestyle of innocent aborigines.[62] The 19th century is viewed as a time of active and overwhelming non-Indian greed, hunger and lust for natural resources in the West. On the other hand, non-Indians in the late 20th century view themselves as free of such base motives. Their only concern is for security in their community's use of resources. In contemporary water rights conflicts Indians and non-Indians are declared to be victims of much more politically complex and morally ambiguous circumstances than existed in times past. For many non-Indians, the federal law of reserved rights squarely conflicts with the federal policy to settle and develop the western United States. They view reserved rights as a malign presence in the community of western natural resources managers. It is extortionate or bullying in its federal form; and must be subdued in the institution of a state court, or transformed into an economically impotent presence through a federally funded settlement.

In an effort to fend off the impact of senior Indian reserved rights on developed, but junior, state appropriative water rights, the non-Indian community has developed a bizarre vocabulary. Opponents in the non-Indian community originally tried to denigrate reserved water rights by arguing to tribes that the rights provide only "paper water"; while what Indians really ought to have is "wet water" which they could get only by negotiating on terms acceptable to the non-Indian community or undergoing the risk of litigation to obtain a reserved rights decree. In the last 20 years the definition of "paper water" has undergone periodic revisions that roughly parallel the defeat of non-Indian challenges to the reserved rights doctrine. At first the pejorative "paper water" referred to the reserved rights doctrine itself. Today it applies to the judicial decrees that tribes have won or appear to have a good chance of winning.

The theme that permeates much of the thinking on the Indian water issue is that Indian water rights conflicts are born of tragic in-

61. Alcea Band of Tillamooks v. United States, 59 F. Supp. 934, 946 (Ct. Cl. 1945).

62. A vivid and popular example of this view is the film DANCES WITH WOLVES (Orion Pictures Corp. 1990).

justice to Indian culture about which nothing can be done today, because to do anything would wreak a similar tragedy on contemporary non-Indian culture. The "that was then, this is now" approach to the legal, moral, and economic conflicts over water is not new; it was used, to little avail, at the creation of the reserved rights doctrine by the settlers in the *Winters* case.[63] Its purpose is to eliminate the protection that Indians need, and were promised, to compete in an economy made possible by the ceded wealth of Indian lands.

FEDERAL AND TRIBAL ADVOCACY OF INDIAN RESERVED RIGHTS

There is no justification for deferring to the status quo of eco-

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63. Winters v. United States, 207 U.S. 564 (1908). The history of the Winters case is illuminated in Norris Hundley, Jr., *The Winters Decision and Indian Water Rights: A Mystery Reexamined*, XIII W. HIST. Q., (No. 1, Jan. 1982). When the district court enjoined non-Indian irrigators from interfering with Indian water use on the Fort Belknap Reservation, the reaction was swift and antagonistic.

> Alarmed settlers hurriedly called public meetings in which they denounced the injunction and petitioned their congressmen for help. Some urged an appeal of [Judge] Hunt's order, others demanded that Congress open to homestead entry the reservation lands along the Milk River, and still others petitioned for a reclamation project to bring additional water into the Milk River Basin . . . .
>
> Hunt's order . . . prompted Montana's U.S. Senator Thomas Carter to introduce a bill, which was ultimately unsuccessful, to separate the Fort Belknap Indians from their water, and it provoked a powerful demand for an appeal of the injunction to the Ninth Circuit Court of Appeals . . . .
>
> [On appeal the settlers insisted that] there was no intention to reserve the vast amounts of water needed for irrigation. "In fact, it cannot be seriously contended that the Indians at the present time are desirous of irrigating their lands or converting them to the purpose of agriculture." To the settlers, Hunt's injunction would destroy communities already developed by giving the Indians a right they neither possessed nor wanted.

Id. at 27-28. Not a lot has changed in Montana since then if the views of Congressman Ron Marlenee are considered representative. In response to a request by the Chippewa Cree Tribe for assistance to add land to the Tribe's reservation, he wrote:

> [B]efore I can even considering (sic) lending support to expansion of Indian lands, I must see the various Indian tribes reverse their current trend towards increasingly unfair treatment of non-Indian residents of these lands. I've been in Congress for more than 12 years, and I've watched this problem gradually worsen. As a result, I am putting Montana Indian tribes on notice that they are playing with fire if they continue in the same fashion that some tribes have in pursuing various policies against non-Indians.
>
> I have warned that, if necessary, I will launch a campaign to withdraw support for funding programs of Indian tribes that are pursuing such policies. Given my position as a senior member of the House Interior Committee, this is not an idle threat.
>
> Indian tribes are going to have to learn that this is a two-way street—in order to receive help, they must call a halt to policies that are blatantly discriminatory against non-Indians. These actions are harmful to the Indians themselves, and are forcing businesses to close their doors, resulting in the loss of valuable jobs.
>
> You can be assured of my continued efforts to see that these discriminatory practices are ended.
>
> Thanks again for writing. If I can be of any assistance in the future, please don't hesitate to contact me.

Letter from the Honorable Ron Marlenee to Joe Rosette, Chairman, Chippewa Cree Tribe, (May 3, 1989).

nomic power in Indian and non-Indian communities today. Progress in Indian country can only occur if the reserved water right is accommodated by the non-Indian community. In the absence of that accommodation, the Indian tribes and the federal government as their trustee[64] should remember that they have substantial legal power in this matter. Vigorous assertion of this power can benefit Indians and cause far fewer adverse economic and social impacts than many would assume.

The importance of the federal trustee's advocacy to Indian reserved rights cannot be overstated. In *Winters v. United States*, attorneys for the federal government crafted and advocated what they considered to be a radical strategy that the federal court expansively developed into the reserved rights doctrine.[65] The Indians themselves were not parties to the litigation. In *Arizona v. California*, the federal advocates for the Indian interest fended off numerous arguments against the reserved rights doctrine and developed the quantification theory of practicable irrigability that was approved by the Supreme Court. The Indians were not party to that case either.[66] *Arizona v. California* quantified the reserved right in the amount needed to reclaim all of the irrigable land on five Indian reservations which, with a water right, has stupendous economic potential. That award is disproportionate to the relative numbers of Indian and non-Indian people in the region. Nonetheless, the Supreme Court made its decision without dissent. Some members of the Court, however, parenthetically suggested that in concurring in the decision on Indian reserved rights they were "not without some misgivings regarding the amounts of

64. The government's fiduciary duty to Indians is not just the responsibility of officials managing Indian Affairs. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 225 (1982). Substantial precedent imposes this responsibility on all federal programs. Courts have ruled specifically that the Environmental Protection Agency, the Federal Energy Regulatory Commission, the United States Navy, the Bureau of Land Management, the Office of Management and Budget and the Department of the Treasury have a fiduciary obligation to Indian tribes. "It is fairly clear that *any* Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes." Nance v. Environmental Protection Agency, 645 F.2d 701, 711 (9th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1981) (emphasis in original). "As an agency of the federal government, FERC is subject to the United States' fiduciary responsibilities towards Indian tribes." Covelo Indian Community v. Federal Energy Regulatory Comm'n, 895 F.2d 581 (9th Cir. 1990). The Navy has a fiduciary duty to conserve a tribe's fishery. Pyramid Lake Paiute Tribe of Indians v. United States Department of the Navy, 898 F.2d 1410 (9th Cir. 1990). "[W]e conclude that a fiduciary relationship exists in the [Bureau of Land Management's] management of tribal mineral resources." Assiniboine & Sioux Tribes v. Board of Oil & Gas Conservation, 792 F.2d 782, 794 (9th Cir. 1986). "While most of the actions complained of in this suit were those of the Bureau of Indian Affairs, defendant cannot escape responsibility merely by showing that another department of the government, *e.g.*, the Treasury or the Office of Management and Budget, caused any needless delay or mismanagement." Cheyenne-Arapaho Tribes of Oklahoma v. United States, 512 F.2d 1390, 1395 n.8 (Ct. Cl. 1975).

65. Hundley, *supra* note 63, at 21-33.

66. 373 U.S. 546 (1963). The Indians of the lower Colorado River reservations were permitted to intervene in subsequent proceedings regarding additional claims to reserved water rights. Arizona v. California, 460 U.S. 605 (1983).

water allocated to the Indian Reservations."[67] No adverse impacts on non-Indians occurred as a result of *Arizona v. California*. In the *Wyoming adjudication* as well, while the Tribes were parties to the case, the trial and appellate courts looked principally to the government's attorneys to defend the reserved rights doctrine.[68]

The United States advocated similarly in the Indian interest for Pacific Northwest treaty fishing rights.[69] In that litigation the government allied with Indian tribes who were powerful advocates on their own behalf to enforce the right to take up to one half the anadromous fish in the Indians' usual and accustomed fishing grounds. In contrast to the Indian claims in *Arizona v. California* which were tried in relative obscurity, the fishing litigation, with its attendant politics, emotion and violence, was much more difficult because of the established non-Indian economic reliance on the fishery.

At the outset of the fishing litigation, the non-Indians would not have accepted any suggestion that a negotiated settlement resemble what was finally decided by the courts. In order for the Indians to enjoy their share of the salmon resource under the treaties with the United States, the fishing cases had to directly challenge the non-Indian fishing industry.

The Indian fishing rights claim was decried by the non-Indian industry as a harbinger of disaster during the litigation. As it turned out, the adversity suffered by the non-Indian fishing industry at the time of the litigation was coincidental. This hardship was due to a collapse in the salmon runs occasioned by the cumulative effects of non-Indian activities such as damming, timbering, and polluting the spawning grounds of the fish.[70] Thus, the zealous federal and tribal advocacy of Indian interest in the treaty fishing rights litigation has had the overall effect, both direct and indirect, of creating a healthier and more abundant resource, better fishery management, and a more productive fishery economy than existed before the litigation got underway.

Four recent cases involving the Pyramid Lake Paiute Tribe also demonstrate how critical faithful federal officials are to Indian affairs.[71] The Pyramid Lake controversy is a complex, longstanding matter involving Indian affairs, a federal reclamation project, and fish

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67. 373 U.S. at 603 (Harlan, J., dissenting in part).

68. See for example the exchanges between the Court and the government's attorney at oral argument in Transcript of Proceedings in the Supreme Court of the United States, Wyoming v. United States, 492 U.S. 406 (1989). *See also supra* note 34 and *infra* note 83.

69. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

70. SYMPOSIUM ON SALMON LAW, 16 ENVTL. L. 343 (1986).

71. Pyramid Lake Tribe of Indians v. Hodel, 878 F.2d 1215 (9th Cir. 1989); United States v. Alpine Land & Reservoir Co., 878 F.2d 1217 (9th Cir. 1989); Pyramid Lake Paiute Tribe of Indians v. Hodel, 882 F.2d 364 (9th Cir. 1989); United States v. Alpine Land & Reservoir Co., 887 F.2d 207 (9th Cir. 1989).

and wildlife programs of the Department of the Interior. Diversion of water by the Newlands Reclamation Project away from Pyramid Lake in western Nevada has destroyed or severely damaged a tribal fishery and wildlife habitat. For 20 years the Pyramid Lake Paiute Tribe of Indians has fought to restore its aboriginal fishery.[72] Throughout the complex and prolonged conflict, the Tribe has litigated questions about the scope of the federal government's trust responsibility, the validity of historic decrees, the Endangered Species Act, the Clean Water Act, the National Environmental Policy Act, reclamation law, fish and wildlife laws, and administrative law.

The four cases generated by the Pyramid Lake controversy involved the scope of secretarial authority to administer federal programs in the context of the trust responsibility, reclamation law, and fish and wildlife laws. In each case, the Indian interest was wholly or partially vindicated. A principal determining factor in the litigation was the court's insistence on deference to the exercise of administrative discretion. In two of the cases,[73] political influence was introduced in the deliberations of the Department of the Interior on litigation strategy in the Court of Appeals. Essentially, Interior Department officials attempted to repudiate on appeal the Assistant Secretary for Indian Affairs' position that the Department should exercise its discretion for the benefit of the Pyramid Lake Paiute Tribe and an endangered species.[74] The Justice Department rarely disagrees with an

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72. The background of this controversy may be found by reference to the following selection of cases. Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1973); Nevada v. United States, 463 U.S. 110 (1983); Truckee-Carson Irrigation Dist. v. Secretary of the Interior, 742 F.2d 527 (9th Cir. 1984); Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257 (9th Cir. 1984); United States v. Alpine Land & Reservoir Co., 697 F.2d 851 (9th Cir. 1983); Pyramid Lake Tribe of Indians v. Hodel, 878 F.2d 1215 (9th Cir. 1989); United States v. Alpine Land & Reservoir Co., 878 F.2d 1217 (9th Cir. 1989); Pyramid Lake Paiute Tribe of Indians v. Hodel, 882 F.2d 364 (9th Cir. 1989); United States v. Alpine Land & Reservoir Co., 887 F.2d 207 (9th Cir. 1989).

73. Pyramid Lake Paiute Tribe of Indians v. Hodel, 882 F.2d 364 (9th Cir. 1989); United States v. Alpine Land & Reservoir Co., 887 F.2d 207 (9th Cir. 1989).

74. In Pyramid Lake Paiute Tribe of Indians v. Hodel, 882 F.2d 364 (9th Cir. 1989), the issue was whether the district court properly required the Secretary to release water for irrigation use over the Department's objection that the water was stored for use by the Pyramid Lake fishery. At the height of United States Senator Chic Hecht's reelection campaign, the Secretary informed the Senator that the Department would not appeal the district court decision. Letter from Secretary of the Interior to Senator Chic Hecht (Aug. 12, 1988). In deciding not to appeal the case, the Secretary relied on legal advice that rationalized abandoning the Indian trust position by rejecting the Department's interpretation of its own regulations and declaring that changing position on appeal would not be an unreasonable discretionary act. Letter from Solicitor Ralph W. Tarr to Assistant Attorney General Roger J. Marzulla (Aug. 12, 1988). The Pyramid Lake Paiute Tribe was fortunate in that case that the Justice Department stepped in to protect the fiduciary interest, nullified the Secretary's commitment to the Senator, and successfully argued the case on appeal. Memorandum from Solicitor Ralph W. Tarr to the Secretary (Aug. 16, 1988); Letter from Assistant Attorney General Roger J. Marzulla to Solicitor Ralph W. Tarr (Aug. 18, 1988). The Justice Department performed similarly in United States v. Alpine Land & Reservoir Co., 887 F.2d 207 (9th Cir. 1989), when it rejected the Solicitor's recommendation to

agency head's litigation recommendation. However, it did so in the Pyramid Lake cases, and prevented the abandonment of the government's fiduciary duty to the Pyramid Lake Paiute Tribe.

The Pyramid Lake litigation is a paradigm of the conflict over Indian trust resources. In this matter, the federal trustee by turns has proven to be both ally and adversary of the Tribe. But the Tribe's unflagging advocacy has secured both judicial and political support for its interests that finally led to a legislative settlement.[75]

The Pyramid Lake cases also demonstrate that the risks to Indian interests arise, in part, from the fact that the government's fiduciary responsibility is enshrouded in discretion that shields much of Secretarial conduct from judicial review. Had the Justice Department acceded to the Department's recommendation, the applicable standard of review (whether the exercise of discretion was arbitrary, capricious or not otherwise in accordance with law) probably would have prevented the Pyramid Lake Paiute Tribe from prevailing on its own. In such cases, the abandonment of the fiduciary role by the government can make it practically impossible for any other interest to defend it. When the attempted abandonment is politically motivated, the precarious nature of the Indian trust is manifest.[76]

It took decades to establish precepts of Indian law in the areas of jurisdiction, taxation and natural resources. Most of those accomplish-

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abandon on appeal the position that the government had advocated on behalf of the Indian interest at trial. Letter from Deputy Solicitor Howard H. Shafferman (for Solicitor Ralph W. Tarr) to Assistant Attorney General Roger J. Marzulla (May 23, 1988); Memorandum from the Solicitor to the Secretary (Oct. 14, 1988).

75. Truckee-Carson-Pyramid Lake Water Settlement Act, Pub. L. No. 101-618, tit. II, 104 Stat. 3294 (1990).

76. Political attempts to persuade the federal government to forfeit its trust responsibility have long plagued the Pyramid Lake Paiute Tribe and the federal trustee. In an earlier stage of the *Alpine* proceedings, the following was received in the Department of Justice.

> Dear Bill:
> RE: ALPINE APPEAL
> While it's fresh on my mind . . .
> —This has immense political overtones out there. All those ranchers—who are ours—feel they're finally going to get some relief from this Administration. To have to go through the legal expense and hassle of an appeal will be a real "downer" for them.
> —On the merits this case should not be appealed. Bruce Thompson wrote a helluva sound decision which *will not* be overturned. These poor ranchers should not be compelled to cough up additional legal fees. They've contributed substantially enough already.
> —If Rex's shop thinks the Indians can intervene, let them. Even have Justice assist in fulfillment of whatever fiduciary responsibility exists, if any. Then at least the monkey won't be on our political backs.
> —Lastly, this would be a badly needed signal—that in a proper case the Attorney General will overrule the careerists in Justice who have never been with us and will never be.
> Thanks for listening, old friend.

Letter from Senator Paul Laxalt to Attorney General William French Smith (Oct. 7, 1981) (emphasis in original).

ments have occurred in the courthouse because Indians generally have neither money nor political power to secure their interests in other forums. All they have is the law.

Fulfilling the Indian interest in water and fishery resources, rather than being costly or disruptive, can be beneficial to both Indians and non-Indians. If fairness does not motivate adversaries at the outset of Indian reserved rights disputes,[77] fairness may carry the day in the process of concluding them. To the extent that cost and disruption do affect non-Indians, it is during their resistance to Indian claims in the course of litigation that they themselves initiated.

States which have acted to reform their water management systems to account for the economic and environmental demands on limited water resources should recognize that Indian water rights would more profitably be addressed not by persistent calls for their compromise or extinction, but by making a place for Indians and their water resources at the table of the region's economy. Examples have emerged in recent years which show that in some cases states have recognized that it is worth their while to do so.[78]

A faithful trustee can prevent the Indian interest from being misunderstood or undermined, and thereby diminish the possibility that the non-Indian interest may prevail unfairly. Indian tribes increase their risk substantially by making their own way in negotiations or litigation. They need the federal government as an ally and an advocate.[79] Where tribal natural resources are concerned, the government's

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77. The Ninth Circuit Court of Appeals prefaced one of its decisions in the Washington fishing rights litigation with the following:

> Agencies of the State of Washington and various of its constituencies continue to attack the judgment in United States v. Washington. Accordingly, we will again set forth the treaty basis of that decision and reaffirm its validity. The state's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases, the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice.

Puget Sound Gillnetters Ass'n v. United States Dist. Court for the W. Dist. of Washington, 573 F.2d 1123, 1126 (9th Cir. 1978) (citations omitted).

78. *See* Fort Peck-Montana Compact (May 15, 1985); Southern Arizona Water Rights Settlement Act, Pub. L. No. 97-293, tit. III, 96 Stat. 1274 (1982); Ak-Chin Water Rights Settlement Act, Pub. L. No. 95-328, 92 Stat. 409 (1978), *revised* Pub. L. No. 98-530, 98 Stat. 2698 (1984); San Luis Rey Indian Water Rights Settlement Act, Pub. L. No. 100-675, tit. I, 102 Stat. 4000 (1988); Salt River Pima-Maricopa Indian Community Water Rights Settlement Act, Pub. L. No. 100-512, 102 Stat. 2549 (1988); Fort Hall Indian Water Rights Act of 1990, Pub. L. No. 101-602, 104 Stat. 3059 (1990); Fort McDowell Indian Community Water Rights Settlement, Pub. L. No. 101-628, tit. IV, 104 Stat. 4480 (1990).

79. There is no substitute for an Indian tribe's own vigorous advocacy of its water rights. The longstanding commitment of the Pyramid Lake Paiute Tribe to protect itself from the impacts of the Newlands Reclamation Project has been essential to its goal of preserving and protecting the Pyramid Lake fishery. In contrast, the Fallon Paiute Shoshone Tribe, which has suffered similarly from the construction and opera-

administration of non-Indian federal programs can overwhelm the Indian interest, notwithstanding the countervailing efforts of officials in the Indian affairs program. This can occur even where the adverse effect of the non-Indian program is wholly unintentional. Following the announcement of the reserved rights doctrine in 1908,

> the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the *Winters* doctrine. With the encouragement, or at least the cooperation, of the Secretary of the Interior—the very office entrusted with the protection of all Indian rights—many large irrigation projects were constructed on streams that flowed through or bordered Indian Reservations, sometimes above and more often below the Reservations. With few exceptions the projects were planned and built by the Federal Government without any attempt to define, let alone protect, prior rights that Indian tribes might have had in the waters used for the projects . . . . In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters.[80]

Both Congress and the Executive need to embrace the premise that treaties and agreements vest Indian tribes with rights in western

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tion of the Newlands Reclamation Project, is in a much different position. The Fallon Tribe is the beneficiary of legislation enacted in 1978. Act of Aug. 4, 1978, Pub. L. No. 95-337, 92 Stat. 455. It required the Secretary of the Interior to make his "first priority" the development of the water supply to which the Tribe has been entitled since the turn of the century, when water facilities were promised to the Tribe in exchange for reservation lands which were needed for project development. The 1978 act has yet to be implemented. In an attempt to meet the Tribe's needs, Congress recently enacted remedial legislation. Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Pub. L. No. 101-618, tit. I, 104 Stat. 3289.

80. NATIONAL WATER COMMISSION, *supra* note 14, at 474-75. In the *Wyoming adjudication*, the State attempted to obscure this reality but was met head on by the United States. Ironically, the United States' rebuttal gave credence to the National Water Commission's conclusion about the disproportionate federal investment in Indian and non-Indian water project construction:

> Wyoming asserts that the Tribes have been assisted by the "infusion of massive amounts of congressionally mandated expenditures for the construction of irrigation projects" (Wyo. Br. 29) in the amount of some $2.3 million (*id.* at 5) expended primarily between 1905 and 1915. (*id.* at 28). This figure, however should be considered in its proper context. The United States has expended almost $72 million to date on the Riverton Irrigation Project, an almost exclusively non-Indian reclamation project located on the Wind River Reservation. Bureau of Reclamation, U.S. Dep't of the Interior, 1984 Summary Statistics, Project Data, Vol. III, at 309. In contrast, some $4.4 million of federal funds have to date been expended on the Indian project, including the "massive" $2.3 million spent more than 70 years ago. See Bureau of Indian Affairs, U.S. Dep't of the Interior, Special Irrigation Report and Recommendations 27 (July 1988) (Prepared for the Deputy to the Assistant Secretary—Indian Affairs (Trust and Economic Development)).

Brief for the United States at 38 n.34, Wyoming v. United States, 492 U.S. 406 (1989) (No. 88-309).

water resources for which the government has a trust responsibility. Vigorous federal advocacy of the federal trust is essential to fair disposition of Indian claims. So long as the federal trustee is absent or neutral in reserved water rights conflicts, the effect is much the same as if the government were formally an adversary to the tribal interest.

If the government is to be accountable for the discharge of its fiduciary duty, the audit should begin at the time candidates are nominated for policy positions in executive agencies that affect Indian affairs. This could be accomplished by making all such nominees subject to confirmation not only by the Senate Committee with jurisdiction over the program activity, but also by the Senate Select Committee on Indian Affairs. The Indian Affairs Committee could examine nominees about their awareness of and commitment to share in the role of the federal trustee in matters affecting Indian affairs. Similarly, frequent exercise of oversight by appropriations committees will help to ensure accountability of the federal fiduciary.

THE INDIAN RESERVED RIGHT IN EVOLVING WESTERN ECONOMIES—WATER MARKETING

The federal trustee and the tribal beneficiary passed a stiff test in the *Wyoming adjudication*. As other tribes complete the adjudication process, they fairly expect to enjoy some economic benefit from the successful defense of their reserved water rights. But having spent most of this century struggling into the reclamation era, Indian tribes are finding that the West is experiencing major changes in federal water policy and water economics. The Reclamation Reform Act of 1982, the reorganization of the Bureau of Reclamation in 1988, and the emergence of markets for federally developed water supplies offer a critical opportunity and a substantial risk for Indian reserved water rights. The economic realities for Indian and non-Indian communities are the same. Non-Indian reclamation project water users are being urged to shift water use away from agriculture to municipal and industrial uses. In spite of the facts that irrigation development was the purpose for most federal reclamation project construction in the first place and reclamation law makes project water appurtenant to irrigated land, there is overwhelming support for having the agricultural purpose of a reclamation project give way to evolving western water economies and their attendant marketing initiatives.[81]

81. *See* WAHL, *supra* note 54, at 133-44. Mr. Wahl identifies a number of markets involving federal water: the Idaho water supply bank; the Northern Colorado Water Conservancy District (Colorado-Big Thompson Project); water banking during the California drought of 1976-1977; the Arvin-Edison Water Storage District (San Joaquin Valley, California) water exchange pool; leases between Emery Water Conservancy District and the Utah Power and Light Company; the Casper-Alcova Irrigation District agreement with the City of Casper, Wyoming; and the water conservation agreement between the Imperial Irrigation District and the Metropolitan Water District of Southern California.

Precisely the opposite view is expressed by the non-Indian community to Indian participation in that economic evolution.[82] Nonetheless, the reserved rights doctrine's expansive purpose was to give Indian tribes the means to develop the arts of civilization and evolve from a nomadic culture to full integration with the emerging economy of the dominant non-Indian community. While beneficiaries of the federally subsidized reclamation program have seen their economies evolve from family farms to agribusiness, opponents of Indian reserved water rights and at least one member of the Supreme Court seem to have no difficulty in insisting that Indian water rights development not progress beyond the maintenance of a peasant economy.[83] The express statutory limits on land ownership in the reclamation program have not operated to prevent non-Indians from becoming very rich from an enormous export business in agricultural products. Indian tribes ceded their lands to make that economy possible. Should they be entitled to any less of an opportunity with regard to the land and water resources they reserved to themselves?

Indian tribes are well aware of the Supreme Court's statement in the supplemental decree in *Arizona v. California* that the means used to quantify reserved water rights is not a limitation on their use.[84] Tribes suspect that the reclamation community will argue and Congress will find that the national economy cannot bear the extension of the reclamation program's subsidies to water project construction for

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82. *E.g.*, J.D. Palma II, *Considerations and Conclusions Concerning the Transferability of Indian Water Rights*, 20 NAT. RESOURCES J. 91 (1980). Mr. Palma makes two arguments: First that Indian reserved rights "were created as an adjunct to land and have no existence apart from that land. Second, *Winters* rights were intended to have only a limited purpose." *Id.* at 93. In fact the reserved right has never been held to be so confined. In any event those arguments more properly describe the effect of nearly a century of federal law on the nature and extent of a water user's right in a reclamation project.

83. Transcript of Proceedings in the Supreme Court of the United States 36-37, Wyoming v. United States, 492 U.S. 406 (1989). The Justice is not identified in the transcript.

> QUESTION: . . . I mean, I find it difficult to believe that in 1868 Congress, no matter what the size of the Indian population that was contemplated to be on the — on the reservation in question, should be deemed to have said we're giving enough water to irrigate every — every inch of arable land. No matter how large the tribe they thought they were settling. Did they expect to make some tribes very rich so they could have an enormous export business —
> MR. MINEAR: Well. I think —
> QUESTION: — in agricultural products or —
> MR. MINEAR: —the idea that these tribes would become very rich off of this grant of water is simply a fantasy.
> QUESTION: Well, I thought — I thought that the purpose of the — of the agricultural grant was to enable them to grow food by which they would live.

Id.

84. Arizona v. California, 439 U.S. 419, 422 (supplemental decree 1979); *see also* Solicitor's Opinion, February 1, 1964, Volume II Op. Sol. on Indian Affairs 1930 (U.S.D.I. 1979) (Reserved water right quantified in terms of practicably irrigable acreage is not restricted to agricultural use and may be used for recreational, commercial, or industrial purposes. The facts in the opinion concerned a proposed, on-reservation, nonagricultural use of decreed water.)

Indian communities. At the same time, Indian tribes recognize the strength of well-established water markets and emerging new ones in the non-Indian community. They are likely to become major players in those markets, notwithstanding considerable non-Indian opposition to their doing so.[85]

Non-Indian opposition to Indian water marketing is based on three premises. First, many reserved water rights are undecreed, unquantified, and undeveloped. Second, some in the non-Indian community believe that they have the economic and political power to keep tribal water rights in that condition; so long as they do, non-Indians may freely use the water subject to Indian water rights. Third, opponents make a legal argument that reserved rights are not intended to be marketable.

The extent of water marketing in the non-Indian community may come as a surprise to many tribes which have known nothing but opposition to it. Both federal and state governments promote water marketing. The Western Governors' Association issued a report and a resolution examining the importance of water marketing to evolving western economies and promoting marketing as a more efficient use of water in the West.[86] The report recommended that the "Department of the Interior prepare a policy statement to facilitate the voluntary transfer of water provided by the Bureau [of Reclamation]".[87] The Department of the Interior responded with a policy statement at the end of the Reagan Administration.[88] The Department observed that

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85. The policy of excluding the Indian community from western water markets is displayed by the following example. In 1988 the Metropolitan Water District of Southern California made an agreement with the Imperial Irrigation District for irrigation water conservation. Metropolitan agreed to pay Imperial $92 million for construction of conservation facilities, $3.1 million annually for associated operation and maintenance costs, and $23 million in five annual installments for indirect costs. In exchange, Metropolitan would become entitled to divert for its use 100,000 acre-feet of Imperial's annual water entitlement from the Colorado River. *See* WAHL, *supra* note 54, at 142-43. At the same time Metropolitan opposes marketing agreements with Indian tribes holding water rights on the Colorado River under the decree in *Arizona v. California*. Letter from Evan L. Griffith, General Manager, and Carl Boronkay, General Counsel, Metropolitan Water District of Southern California to Secretary of the Interior James G. Watt (Feb. 15, 1983).

86. WESTERN GOVERNORS' ASS'N, WATER EFFICIENCY: OPPORTUNITIES FOR ACTION (1987). Appendix A to that report is Western Governors' Association Resolution 86-011 (July 8, 1986). The resolution recommended that:

> The [Western Governors' Association] should initiate a working group to include representatives of the WGA, Western States Water Council, and Department of Interior to consult widely with western water interests to identify steps to facilitate voluntary water transfers and other needed changes and to develop recommendations for changes in law and practice at the federal, state, and local levels.

Id. The report recommended that western governors become active in the Congress to promote consideration of water marketing and changes in federal reclamation law to facilitate marketing.

87. *Id.* at 6.

88. DEP'T OF THE INT., OFFICE OF THE ASSISTANT SECRETARY FOR WATER AND SCIENCE, PRINCIPLES GOVERNING VOLUNTARY WATER TRANSACTIONS THAT INVOLVE OR AF-

there was already an extensive water market in the West and stated that the Department's policy is intended to afford maximum flexibility to State, Tribal, and local entities to arrive at mutually agreeable solutions to their water resources problems and demands.[89]

It is not at all clear that the Western Governors' Association ever intended to accord Indian water rights the status they receive in the Department's policy. The Western Governors' report emphasized that state law should have primacy in any water marketing policy.[90] The Department's policy professes that "[p]rimacy in water allocation and management decisions rests principally with the States,"[91] but it carefully circumscribes deference to state primacy where federal interests are concerned. Marketing initiatives have to be in accord with federal law. Tribal interests will be evaluated independently of State and local interests in water marketing proposals. Significantly, the Department will shed its general role of facilitator (presumably for that of interested advocate) in a water marketing proposal "when it is part of an Indian water rights settlement, a solution to a water rights controversy, or when it may provide a dependable water supply the provision of which otherwise would involve the expenditure of federal funds."[92] The Department's policy describes a constructive and consistent, but nonetheless controversial approach to Indian water marketing initiatives. Early in the Reagan Administration when the Department decided to support water marketing as an option for Indian tribes in reserved water rights negotiations, the proposal drew immediate fire.[93] Nonetheless, the Department could not agree with opponents of Indian water marketing that either law or policy forbids off-reservation marketing of Indian water rights.[94]

FECT FACILITIES OWNED OR OPERATED BY THE DEP'T OF THE INT., (December 16, 1988).

Federal water marketing is not a new idea. The government found itself with a substantial surplus of stored water in the Missouri River basin in the late 1960's. As irrigation project construction declined and coal development appeared on the verge of a mini-boom, the Department introduced a plan to market unused irrigation water to generate income for the reclamation fund and reduce reliance on foreign energy sources. By the early 1970's the Department had option contracts on 685,000 acre-feet of water. *See* Environmental Defense Fund v. Andrus, 596 F.2d 848 (9th Cir. 1979).

89. *Id.*

90. WESTERN GOVERNORS' ASS'N, *supra* note 86, Appendix A.

91. DEP'T OF THE INT., *supra* note 88.

92. *Id.*

93. *E.g.*, Letter from John P. Fraser, Executive Director and General Counsel, Association of California Water Agencies, to Secretary of the Interior James G. Watt (Feb. 22, 1983).

94. In a letter to opponents of Indian water marketing the Department wrote:

> Indian water rights under the Winters doctrine must be quantified in terms of the amounts necessary to fulfill the purposes of the reservation to which they pertain. We have no intention of asserting a Winters' claim for water in excess of the amount needed to fulfill the purposes of the reservation simply because there might exist a market for that off the reservation. Once the Indian water right has been quantified in those terms, however, we believe for a variety of reasons that the Indians should not be restricted in putting their water to beneficial use. In the first place, supporting Indian efforts to apply their water rights beneficially both on and off the reservation is consistent with President Reagan's efforts to

The roots of Indian water marketing policy go deeper than the Reagan Administration. They extend to the work of the National Water Commission which recommended that the government lease water from Indians to stabilize non-Indian water uses which are in conflict with Indian rights.[95]

The water marketing issue made a brief but noteworthy appearance in the *Wyoming adjudication*. The Wyoming Supreme Court reviewed the district court's holding that the Shoshone and Arapaho Tribes could not sell or lease reserved water rights for off-reservation use. The Court appeared to conclude that off-reservation marketing was a moot issue in the case.[96] Nevertheless, two of the dissenting justices considered the marketing issue, and disagreed with one another. Justice Thomas wrote:

> I would hold that the implied reservation of water rights attaching to an Indian reservation assumes any use that is appropriate to the Indian homeland as it progresses and develops. The one thing that I would not assume is that using the reserved water as a salable commodity was contemplated in connection with the implied reservation of the water. I would limit its use to the territorial boundaries of the reservation.[97]

District Judge Hanscum (sitting by designation) disagreed with that portion of Justice Thomas' dissent:

> I depart, however, when Justice Thomas proposes to limit

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strengthen tribal economies and governments by giving the Indians more control over and benefits from their resources. Marketing of Indian water rights off the reservation can generate substantial income to capitalize reservation development and provide the tribes with needed flexibility in their resource development planning. We see no reason why the Indians should not be permitted to reap the maximum benefit from their water resources just as they would from any other tribal natural resources.

Second, off reservation marketing of water can be a valuable tool in fashioning negotiated settlements to many difficult disputes over Indian water rights in the West. For example, the provision for off reservation marketing in the Papago settlement [Pub. L. No. 97-293 Title III (Act of October 12, 1982)] . . . was added at the insistence of non-Indian[s] . . . who recognized that . . . transferability of water rights would serve both the Indian and regional economic interests.

Letter from William H. Coldiron, Solicitor, to Evan L. Griffith, General Manager, and Carl Boronkay, General Counsel, Metropolitan Water District of Southern California (Mar. 29, 1983).

95. NATIONAL WATER COMMISSION, *supra* note 14, at 480-81.

96. "The Tribes did not seek permission to export reserved water, and the United States concedes that no federal law permits the sale of reserved water to non-Indians off the reservation. Because of our holding on the groundwater issue, we need not address the separate constitutional attack on the prohibition of exportation of groundwater." *Wyoming adjudication*, 753 P.2d at 100. The lack of federal permission presumably referred to the fact that the protective restraints of 25 U.S.C. § 177 (1986) had not been loosened generally by Congress in the off-reservation marketing context. *But cf.* 25 U.S.C. § 415 (1986) (regarding on-reservation leases and tribal natural resource development).

97. *Wyoming adjudication*, 753 P.2d at 119.

> water use to the territorial boundaries of the reservation, thus precluding marketability of the water. Justice Thomas would hold that, as a matter of law, marketing water off the reservation never could be appropriate to the progress and development of the Indian homeland.
>
> I disagree. I would go that additional step. I would hold that sale of water off the reservation should be permitted, provided that, as a factual matter, it could be demonstrated that such marketing contributed to the progress and development of the Indian homeland. I can envision a variety of scenarios where such showing could be made successfully. To preclude the opportunity of proving such a nexus unduly would restrict and hamper the prospective development of the Indian homeland in the future.[98]

Thus, while the majority's conclusion about water marketing fairly can be read to hold that the matter was moot, the two dissenters did not see it that way.

The Wyoming Supreme Court dissenters' discussion of water marketing suggests a misunderstanding about reservation economies and the facts of the case. Did they assume that there is little or no economic potential for on-reservation use of reserved water? Many tribal opponents are persuaded that limiting reserved water use to the reservation effectively prevents its use at all, especially when those opponents also have the political influence to block appropriations for water project construction. In the *Wyoming adjudication*, the nearest market for the Indian reserved water was within the reservation boundaries. At the beginning of the adjudication the parties agreed on the exterior boundaries of the reservation.[99] As stipulated, the boundaries encompassed the City of Riverton and the Riverton Reclamation Project. Any economic impact from the Tribes' exercise of their reserved rights would be experienced first by the on-reservation non-Indian community. That community would be the most likely candidate for a water marketing agreement with the Tribes. Such an agreement would not be barred under the analysis in Justice Thomas' dissent. Just such a temporary agreement was made for the 1989 irrigation season while the case was pending in the Supreme Court.[100]

Water marketing makes as much sense for Indians as it does for non-Indians. The objection to Indian water marketing makes sense only as a means to divest Indians of their rights. It assumes that Indian water resources are an obstacle to economic development so long as they remain in Indian ownership. Unpleasant as this conclusion

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98. *Id.* at 135.

99. Report of Teno Roncalio, Special Master, *supra* note 21, Appendix 1 (Apr. 15, 1980) (Stipulation Concerning the Boundaries of the Wind River Reservation).

100. Tribal-State Interim Settlement Agreement on Tax and Water Issues (Feb. 17, 1989).

may be, there is no other explanation for the non-Indians' position.[101]

CONCLUSION

The McCarran amendment decisions represent a victory for western states by giving them the forum of their choice for adjudicating Indian reserved water rights. Nonetheless, it is only a victory of forum, not substance. The *Wyoming adjudication* shows the willingness of a state court to apply the federal law of reserved water rights in an adjudication, although the Supreme Court's affirmance in that case could not have been closer. The successful defense of the reserved rights doctrine in Wyoming required a fair forum, and zealous advocacy by both the Indian tribes and their federal trustee. The same fairness and zeal will be necessary in future adjudications and negotiations. But when the conflict is resolved and decrees are filed, Indian water rights will have meaning only if they can be accommodated in the regional economy in a way that gives value to Indians. So long as Indian tribes are denied the value of their water rights, the sorry chapter of this nation's conduct of Indian affairs will continue to be written, and the loss of Indian lands will be followed by the loss of their water resources.

POSTSCRIPT

The latest chapter in the *Wyoming adjudication* suggests that the conflict between Wyoming's judiciary and its executive over Indian reserved water rights has not abated.

In April 1990, the Shoshone and Arapaho Tribes dedicated a portion of their reserved water right, which had been quantified in terms of practicably irrigable acreage, to instream flows for fisheries maintenance.[102] A tribal agency, the Wind River Water Resources Control Board, issued an instream flow permit, but the Wyoming State Engineer refused to enforce it. Joined by the United States as their trustee, the Tribes moved to hold the State Engineer in contempt of the court's decree and to enforce the instream flow permit. The court ruled that the Tribes had the authority to use their right to irrigation

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101. A principal reason for the filing of the *Wyoming adjudication* was because of concern in the 1970's that the mineral development boom in Wyoming would require water resources that were subject to Indian reserved water rights claims. *Caton interview, supra* note 19. That motive for Wyoming's suit is revealing. It suggests that Indian tribes are an obstacle to economic development rather than potential partners in progress with the non-Indian community. But the Shoshone and Arapaho Tribes had long since established their legitimacy as partners with mineral companies in the production of oil and gas on the Wind River Reservation. Moreover, at the time Wyoming was opposing Indian water marketing it was supporting interstate marketing of undeveloped reclamation irrigation water for industrial use (coal slurry) in ETSI Pipeline Project v. Missouri, 484 U.S. 495 (1988).

102. The Tribes' claim to a reserved right for fishery maintenance in the adjudication had been rejected.

water for fishery purposes under the original rulings in the adjudication.[103]

That was not the end of the matter, however. The district court went on to conclude that the conduct of the State Engineer in discharging his obligations to enforce the decree, "while not contemptuous",[104] was so deficient as to require his removal because of his

> difficulty in assuming a neutral role in the administration of reserved rights. Therefore, the Court proposes to select, once again, a single administrative agency, but now assigns those duties to the Tribal water resources agency. The Tribal agency which regulates reserved water matters on the reservation shall have the authority to administer all water rights within the stipulated boundaries of the Wind River Indian Reservation, Indian and non-Indian alike. The non-Indian water rights will be administered according to state water law by the Tribal agency, with appropriate judicial review in state district court pursuant to Title 41 of the Wyoming statutes.[105]

Apparently unaware of the court's March 11, 1991, decision, the State Engineer wrote to the court on the following day to advise the court of his decision not to enforce the Tribes' reserved water rights in the 1991 irrigation season.[106] He stated that the 1985 Amended Judgment and Decree of the Wyoming District Court, as modified by the Wyoming Supreme Court, and affirmed by the United States Supreme Court could not be considered a final adjudication of the Tribes' reserved water rights. In the State Engineer's view, the reserved rights adjudication would not be final until all other rights had been determined in Water Division 3. "As a result, we plan to handle administration and monitoring this summer in a fashion substantially similar to water rights administration at the time the adjudication began [in 1977] and which has existed from that time through 1988."[107]

Thus, as had proven to be the case throughout the adjudication, the Wyoming District Court could not rely on the state's executive branch to discharge its obligations under federal law even as affirmed by the United States Supreme Court. The conduct of the State Engineer fulfilled the Tribes' worst fears about the willingness of the State of Wyoming to honor their reserved water rights. But, once again, the District Court stepped in to ensure the integrity of its decree with a decision that neither the Tribes nor the state could have anticipated; it conferred authority on the tribal agency to administer all water

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103. *Wyoming adjudication*, Civ. No. 4993 (Dist. Ct., 5th Jud. Dist. Mar. 11, 1991) (Judgment and Decree).

104. *Id.* at 15.

105. *Id.* at 14.

106. Letter from Gordon W. Fassett, State Engineer, to Gary P. Hartman, District Judge, Fifth Judicial District (Mar. 12, 1991).

107. *Id.*

rights on the Wind River Reservation.

By their juxtaposition, the March 11 Judgment and Decree and the March 12 administrative decision describe for western states the profound and persistent conflict between law and politics over the issue of reserved water rights. As this article goes to press, an appeal to the Wyoming Supreme Court is pending and the Tribes and the state are in settlement negotiations.