

September 2005

RESERVED WATER RIGHTS STUDY - BACKGROUND MEMORANDUM

Senate Bill No. 2115 (attached as Appendix A) directs the Legislative Council to study the process to negotiate and quantify reserved water rights. Senate Bill No. 2115, as introduced (attached as Appendix B), would have authorized the State Engineer to negotiate reserved water rights of the United States and federally recognized Indian tribes.

Proponents of Senate Bill No. 2115 noted that current state law does not contain a procedure allowing the state to negotiate with tribes or the federal government to quantify reserved water rights and Senate Bill No. 2115 would have established such a procedure. In addition to the State Engineer, the Turtle Mountain Band of Chippewa supported the bill. The bill was opposed by the Mandan, Hidatsa and Arikara Nation (Three Affiliated Tribes) and the Standing Rock Sioux Tribe. The chairman of the Mandan, Hidatsa and Arikara Nation testified that in addition to the State Engineer, other individuals and parties should be involved in the negotiation process and that it may be better for the tribes to negotiate with a body or perhaps a commission that would be a fair representative of the state rather than with just one individual. The chairman testified that any agreement negotiated by the State Engineer should be subject to ratification by the Legislative Assembly and signed by the Governor. Finally, the chairman testified that the Mandan, Hidatsa and Arikara Nation objected to the provisions of Senate Bill No. 2115 providing that exceptions to an agreement would be resolved through an administrative process. The chairman of the Standing Rock Sioux Tribe testified that the tribe was in fundamental opposition to Senate Bill No. 2115. The chairman testified that the bill posed grave risks for all North Dakota tribes and did not believe it was necessary at this time to quantify the tribes' reserved water rights under the "Winters doctrine" relating to reserved water rights for Indian tribes.

NORTH DAKOTA WATER LAW

Surface Water Appropriation

There are generally two systems that govern the appropriation of water in the United States. The humid eastern states where water resources are more plentiful follow the common-law doctrine of riparian rights. The arid western states where water resources are more scarce have rejected the doctrine of riparian rights and have adopted instead the doctrine of prior appropriation.

A riparian right is a right to use a portion of the flow of a watercourse that arises by virtue of ownership of land bordering a stream. The basic principle of the

prior appropriation doctrine is that a person may acquire an exclusive right to use a specific quantity of water by applying it to a beneficial use without reference of the focus of the use. An appropriate right is also defined by the time period of use as well as by the quantity claimed. Thus, the prior appropriation doctrine is often known as the first in time first in right water appropriation system.

North Dakota is a prior appropriation doctrine state. North Dakota Century Code (NDCC) Section 61-04-06.3 provides, in part:

Priority in time shall give the superior water right. Priority of a water right acquired under this chapter dates from the filing of an application with the state engineer, except for water applied to domestic, livestock, or fish, wildlife, and other recreational uses in which case the priority date shall relate back to the date when the quantity of water in question was first appropriated, unless otherwise provided by law.

Ground Water Appropriation

Generally, there are four water allocation doctrines applicable to ground water--absolute ownership, reasonable use, correlative rights, and prior appropriation. The first three are based upon ownership of the land overlying the water resource, and the fourth doctrine has been applied to ground water by a number of states that use the prior appropriation doctrine to allocate surface water resources.

The absolute ownership doctrine was imported to the eastern United States from England. Under its provisions, a landowner owns, and has an unlimited right to withdraw, any water found beneath the landowner's land. This doctrine is followed in Connecticut, Georgia, Illinois, Indiana, Maryland, Massachusetts, Mississippi, Rhode Island, Texas, and the District of Columbia.

Under the reasonable use doctrine, ground water may be used without waste on overlying land and landowners are only liable for injuries arising from their ground water withdrawals if their use is unreasonable. A use is unreasonable if it is wasteful or if the water is used on nonoverlying lands. This doctrine is followed in Arizona, Nebraska, and Oklahoma. However, Nebraska has enacted legislation authorizing industrial and municipal nonoverlying ground water uses if a permit has been obtained.

The correlative rights doctrine was designed to accommodate all overlying owners when water supply is insufficient to meet the reasonable needs of all overlying landowners. Under this doctrine, owners of

land are each limited to a reasonable share of the total supply of ground water. The share is usually based on the amount of acreage owned by each landowner. California is the only state that follows this doctrine.

The prior appropriation doctrine, when applied to ground water, has been modified in most jurisdictions to allow more widespread ground water use than strict application of the doctrine would allow. Alaska, Colorado, Idaho, Kansas, Montana, Nevada, New Mexico, Oregon, South Dakota, Utah, Washington, and Wyoming, as well as North Dakota, apply this doctrine.

Priority

Although North Dakota is a prior appropriation state, this common-law doctrine has been statutorily modified by the requirement that the first in time first in right be measured by the acquisition of a water permit from the State Engineer. North Dakota Century Code Section 61-04-02 requires that an appropriator secure a permit for the beneficial use of water. If there are competing applications for water from the same source and the source is insufficient to satisfy all applicants, then the State Engineer must follow the priority established by NDCC Section 61-04-06.1 in granting water permits. The priority established by Section 61-04-06.1 is (1) domestic use; (2) municipal use; (3) livestock use; (4) irrigation use; (5) industrial use; and (6) fish, wildlife, and other outdoor recreational uses.

The water appropriated must still be put to a beneficial use in order to secure a valid water right under the prior appropriation doctrine. Also, NDCC Section 61-04-06.3 provides, in part:

Priority of appropriation does not include the right to prevent changes in the condition of water occurrence, such as the increase or decrease of streamflow, or the lowering of a water table, artesian pressure, or water level, by later appropriators, if the prior appropriator can reasonably acquire the prior appropriator's water under the changed conditions.

RESERVED WATER RIGHTS DOCTRINE

In *Cappaert v. United States*, 426 U.S. 128 (1976), the United States Supreme Court stated:

This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation

and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Article I, Section 8, which permits federal regulation of navigable streams, and the Property Clause, Article IV, Section 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

The United States Supreme Court first recognized Indian reserved water rights in *Winters v. United States*, 207 U.S. 564 (1908). In *Winters* the United States Supreme Court held that the 1888 agreement and statutes, which created the Fort Belknap Reservation in north central Montana, implicitly reserved to the tribe water from the Milk River for irrigation purposes. In finding that the policy of the United States to promote the transformation of tribal members to a "pastoral and civilized people" would be defeated and the land would become "practically valueless" unless the tribe's supply of irrigation water was protected from non-Indians claiming water under state law, the court stated that "[t]he lands were arid, and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters, without which they would be valueless, and 'civilized communities could not be established thereon.' And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession." It should also be noted that courts have held that the priority of Indian reserved water rights dates from the creation of the Indian reservation and Indian reserved water rights are not subject to forfeiture or abandonment for nonuse.

QUANTITY OF RESERVED WATER RIGHTS - THE PRACTICABLY IRRIGABLE ACREAGE (PIA) STANDARD

In *Arizona v. California*, 373 U.S. 546 (1963), the United States Supreme Court adopted the practicably irrigable acreage standard as the presumptive quantification standard for Indian reserved water rights. In *Arizona* the Court agreed with the special master's conclusion that the quantity of water intended to be reserved was intended to satisfy the future as well as the present needs of the Indian reservations and ruled that enough water was reserved to irrigate all of the practicably irrigable acreage on the reservations.

Arizona contended that the quantity of water reserved should be measured by the Indians' "reasonably foreseeable needs," which the Court rejected. The Court concluded, as did the special master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.

scarce water, most western states have commenced general adjudication of varying scope in order to quantify reserved water rights and incorporate them into comprehensive state water management systems."

ADJUDICATION AND QUANTIFICATION OF RESERVED WATER RIGHTS

In *Indian Reserved Water Rights* by John Shurts, the author outlines the rationale for the adjudication and quantification of Indian reserved water rights. He states that the "prospect of expensive litigation and uncertain outcomes has led Indian groups, the federal government, state and local governments, private water users, and others to focus heavily on negotiating agreements to confirm and quantify reserved rights; agreements that Congress is asked or will be asked to ratify. In the usual situation, a particular Indian nation is asked by the other parties to relinquish its indefinite and potentially expandable reserved rights in return for a clearly described right to a definite, quantified amount of water, plus an amount of money or an agreement for assistance in bringing water to reservation lands, or both." However, until passage of the McCarran Amendment in 1952, the ability of states to quantify reserved water rights and to incorporate them into decrees and administrative systems was thwarted by the sovereign immunity of the United States and tribes. The McCarran Amendment waives the sovereign immunity of the United States and allows the United States to be named as a defendant in state general adjudication and administration proceedings. The McCarran Amendment provides:

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 such a 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 in like circumstances.

The American Indian Law Deskbook notes that "[i]n part due to the passage of the McCarran Amendment and in part due to the increasing competition for

As discussed above and affirmed by the United States Supreme Court in *Colorado River Water Conservation District v. United States*, 427 U.S. 800 (1976), the McCarran Amendment allows Indian reserved water rights to be adjudicated in state courts by suing the United States in its role as trustee for the tribes. *The American Indian Law Deskbook* notes that tribes themselves cannot be named as defendants in state adjudication proceedings, since the McCarran Amendment did not waive the sovereign immunity enjoyed by Indian tribes.

State adjudication proceedings generally take one of three forms. One form is the traditional civil judicial action wherein a court determines the water rights of the interested parties. The second form is to authorize an administrative agency to conduct the adjudication process, and the third form is to create a commission to negotiate the adjudication of reserved water rights with Indian tribes.

An example of a state that provides for civil judicial adjudication of reserved water rights is South Dakota. South Dakota Codified Laws Section 46-10-01 provides that "[i]t shall be the duty of the attorney general to bring an action for the general adjudication of the nature, extent, content, scope, and relative priority of the water rights and the rights to use water of all persons, or entities, public or private, on any river system and on all other sources, when in his judgment, or in the judgment of the Water Management Board, the public interest requires such action." Section 46-10-1.1 provides that the procedure in any case of general adjudication is as in other civil cases, insofar as that procedure is not inconsistent with South Dakota law. A copy of South Dakota Codified Laws Chapter 46-10 is attached as Appendix C. Some commentators have criticized this method of adjudicating reserved water rights because the judicial proceedings are adversarial in nature and thus the final adjudication is sometimes viewed as one in which there are winners and losers.

The second method of adjudicating reserved water rights is delegation of negotiation authority to an administrative agency which then conducts negotiations with the tribes or the federal government. An example of a state that has adopted this procedure is Oregon. A copy of the Oregon statute is attached as Appendix D. It appears that Senate Bill No. 2115 is based on the Oregon statute.

An example of a state that has adopted the commission form of adjudicating reserved water rights is Montana. Montana Code Annotated Section 85-2-701 provides that "because the water and water rights in each water division are interrelated, it is the intent of the legislature to conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act. It is the intent of the legislature that the unified proceedings include all

claimants of reserved Indian water rights as necessary and indispensable parties under authority granted the state by 43 U.S.C. 666 (the McCarran Act). However, it is further intended that the state of Montana proceed under the provisions of this part in an effort to conclude compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state. To the maximum extent possible, the reserve water rights compact commission should make the negotiation of water rights claimed by the federal government or Indian tribes in or affecting the basins identified by law its highest priority. In negotiations, the commission is acting on behalf of the Governor." The relevant Montana statutory provisions are attached as Appendix E.

Montana has approved, ratified, and codified the Yellowstone River Compact, the Fort Peck-Montana Compact between Montana and the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, the North Cheyenne-Montana Compact between Montana and the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, the United States Park Service-Montana Compact between Montana and the United States National Park Service, the United States Bureau of Land Management-Montana Compact between Montana and the United States Bureau of Land Management, the Chippewa Cree Tribe-Montana Compact between Montana and the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation, the United States Fish and Wildlife Service, Black Coulee and Benton Lake-Montana Compact between Montana and the Fish and Wildlife Service, the Red Rock Lakes-Montana Compact between Montana and the Fish and Wildlife Service, the Crow Tribe-Montana Compact between Montana and the Crow Tribe, and the Fort Belknap-Montana Compact between Montana and the Fort Belknap Indian community of the Fort Belknap Reservation. The compacts involving Indian tribes are also included in Appendix E.

POSSIBLE STUDY APPROACH

In conducting its study of the process to negotiate and quantify reserved water rights, the committee could solicit testimony from a number of sources. These include the State Engineer and representatives of the state's Indian tribes.

ATTACH:5