THE WINTERS DOCTRINE AND INDIAN WATER ISSUES

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At the outset let me say that I appreciate the invitation to participate in this conference with you. This is my first trip to New Mexico and although I am a stranger here, I am not a stranger to New Mexican warmth and friendliness. I have had the pleasure of working with some New Mexicans in the Department of the Interior, principally Garrey Carruthers, Frank DuBois, and Tom Bahr, and I have very much enjoyed that association.

Yesterday Professor Clark, in his excellent discussion of the evolution of western water law, characterized western water law as "essentially state property law" with what he termed "important federal dimensions." My purpose this morning is to discuss with you just briefly what those important federal dimensions are--specifically, the nature and extent and status of what we call the federal reserved right. I will focus that discussion by addressing three simple questions: First, what do we know about the federal reserved right? Second, what don't we know about it but would like to know or are anxious to learn? Finally, what are we doing with it? How does the federal reserved right fit into the general scheme of western water law and the attempts to wisely allocate our western water resources?

WHAT WE KNOW ABOUT THE FEDERAL RESERVED RIGHT

Surprisingly, although the federal reserved right has only relatively recently been a subject of intense concern and interest in the West, most of what we know about it we have known for a long time, ever since the Supreme Court decided in the 1908 case United States v. Winters, 207 U.S. 564 (1908). That case was the first judicial recognition of what we call the federal reserved right. Its teachings on what that right is have gone virtually unchanged since that time. It is worthwhile to layout the

facts of the Winters case because even today they illustrate very well the fundamental concepts that make up the federal reserved right. The facts were these: In 1888 the federal government concluded a treaty with certain Indian tribes in Montana. Under the terms of that treaty, the tribes ceded to the United States a large portion of lands the tribes had been occupying and using. In return, the United States established in Montana a reservation for those tribes, which is now known as the Fort Belknap Indian Reservaton. The northern boundary of the reservation was the Milk River. The United States then took the lands that had been ceded to them by the tribes and opened them up to settlement by homesteaders. The homesteaders moved on to the land and, as you would expect, they immediately began to dig ditches and canals, and build dams and reservoirs to divert the waters of the Milk River, which were upstream of the reservation, for use on their own farmlands. In the early 1900s, the United States built on the reservation an irrigation project for the benefit of the Indians who lived there. However, when they completed the project they found that the upstream diversions by the homesteaders were so great that there was insufficient water for the irrigation project. As a result, the United States brought suit against the homesteaders to enjoin them from diverting the waters of the Milk River upstream of the reservation. The United States claimed that those diversions were in derogation of the United States' rights to the use of the waters of the Milk River. The homesteaders responded by pointing out that: (1) they had acquired their rights legitimately under Montana state water law by prior appropriation; (2) they had been applying them to the land for several years; (3) they had spent several thousands of dollars constructing the irrigation works that carried the water from the river to their lands; and (4) the lands themselves would be valueless, at least as farm lands, unless there was water to irrigate those lands and make them productive. The court, however, held against the homesteaders. The decision turned on the treaty which had established the reservation. Although the treaty said nothing specifically about the water rights of the Indians, the court found that by implication it had set aside sufficient water to fulfill the purposes of the reservation.

In the case of the Fort Belknap Indian Reservation, the treaty said that one of the primary purposes was to assist and encourage the Indians to develop a pastoral way of life, a life built on an agricultural economy.

We learn from the Winters case, then, that the federal reserved right is a federal right that is independent of state water law. If that right arises prior in time to otherwise valid state rights, it can defeat those state rights. The priority of the federal reserved right, in most instances, is the date of the creation of the reservation. Also, the federal reserved right does not have to be exercised in order to continue in existence and it cannot be lost by nonuse. In other words, the right to use this water arose at the time of the creation of the reservation in 1888. Although the homesteaders upstream of the reservation then appropriated water under Montana law and put that water to use, when it came time for water to be used in the irrigation project the federal government had constructed, the right was still in existence; it had not been lost by nonuse. The Indians did not have to exercise it in order to maintain it, so the homesteaders who had existing rights and who had been using the water had their rights defeated in this case by the federal reserved right.

The Winters decision was in 1908. Since then, several Supreme Court cases have reaffirmed the doctrine, but they haven't really told us a great deal more about it. The court has held in Cappaert v. U.S., 426 U.S. 128 (1976), that these federal reserved rights attach not only to Indian reservations, reservations of land to be used for the settlement of the Indian tribes, but also to other federal reservations as well--federal parks, national monuments, wildlife refuges and military reservations. Basically, whenever the government reserves land for its own purposes, whether the agreement is explicit or not with respect to the water rights, there is implied a reservation of water sufficient to fulfill the purpose of the federal reservation. The other significant thing that we have learned since Winters about the federal reserved right is that it is measured, at least for most Indian reservations, by reference to the practicably irrigable acreage on the reservation. The Supreme Court heard in Arizona v. California, 373 U.S. 546 (1963), the

case in reference to several Indian reservations on the Colorado River that had been set aside primarily for the purpose of encouraging the Indians to develop an agricultural economy. The court held that the only way to measure the extent of that right was to determine the practicably irrigable acreage on the reservation and then fix the amount of water the Indians had the right to use with reference to that acreage.

Yesterday, when Professor Clark was talking about water law generally in the West, he summarized his remarks by comparing the riparian water rights system with the appropriative water rights system. For purposes of our discussion this morning, let me add the federal reserved right to that comparison. First, the federal reserved right, as I have pointed out, is like the riparian right in the sense that it does not have to be put to use in order to exist. It has been reserved for the use of the Indians or the military or the Park Service whenever water is necessary to fulfill the purposes of a reservation. As a corollary, the federal reserved right, like the riparian right, cannot be lost by nonuse.

The riparian right, for the most part, is unquantified because there is enough water for everybody in those states where the riparian system is used. On the other hand, there is enormous pressure to quantify appropriative rights in the arid West. They are quantified by reference to the concept of beneficial use. You can use as much water as you can appropriate and put to beneficial use. In contrast, the reserved right is quantifiable in terms of what is needed to fulfill the purpose of the reservation, whether it has been put to use or not.

The riparian right is not a system where it makes any difference who was using the water first. You derive your right to use the water by being riparian to the stream. Water shortages are shared equally by all users. In the appropriative system, on the other hand, it is critical who got there first. First in time is first in right. When there is a water shortage, the senior user can defeat the rights of the junior user. For the federal reserved right, the priority date is normally the date on which the reservation was created. For most Indian tribes, that priority date usually will be one of the most senior, if not <u>the</u> senior right, on most waterways and streams in the West because their reservations were created in the past century.

WHAT WE DON'T KNOW ABOUT THE FEDERAL RESERVED RIGHT

If that is what the federal reserved right is and that's what we know about it, what don't we know about it? What are the issues still outstanding? What are the questions that have been raised about the extent and nature of those rights that either are now in litigation or have been posed as theoretical matters that would give us more insight into the nature of the reserved right and its impact on western water law? The biggest question is just how much water in the West is subject to the reserved right. We don't know the answer partly because we are not far enough along in the adjudication process to determine exactly how much water is subject to federal reserved rights. There are also some other reasons why we can't even guess very well what the quantities may be. In the case of an Indian reservation where farming is one of the reservation's primary purposes, the court has given us a measure of what the water right might be. It is measured in terms of the practicably irrigable acreage. We don't, however, have a great deal of experience in courts of law with the exact type of proof that will be required to show what that acreage is. We don't know how strictly or how generously the courts are going to construe this concept of practicably irrigable acreage. We also don't know a great deal about whether there are other appropriate measures besides practicably irrigable acreage. Many of the treaties and executive orders that established Indian reservations, for example, stated that one of the purposes--indeed the primary purpose--of the reservation was to set aside or create permanent homelands for the Indian tribes. At the time, the treaty makers may have had in mind that the reservation would be a permanent homeland as a farming community. Now, however, the question being raised is if this land was set aside as a permanent homeland for the Indians and it would now be sensible for the Indians to develop the reservation's mineral wealth along with its farms, does the reserved right allow the Indians enough water to develop the minerals on the reservation? That may not have been a purpose that was specifically foreseen at the time the reservation was created, but it is certainly an arguable part of this larger concept of reservations as permanent homelands for the Indian tribes.

Another thing that we don't know about the federal reserved right, which I think will be very important, particularly to the Indian tribes, is whether they can take their reserved water rights into the marketplace and sell them off the reservation. We do know that in the few instances where we have been involved in serious negotiations over the extent of the federal reserved right, one of the key elements has been the desire of the tribes to have the right to sell their water rights off the reservation if they so choose. We don't know yet whether that is an incident of the federal reserved right as a matter of law, but we certainly know that it is an important component in negotiated settlements. Another thing we don't know about the federal reserved right is the extent to which it can be exercised by non-Indians. A great deal of Indian land, land within the reservations, was at one time allotted to individual Indians in 160-acre or larger parcels. Much of that land was then conveyed to non-Indians. As a result, a great deal of land within the borders of most reservations today is owned in fee by non-Indians. The question thus arises whether a non-Indian who acquired an Indian allotment also acquired a reserved water right with its early priority date. There is at least one case, Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), in the state of Washington which has held that the reserved right attaching to an allotment can pass to a non-Indian.

Another question we can't answer with certainty yet, and which is now being raised in two legal cases, is what happens with lands within a reservation which pass out of Indian ownership at some time and are conveyed to non-Indians, but then are reacquired, perhaps by the tribe, 50 years later? Does the federal reserved right that originally attached to those lands continue to attach to the reacquired lands and, if it does, what is the priority date? Is the priority date the date upon which the lands are reacquired or is it the date upon which the reservation was created, although the lands may have been out of Indian ownership for a substantial period of time since the reservation was created? And, finally, what is the extent to which an Indian tribe has regulatory power over the use of water on the reservation, particularly

over the use of water by non-Indians on the reservation? Those are some of the issues you can look to for answers as the cases are decided.

WHAT WE ARE DOING WITH THE RIGHT

That is what we know about the reserved right and some of what we don't know about the right. Let me conclude by making some comments on what we are doing with the right. From my perspective, what we are doing mostly is litigating. In my office in Washington, more than 50 lawsuits are pending. Most of them are general stream adjudications, all of which involve the controversial issues of the extent and nature of the federal reserved right, more often than not in the context of an Indian reservation. These 50 lawsuits involve 13 major river systems in nine of the western states. They involve almost 50 separate Indian nations and tribes and thousands upon thousands of other western water users. Some of them have been going on for an awfully long time. The relatively new ones are 5, 10, and 15 years old. The older ones date back 60 or 70 years. They are very expensive pieces of litigation. They are also very time consuming because of the technical nature of the proof that is required. Moreover, one of the things that is most discouraging to me is that even if we pursue these lawsuits to their bitter end, and even if we come up with the resources to adjudicate all of the streams in the West and figure out who has the right to use how much water, when we are done, we may find we have a very unsatisfactory result. The reason I say that is, for the Indians, at least, the right that is decreed at the end of that process may very well be only a paper right. Yes, the court will have recognized that they have a right to use "x" amount of water, but they may find themselves lacking the means, the economic resources, to do anything with that water right. And although the right will have been quantified, the real difficult adjustments will have to be made in western water management in the future. That is when the actual exercise of the Indian right defeats state water rights on non-Indians and requires the actual displacement of non-Indian users. Also, lawsuits are not very well suited to resolving difficult and critical water management

and water conservation issues. The focus in these adjudications is on "me and mine" and "thee and thine," instead of focusing on how we can cooperate together as a community in managing the water and sharing the water and improving the resource and conserving it. Thus, we may find after having gone through this very difficult exercise that we really haven't resolved much when it is all over.

Another reason why the results may be unsatisfactory for the Indian tribes is that to the extent that they have to quantify their right today, they will have to do it in terms of today's technologies, only to find 15 years later that there are new technologies and that had they waited, had they quantified their right 15 years later, they would have been entitled to more water.

In view of the disadvantages of the adjudication process, what are we doing? At the Interior Department we have been trying in the past two or three years to encourage negotiation of disputes over water in the West. We think it only makes good sense for people to sit down and talk this out, to bring a little flexibility to the negotiating table instead of being locked into the rigid formulations of a court of law, to see if we can't address in negotiations some of these management and conservation issues and put some of these disputes to rest. We have had some significant success. We succeeded in putting together a negotiated settlement of part of the claims of the Papago Tribe in and around the city of Tucson, Arizona. We are in the middle of trying to satisfy the claims of the Ak Chin Indian Community in Arizona. We are also in the process, which I hope will succeed, of negotiating a settlement of the dispute over the waters of the Truckee-Carson River basins and the Pyramid Lake. This dispute has been going on for many years and has involved 14 or 15 lawsuits at one time or another. We also have been contacted by Indian and non-Indian interests in New Mexico, California, Washington, Oregon, Utah, Montana and South Dakota who are anxious to begin talking.

Let me conclude by saying that I was struck by President Thomas' image yesterday of the attorneys as beavers who spend their time damming up the streams. That may or may not be true, but one thing that is clear

to me, though, is that if the log jam is to be broken, we need to look to people other than attorneys, we need to look to water professionals like yourselves. This area of western water rights offers a tremendous opportunity for statesmanship, for people to reach out to each other, to break down some of the hostilities, some of the mistrust. It can be the chance to work together in cooperative efforts to figure out how we can live together, how we can manage our water resources and not simply be locked together in lawsuits where we are making our arguments to a judge. So I would hope that you would take that to heart, that in your various responsibilities you would take the opportunity for a little statesmanship, that you would encourage those with whom you have contact to consider negotiating. By doing so, we can resolve what is really one of the most difficult issues in western water law today.