



State-Tribal Relations Committee

60th Montana Legislature

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TO: State-Tribal Relations Committee Members
FROM: Jeremy Gersovitz, Staff Attorney
RE: Selected holdings of court cases, primarily from Montana, on Indian water rights, to be read in conjunction with the Time Line for Selected Water-related Litigation involving Tribes since 1968
DATE: July 28, 2008

Tweedy v. The Texas Company, 286 F.Supp. 383 (1968). In this United States District Court case, plaintiff citizens of the state of Montana sought money damages for nearly a half million barrels of underground water the defendant corporation had taken to use in recovering oil and gas on land within the boundaries of the Blackfeet Indian Reservation. Note that the *Winters* Doctrine--the foundation upon which Indian water rights is grounded--provided that when a reservation was created, there was impliedly reserved accessory water adequate to the then-existing and the future needs of the reservation. Winters v. U.S., 207 U.S. 564 (1908).

In *Tweedy*, the court declined to award damages for the taking of the water, because it was not otherwise being used nor was it needed for the purpose for which the reservation had been created. Note: Indian water rights fall into one of three categories: reserved water rights, aboriginal water rights, and appropriative water rights.

Colorado River Water Conservation District v. U.S., 424 U.S. 800 (1976). As background to this United States Supreme Court case, it should be understood that through the McCarran Amendment in 1952, Congress waived its immunity from suit and consented to the United States being joined as a defendant in general stream water rights cases brought in state court. Thus state courts were allowed concurrent jurisdiction to adjudicate federal water rights. In *Colorado River*, the Supreme Court held this consent applied to federal reserved water rights including Indian reserved rights.

U.S. v. Aageson, 484 F.Supp. 31 (1979). The United States District Court granted the State of Montana's motion to dismiss the federal actions which had been brought by the U.S. and various Indian tribes to adjudicate Indian water rights. The rationale, in part, was that according to *Colorado River*, the state court had jurisdiction of the adjudication of the water rights.

Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (1982). The Ninth Circuit Court of Appeals held that the McCarran Amendment did not override Montana's express disclaimer, contained in its constitution and enabling act, of jurisdiction over Indian lands. The relevant language of the McCarran Amendment sets out that: "(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States

is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances...."

The Ninth Circuit's decision in *Adsit*, however, was reversed by the U.S. Supreme Court in Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983), where the highest court in the land held that as long as state court procedures are comprehensive and adequate, deferral to those courts is in fact appropriate. After remand of *San Carlos*, the Ninth Circuit Court of Appeals held that the question of jurisdiction under state law was one that the state courts were to definitively resolve. Northern Cheyenne Tribe v. Adsit, 721 F.2d 1187 (1983) .

State of Montana ex. rel. Greely v. Confederated Salish and Kootenai Tribes, 712 P.2d 754 (1985). In deciding a number of issues of first impression in Montana, the Montana Supreme Court held that the state's constitution does not preclude jurisdiction for the adjudication of Indian reserved water rights. Additionally, the Court decided that the Montana Water Use Act is facially adequate for the adjudication of Indian and federal reserved water rights.

Blackfeet Indian Nation v. Hodel, 634 F.Supp. 646 (1986). Here, the federal district court judge granted the defendants' motions for summary judgment, finding that the procedures allowed for under Montana law are facially adequate to adjudicate the water rights at issue.

In the Matter of the Application for Beneficial Water Use Permit Nos. 66459-76L, Ciotti, 923 P.2d. 1073 (1996). The Montana Supreme Court held the Department of Natural Resources and Conservation cannot issue new water permits on the Flathead Reservation until the Salish and Kootenai Tribes' federally reserved water rights have been quantified.

Some three years later and subsequent to S.B. 97, the Montana Supreme Court issued its opinion in Confederated Salish and Kootenai Tribes v. Clinch, 992 P.2d. 244 (1999), and reiterated that it is impossible for the State to decide whether water is legally available on the reservation until the Tribes' reserved water rights are quantified.

Then, in Confederated Salish and Kootenai Tribes v. Stults, 59 P.3d 1093 (2002), the Montana Supreme Court again hammered home that the DNRC is prohibited from issuing beneficial water use permits for groundwater until the Tribes' federally reserved water rights have been defined and quantified.