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Who Owns the Water in the West?
An Overview of the Challenges Facing
Private Prior Appropriation & Federal Reserved Water Rights ©

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I. Privately Owned Water Rights

A. Water is a Property Right

i. Water is a form of property b/c the holder of the water right has a thing of value that can be alienated - provide economic benefits to him. *Palmer v. Railroad Comm'n*, 167 Cal. 163, 138 P. 997 (1914).

ii. But, the corpus of the water cannot be 'owned' if it remains in the stream, "'because…so long as it continues to run there cannot be that possession of it which is essential to ownership.'" Instead, it is only a usufructuary right to the water. *Maricopa County Mun. Water Conservation Dist. v. Southwest Cotton Co.*, 4 P.2d 369 (Ariz. 1931); *Palmer v. Railroad Comm'n of Cal.*, 138 P. 997, 999 (Cal. 1914).

B. Riparian Doctrine (Abundance of Water) – private landowners have property rights (consumptive and non-consumptive access & beneficial use rights) in the waters contiguous to their lands (lakes, streams). *Lux v. Haggin*, 69 Cal. 255, 10 P. 674 (1886). Private landowners also possess a right of access to adjacent navigable waters. *Board of Trustees v. Maderia Beach Nominee, Inc.*, 272 So. 2d 209, 214 (Fla. App. 1973); *McCarthy v. Coos Head Timber Co.*, 302 P.2d 238, 246 (Ore. 1956); Hollan v. State, 308 S.W.2d 122, 125 (Tex. Civ. App. 1958). They also share with other members of the public the right to navigate, fish, swim, or bathe in such waters. *Harris v. Brooks*, 283 S.W.2d 129, 134 (Ark. 1955).

i. Most eastern states follow the riparian water rights system, except Mississippi (Miss. CODE ANN. § 51-3-7 (1972)).

ii. Kentucky follows the riparian water rights system – *See* Richard C. Ausness, *Water Use Permits in a Riparian State: Problems and Proposals*, 66 Ky. L.J. 191

(1978).

iii. Riparian landowners only have a usufructury right to the water abutting his/her lands – i.e., to a 'reasonable use' of that water; he/she does not 'own' the water. While in most states, irrigation has been deemed a 'reasonable use,' it remains aquestion of fact whether a given amount of water put to use is 'reasonable.'

C. Prior Appropriation ("Colorado") Doctrine – (Shortage of Water) – provides that water can be diverted to beneficial use. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 42-49 (1950).

i. The prior appropriation system prevails in the following eight western states: Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. *See* F. Trelease, *Cases and Materials on Water Law* 11 (2d ed. 1974).

ii. Priority Dates Matter - The appropriator who is first in time is first in right, and a prior or earlier appropriator is entitled to satisfy his water needs before a subsequent appropriator may satisfy his. *City of Pasadena v. City of Alhambra*, 207 P.2d 17 (Cal. 1949); *Bailey v. Idaho Irrigation* Co., 227 P. 1055 (Idaho 1924).

iii. Quantity of Water Diverted, Water Consumed - Ownership of a quantified water right has two dimensions: 1) water diverted; and 2) water consumed.

a. Appropriations are for a definite quantity of water, usually expressed in cubic feet per second for direct diversion or in acre-feet for reservoir storage.

iv. Beneficial Use – "The appropriator's right to water diverted from streams is established by the water put to beneficial use. Beneficial use is the basis, the measure and the limit of the right. *See* Reclamation Act of 1902, 43 U.S.C. 372.

a. Not only must the use be a beneficial one, but the methods of diverting the water, conveying it to the place of use, and applying it to the land or machinery for which it is appropriated must also be efficient under the circumstances.

b. The applicant must designate the proposed place of use for the water he desires to appropriate. The place of use may be on nonriparian land.

c. Diversions are often limited to specific times of the day or week or year.

v. Consumptive Use – defines the quantity of water associated with a right acquired through beneficial use that can be transferred to a new owner.

a. Water rights are perpetual in duration, although they may be lost or abandoned through nonuse.

b. For allocating water during times of shortage or for choosing between simultaneous applications, several states have enacted statutes giving certain uses preferred status.

c. In most jurisdictions permits are issued by a state administrative agency pursuant to some form of adjudicatory process. The agency often has the power to deny or modify permit applications in order to protect senior appropriators or the public interest.

vi. Non-Consumptive Use –

a. "Surface water use is nonconsumptive when there is no diversion from the

water source or diminishment of the source. Additionally, when water is diverted and returned immediately to the source at the point of diversion following its use in the same quantity as diverted and meets water quality standards for the source, the water use is classified as nonconsumptive:

I. Water use in hydroelectric projects when the water is not diverted away from the natural confines of the river or stream channel;

II. Water use in some beautification ponds and fish hatcheries when the outflow is returned to the point of diversion, i.e., there is no bypass reach in the system." *See* Washington State Water Resources Program Policy, *Consumptive and Non-Consumptive Water Use* (10/31/91).

III. Non-consumptive uses also include inland navigation, recreation and water sports and ecosystem maintenance. See Bruce Aylward, Chap. 2 *Water Resources Management*, Ecosystem Economics (2013) at p. 1.

vii. Junior Water Rights – The water right held by a junior or subsequent appropriator also possesses a legally protected water right, but it is subordinate to that of the senior appropriator. *Smith v. O'Hara*, 43 Cal. 371, 375 (1872).

D. Mixed Riparian and Prior Appropriation Systems – Eleven states have such dual systems: Alaska, California, Kansas, Mississippi, Nebraska, North Dakota, Oklahoma, **Oregon**, South Dakota, Texas, and **Washington**.

i. Limit the exercise of riparian rights to some extent.

II. State-Owned Water Rights

A. Discovery Doctrine – Federal Government –

"[D]iscovery gave title to the [federal] government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession. […T]he original inhabitants were […] admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their […] power to dispose of the soil at their own will to whomsoever they pleased was denied by the original fundamental principle that discovery gave exclusive title to those who made it." *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 21 U.S. (8 Wheat.) 543, 573-574 (1823).

B. Water Rights Upon Statehood –

i. 13 Original Colonies

a. "By the common law, the title in the soil of the sea, or of arms of the sea, below high water mark, except so far as private rights in it have been acquired by express grant, or by prescription or usage, is in the King, subject to the public rights of navigation and fishing, and no one can erect a building or wharf upon it, without license. Upon the American Revolution, **the title and the dominion of the tidewaters and of the lands under** them vested in the several States of the union within their respective borders, subject to the rights surrendered by the Constitution to the United States." *Shively v. Bowlby*, 152 U. S. 1, 11-18, 24-31 (1894).

ii. States Admitted Since Adoption of Constitution – Equal Footing Doctrine

a. "The new states admitted into the union since the adoption of the

Constitution have the same rights as the original states in the tidewaters and in the lands under them within their respective jurisdictions." *Id*.

b. "In order to allow new States to enter the Union on an 'equal footing' with the original States with regard to this important interest, 'the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory…as held for the ultimate benefit of future States.'" *United States v. Holt State Bank*, 270 U. S. 49, 55 (1926).

iii. State Ownership of Land Under Navigable Waters - Bottomlands

a. The default rule is that title to land under navigable waters passes from the United States to a newly admitted State. *Shively v. Bowlby, 152 U. S. 1, 26-50 (1894)*

b. "A court deciding a question of title to the bed of navigable water must…begin with a 'strong presumption' against defeat of a State's title." *United States v. Alaska*, 521 U.S. 1, 34 (1997), citing Montana v. United States, 450 U. S. 544, 552 (1981). "We will not infer an intent to defeat a future State's title to inland submerged lands 'unless the intention was definitely declared or otherwise made very plain.'" *United States v. Holt State Bank*, 270 U. S. 49, 55 (1926). *Alaska* at 34.

c. "The United States retains any title vested in it before statehood to any land beneath waters not then navigable," pursuant to the equal footing doctrine. *PPL Montana, LLC v. Montana*, 565 U. S. ___, 132 S. Ct. 1215, 1228 (2012).

C. Public Trust Doctrine –

i. Under the **public trust doctrine**, the state holds its navigable waters and underlying beds **in trust for certain public uses, principally navigation, commerce, and fisheries**. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452-61 (1892); City of Berkeley v. Superior Court, 26 Cal.3d 515, 521-23, 606 P.2d 362, 364-66, 162 Cal. Rptr. 327, 329-31 (1980).

ii. Other court decisions have expanded the doctrine to include virtually **any public use associated with navigable waters, such as recreation and aesthetics**. *See, e.g. Marks v. Whitney*, 6 Cal.3d 251, 258-62, 491 P.2d 374, 379-82, 98 Cal. Rptr. 790, 795-98 (1971).

iii. As a Matter of State Water Rights –The public trust doctrine applies to water rights insofar as it requires the State to 'balance' economic needs against environmental values in granting water rights, and to determine whether this balance is consistent with modern public needs. *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 446; 658 P.2d 709, 727-728; 189 Cal. Rptr. 346, 364 (1983). In *National Audubon Society*, Los Angeles had secured water rights appropriation permits authorizing diversions from Mono Lake basin. In reliance on such permits, L.A. thereafter, built diversion facilities providing the City with approximately 17 percent of its water supply. The Court set forth the following four principles to define the public trust doctrine as applied in the water rights context:

a. The state as sovereign "retains continuing supervisory control" over

navigable waters and underlying beds;

b. "The legislature, either directly or through the water rights agency, has the right to grant usufructuary water rights even though such rights will "not promote, and may unavoidably harm, the trust uses at the source stream;"

c. "The state has the 'affirmative duty' to take the public trust into account in planning and allocating water resources; and

d. The state has a "duty of continuing supervision" over water rights even after such rights have been granted." *Id*. at 445-48, 658 P.2d at 726-28, 189 Cal. Rptr. at 364-65

iv. Is a Matter of State Law –

a. The public trust doctrine remains a matter of state law" and its "contours...do not depend upon the Constitution." *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012). The public trust doctrine, as a matter of state law, "has functioned as a constraint on states' ability to alienate public trust lands." *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1082 (D.C.Cir.1984)

b. California courts have interpreted the public trust doctrine as a form of state property in that it creates a public easement in navigable waters, as reflected in state law. For example, California, Colorado and Idaho provide by constitutions or statutes that water is the 'property' of the people, which presupposes that the state has a paramount proprietary right in water. CAL. WATER CODE 102 (West 1971); COLO. CONST., art. XVI, §5; IDAHO CODE 42-101 (1977).

c. Montana courts have interpreted the public trust doctrine as <u>both</u> a property right and an exercise of sovereign state regulatory power akin to the police power.

I. As Property –

"All waters in Montana are the property of the State of Montana for the use of its people. MT Const. Art. IX, Sec. 3. Under the MT Constitution and the public trust doctrine, the public owns an instream non-diversionary right to the recreational use of the state's navigable surface waters. Bean Lake III at par. 30. The State of MT became trustee of the public trust over the navigable streambeds and the waters of this State upon achieving Statehood, and the constitution and public trust 'do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters." *Montana Trout Unltd. V. Beaverhead Water*, 255 P.3d 179 (MT 2011).

II. As Exercise of Regulatory Power –

<u>MCA Sec. 75-5-101</u> – "It is the public policy of the State to conserve water by protecting, maintaining and improving water quality for public water supplies , wildlife & fish, aquatic life, agriculture, recreation and other beneficial uses."

III. MCA Sec. 85-2-101 – Provides that "[a]ny use of water is a public

use and the water within the State is the property of the State for the use of its people."

IV. MCA 85-2-101(1) –Establishes that "any use [of water] is a public use." This supports the "longstanding underlying policy…that water is a public resource that cannot be owned by individual users." *See* Albert W. Stone, "Montana Water Law," 70 State Bar of MT 1994.

V. "'Ownership' is not defined within Title 85, but as Stone explains, "a water right is 'usufructury'; i.e., it is a right to make use of waters owned by the State – a water right confers no ownership in those waters." *Montana Trout Unltd. V. Beaverhead Water*, 255 P.3d 179 (MT 2011).

III. Federally Owned Water Rights

A. Doctrine of Navigational Servitude –

It authorizes the federal government to take private property rights for navigation purposes without payment of compensation. It empowers Congress to legislate for the protection of federal navigation interests, but does not bar obstructions in navigable waters. *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. I (1888). Congress has maintained regulatory control over navigable rivers through enactment of the Rivers and Harbors Act of 1899, the Clean Water Act, and the Wild and Scenic Rivers Act.

B. Submerged Lands in National Government Land Tract – (wildlife refuge, national park; monument, forest lands, etc.)

It is necessary to look to Congressional intent to resolve conflicts over submerged lands claimed to have been reserved or conveyed by the United States before statehood. "The issue of congressional intent is refined somewhat **when submerged lands are located within a tract that the National Government has dealt with in some special way before statehood, as by reserving lands for a particular national purpose such as a wildlife refuge or, as here, an Indian reservation**. Because reserving submerged lands does not necessarily imply the intent "to defeat a future State's title to the land," Utah Div. of State Lands, supra, at 202, we undertake a two-step enquiry in reservation cases. We ask whether Congress intended to include land under navigable waters within the federal reservation and, if so, whether Congress intended to defeat the future State's title to the submerged lands. *United States v. Alaska*, 521 U.S. 1, 34, 36.

C. Implied Reservation of Water Rights in Federal Lands for Wildlife Refuge/National Park –

a. The U.S. Supreme Court has held that the Property Clause of the U.S. Constitution (Art. IV, Sec. 3, Cl. 2) authorizes the federal government to reserve lands from the public domain for federal purposes and to reserve sufficient water to accomplish the primary purposes of the reservation - both explicitly and implicitly. *Cappaert v. United States*, 426 U.S. 128, 138-139 (1976); *United States v. New Mexico*, 438 U.S. 696 (1976).

b. – Idaho Supreme Court Snake River Adjudication cases *et al.* –

i. The Idaho Supreme Court previously held that the Wild and Scenic Rivers

Act creates an express federal reservation of water rights in an amount necessary to fulfill the purposes of the Act. *Potlatch Corp. v. United States* (*In re SRBA Case No. 39576, Re: Wild and Scenic Rivers Claims*), 12 P.3d 1256 (Idaho 2000).

ii. The Idaho Supreme Court previously held that Congress did not intend to create federal reserved water rights in the Wilderness Act of 1964. However, it found that Congress did intend so in connection with the Hell's Canyon National Recreation Area Act. The Court remanded the latter case for proper quantification of the water rights needed to fulfill the purposes of the Hell's Canyon legislation. *Potlatch Corp. v. United States* (*In re SRBA Case No. 39576, Re: Wilderness Reserved Claims*), 12 P.3d 1260 (Idaho 2000).

iii. The Idaho Supreme Court found that Congress did not provide a basis in the Sawtooth National Recreation Area Act for federal reserved water rights. I*daho v. United States* (*In re SRBA Case No. 39576, Re: Sawtooth National Recreation Area Claims*), 12 P.3d 1284 (Idaho 2000).

iv. The Idaho Supreme Court rejected a claim by the United States that it had perfected an **instream flow right for refuge use.** The Court reasoned that absent a federal reserved right, the United States only may acquire a water right under state law by diverting the water for beneficial use. *Idaho v. United States* (*In Re SRBA Case No. 39576, Re: Minidoka National Wildlife Refuge*), 996 P.2d 806 (Idaho 2000).

v. The Idaho Supreme Court determined that there was no basis in the authorizing legislation to provide federal reserved rights for the Deer Flat National Wildlife Refuge. *United States v. Idaho* (*In re SRBA Case No. 39576, Re: Fish and Wildlife Service*), __ P.3d __, 2001 WL 170644, No. 25546 (Idaho Feb. 22, 2001), as amended (May 1, 2001).

d. The Arizona Supreme Court previously held that federal reserved water rights also covered groundwater not otherwise subject to prior appropriation consistent with Arizona law. In addition, the Court held that holders of federal reserved rights are subject to greater protection from groundwater pumping than those who hold only state law rights. *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739 (Ariz. 1999), cert. *denied sub. nom. Phelps Dodge Corp. v. U.S.*, 530 U.S. 1250 (2000).

e. *See Sturgeon v. Frost*, Docket No. 14-1209, "Oral Argument Transcript" (Jan. 20, 2016) at pp. 34-36, available at: http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-1209_n75o.pdf (wherein the Solicitor General's Office had argued that the federal government's holding of a usufructury ("use") right in an Alaska river flowing through a national park, which it deemed equivalent to holding title to an interest in the river, granted the U.S. government the authority to regulate the water. "We only have authority to regulate the lands in which we have reserved water rights, and those are only waters within the park's 2 units." *Id.*, at 36-37.)

D. Implied Reservation of Water Rights for Indian Reservations

i. Most Indian reservations are located in the west and were established before state appropriation systems were in place. Since Indian reserved water rights often predate non-Indian use, tribal rights tend to be superior to rights of non-Indian appropriators recognized under state law.

ii. Stevens Treaties – A Treaty negotiated with Isaac Stevens, governor of the Washington Territory in 1853, to retain rights to traditional foods and harvest practices. Each of ten treaties contained a clause which, with some variation from treaty to treaty, stated the following

a. The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." *See* Treaty with the Yakima, U.S.-Yakama Nation, art. III, ¶ 2, June 9, 1855, 12 Stat. 951, 953;

b. "The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land." *See* Treaty with the Flatheads (Treaty of Hell Gate), U.S.-Flathead Tribe, art. III, ¶ 2, July 16, 1855, 12 Stat. 975, 976

iii. Implied Water Rights Doctrine –

a. The U.S. Supreme Court has held that, the Indians did not reduce the land area of their occupation **and give up the waters which made it valuable or adequate** when they entered into a treaty with the United States exchanging such area for a reservation. The Court based its decision, in part, on its reading of the 1888 Indian treaty establishing the Fort Belknap Reservation in Montana most favorably to the tribes. It employed a "rule of interpretation of agreements and treaties with the Indians, [providing that] ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it." *United States v. Winters*, 207 U.S. 564, 576-577 (1908).

I. Simply stated, the Court held that, upon the creation of Indian reservations, the federal government reserved water rights for the benefit of the Indians living on the reservation. The implied water rights doctrine was employed to preclude the appropriation of reserved water under state law. Indian reserved water rights operate outside the systems of prior appropriation.

b. The U.S. Supreme Court subsequently limited the scope of water rights

reserved under *Winters* to those "necessary to fulfill the purpose of the reservation, no more." *Cappaert v. United States*, 426 U.S. 128, 141 (1976).

c. In *United States v. Winans*, 198 U.S. 371, 381 (1905), the U.S. Supreme Court held that the treaty reserved to the Indians their pre-existing right to fish "at all usual and accustomed places." The Court's holding has been recognized as reflecting "the long accepted principle that "the treaty is not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *Id*. at 378. *See e.g.*, Montana Reserved Water Rights Compact Commission, *Report on the Proposed Water Rights Compact Between the State of Montana and The Confederated Salish and Kootenai Tribes of the Flathead Reservation*, at p. 22, available at: http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/docs/cskt/watercompactreport.pdf.

d. The U.S. Supreme Court extended the *Winters* Doctrine to non-Indian federally reserved lands. It held that establishing Indian reservations creates a concomitant reservation of water sufficient to develop, preserve, produce or sustain food and other resources, "to make the reservation livable." *Arizona v. California*, 373 U.S. 546, 599 (1963). Inherent in this definition of Indian reserved water rights is a reservation of water for future use.

e. The U.S. Supreme Court held that an examination of the limited purposes for which Congress authorized the creation of national forests provides no support for the claim that the United States was entitled to a minimum instream flow for "aesthetic, environmental, recreational and 'fish' purposes." "Without legislative history to the contrary, we are led to conclude that Congress did not intend in enacting the Multiple-Use Sustained-Yield Act of 1960 to reserve water for the secondary purposes there established." The Court favorably referred to the lower court's finding that national forests could only be created "to insure favorable conditions of water flow and to furnish a continuous supply of timber" and not for such purposes. *United States v. New Mexico*, 38 U.S. 696 (1978), citing 90 N. M., at 412-413, 564 P. 2d, at 617-619.

f. In in his dissent in *Arizona v. San Carlos Apache Tribe*, "[u]nlike state-law claims based on prior appropriation, Indian reserved water rights are not based on actual beneficial use and are not forfeited if they are not used." 463 U.S. 545, 574 (1983) (Stevens, J., dissenting).

g. Unlike prior appropriation rights, *Winters* rights are not based on actual use, but future needs. *Arizona v. California*, 373 U.S. 600-601).

h. *Winters* rights date at least to **the time of establishment of tribal reservations**, which often pre-dates the development of state-permitted water use in western watersheds. *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1983). *Winters* rights for in situ water use,

i.e., **in-stream flows to support fisheries,** date back even further, to "time immemorial." *Id*.

iv. State Adjudication of Indian Reserved Water Rights –

Many states continue to determine federally created Indian reserved water rights that contemplate future use, under state systems of appropriation which instead focus on actual use rather than future use rights. The most common procedure is a general stream adjudication, which judicially ascertains the intersese rights of all claimants to a water source. The Montana adjudication provisions are found at MONT. CODE ANN. §§ 85-2-212 to -243 (1997).

a. McCarren Amendment (1952) – Endowed the States with the authority to determine Indian reserved water rights by expressly permitting the joinder of the federal government in state suits involving the adjudication of such rights. 43 U.S.C. § 666 (1988).

b. The U.S. Supreme Court has held that, the purpose of the McCarran Amendment was to prevent "piecemeal" adjudications by requiring the determination of all water rights in a given river system in a single proceeding. *United States v. District Court in and for Eagle County*, 401 U.S. 520, 525 (1971).

c. Federal courts have generally deferred to state determinations of Indian reserved water rights under the McCarran Amendment.

I. In *Colorado River Water Conservation District v. United States*, the Supreme Court extended the McCarran Amendment's waiver of federal sovereign immunity to state court adjudications of Indian reserved water rights. In Arizona v. San Carlos Apache Tribe, the Court held that the McCarran Amendment negated any limitation placed on state jurisdiction over Indian water rightsby federal policy, including federal enabling acts. *Arizona v. San Carlos Apache Tribe*, 463 U.S. at 564. Furthermore, the *San Carlos Apache Court* followed Colorado River by allowing for comprehensive adjudication of Indian water rights in state courts. *Id*. at 570. Central to the Court's reasoning was the McCarran Amendment's underlying policy favoring a single comprehensive adjudication of water rights. *Id*

d. States generally oppose the assertion of Indian reserved water rights, most of which are unquantified, making state court adjudication of Indian rights contentious.

I. *In the Matter of the Application for Beneficial Water Use Permit Nos. 66459-76L, Ciotti*; *64988-g76L, Starner*; and *Application for Change of Appropriation Water Right No. G15152-S761, Pope4 (Ciotti)*, the Montana Supreme Court in *Ciotti* held that, where the overall quantity of allocable water was not certain, the existence of Indian reserved water rights precluded state court adjudication of water rights on the Flathead Reservation under the Montana Water Use Act (surface and ground water rights).

e. The Ninth Circuit Court of Appeals held in 1982 that since neither General Allotment Act/Dawes Severalty Act of 1887 or the Flathead Allotment Act of 1904 terminated or diminished the validity of the Flathead Indian Reservation, the CSKT were not precluded from holding title to the south half of Flathead Lake or having power to regulate non-Indian owners of fee land bordering the Lake. *Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Namen*, 665 F.2d 951 (9th Cir. 1982) (*Namen II*).

I. In *Montana Power Co. v. Rochester*, 127 F.2d 189 (9th Cir. 1942), the Ninth Circuit Court of Appeals ruled that the United States holds title to the bed and banks of the south half of Flathead Lake in trust for the Tribes (which beneficial ownership has been evidenced by the Tribes having received annual lease payments from Kerr Dam licensees during the term, at least, of the 1985 Derr Dam license).

II. The Ninth Circuit Court of Appeals chose between two rules to arrive at the conclusion that the CSKT had the right to regulate non-tribal members' activities (i.e., exercise of riparian water rights) along the south half of Flathead lake. "Such conduct, if unregulated, could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake, which is one of the most important tribal resources." 665 F.2d at 964.

A. The Coleville Rule – articulated in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153-154 (1980) – "tribal powers are not implicitly divested by virtue of the tribes' dependent status. . .[on the contrary, divestiture is found only] where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government."

B. The Montana Rule – articulated in *Montana v. United States*, 450 U.S. 544, 565-566 (1981) – "a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," in reliance upon the U.S. Supreme Court's prior holding in *United States v. Wheeler*, 435 U.S. 313 (1978) (holding that an implicit divestiture of tribal powers occurs when relations between Indians and non-Indians are involved). The *Montana* Court had found that the dependent status of the Tribes had implicitly divested them of powers over non-Indians.

C. Polson and non-Indian riparian landowners appealed *Namen II* to the U.S. Supreme Court, which denied certiori

on November 1, 1982, with Justices Rehnquist and White dissenting in disagreement regarding the regulation issue. See Sheri L. Flies, Namen II: Do the Tribes Have the Authority to Regulate Non-Indian Riparian Rights on Flathead Lake?, 4 Pub. Land L. Rev. 170 (1983), available at: http://scholarship.law.umt.edu/cgi/viewcontent.cgi?article=1080&context=plrlr.

v. Current Conflicts Between State and Private Prior Appropriation Rights Claims and Federal Indian Reserved Water Right Claims

a. Klamath Region –

I. Involved an 1864 Treaty between the United States and the Klamath and Modoc Tribes, wherein the Tribes ceded 12 million acres in return for an 800,000-acre reservation.

II. The Treaty identified two purposes of the reservation: to convert the Tribes to agriculture pursuits and to allow the Tribes to continue their hunting and gathering ways of life. *United States v. Adair*, 478 F. Supp. 336 (D. Or. 1979), aft'd, 723 F.2d 1394 (91 Cir. 1983), cert. denied sub nom, Oregon v. United States, 467 U.S. 1252 (1984).

III. Citing the findings of the lower court, the Court held that both agricultural and fishing-hunting purposes were valid and recognized under the *Winters* doctrine, and that the Klamath Tribesheld water rights to support game and fish adequate to the needs of Indian hunters and fishers. *Id*. at 1394. This right was described as a **non-consumptive entitlement that prevents other users from depleting stream waters below protected levels**. *Id*. at 1418

IV. Interpreting the treaty most favorable to the Tribes, the court held that the Tribes' non-consumptive water rights were not created, but were **instead reserved and confirmed by the Treaty.** *Id*. at 1415. These rights were established when the Klamath Tribes first began hunting and fishing in the region, dating back a thousand years or more. **The priority of the Tribal rights was therefore held to date from "time immemorial**." *Id*. at 1414. Consistent with *Winters*, *Adair* held that reservations may be established for fisheries purposes, that in-stream water rights may be reserved to protect those purposes, and further, that the priority date of such rights is time immemorial. *United States v. Adair*, 723 F.2d 1394, 1416 (9th Cir. 1983)

V. The state court adjudication of water rights in the Klamath Basin commenced in 1976. By 2013, the trial court issued a final orde legally recognizing the instream flow water rights of the Klamath

Tribes identified in the 1983 *Adair* decision, and quantifying and awarding them a "time immemorial" priority date. Such judicial recognition and quantification of Klamath Treaty water rights caused the tribes to call for curtailment of junior rights to preserve ecological water flows.

VI. In 2009, a multi-party agreement was signed to demolish four Klamath River dams—the largest dam removal ever contemplated—to allow for fish passage and ecologically appropriate water flows. See Klamath Basin Restoration Agreement ("KBRA") and Klamath Hydroelectric Settlement Agreement ("KHSA").

b. Northwestern Montana - Flathead Indian Reservation

I. The 1979 Montana Water Use Act included an innovative alternative dispute resolution approach, creating the Reserved Water Rights Compact Commission. MONT. CODE ANN. § 2-15-212 (West 2013). It called for voluntary government-to-government negotiations among the state, Tribal and federal governments, to resolve Winters water right claims through settlement agreements. MONT. CODE ANN. § 85-2-702 (West 2013). The Montana Compact Commission has had substantial success n achieving water right settlements with most of the Indian Tribes in Montana. MONT. CODE ANN. § 85-20 (West 2013).

II. Despite this success, substantial conflict has arisen over water rights reserved for the western-most tribal reserve in Montana, the Flathead Reservation, home to the Confederated Salish and Kootenai Tribes (CSKT). The CSKT have sought to limit on-reservation state-based water allocations made by the state water resources agency issuing provisional rights to non-Indians before the completion of the water compact negotiations.

III. Three Montana Supreme Court decisions established that the state water resources agency may not issue water permits on the Flathead Reservation for surface or ground waters until CSKT's Winters rights are adjudicated or resolved by compact. *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Stults*, 2002 MT 280, 312 Mont. 420, 59 P.3d (Mont. 2002); *In re Benefit Water Use Permit*, 287 Mont. 50, 923 P.2d 1073 (Mont. 1996); *Confederated Salish and Kootenai Tribes v. Clinch*, 1999 MT 342, 297 Mont. 448, 992 P.2d 244 (Mont. 1999).

IV. Tri-partite settlements among states, Tribes and the federal government have become an increasingly common mechanism for resolution of *Winters* water claims. The Montana Reserved Water Rights Compact Commission sets forth a political approach pursuant to which the state has utilized diplomatic engagement to

address historic water conflicts. Montana has entered into eighteen of them already. It is state policy to do so. *See* Montana Codes Annotated.

V. The CSKT are the sole Stevens Treaty Tribe in Montana. Consequently, their claims to water on and off the Flathead Reservation present a significant challenge to the Montana compacting process.

c. Yakima Washington

I. In 1974, the Western District of the Washington Federal District Court interpreted the provision contained in the 1855 Treaty with the Yakima Nation, a Stevens Treaty, providing for the "taking fish at all usual and accustomed places, in common with the citizens of the territory." *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) aff'd and remanded, 520 F.2d 676 (9th Cir. 1975). Its ruling was intended to ensure that the annual salmon harvest was **shared equally between the ten Stevens Treaty Tribes and non-Indians**. *See* Treaty with the Yakima, U.S.-Yakama Nation, art. III, ¶ 2, June 9, 1855, 12 Stat. 951, 953.