1-3-1977

Brief of the Spokane Indian Tribe

Robert D. Dellwo
Dellwo, Rudolf, & Schroeder, P.S.

Kermit M. Rudolf
Dellwo, Rudolf, & Schroeder, P.S.

The issue is currently being addressed in the adjudication of the waters of the San Juan River in Colorado.[254]

2. The McCarran Amendment and state claims of jurisdiction over Indian reserved water rights

A unique relationship between the federal government and the Indian people and their property rights originated in article I, section 8, clause 3 of the Constitution.[255] That relationship is fundamental to the issue of jurisdiction over Indian water rights.

The United States is not the "owner" of rights reserved for the benefit of Indians in the same way it is the "owner" of water rights reserved for use on federal parks or forests held for the benefit of the general public. The Indians' right to the use of water, though held in trust by the United States, is equitably owned and exercised by individual Indians and Indian tribes in connection with their possession of reserved lands.[256] These water

254. United States v. Akin, 504 F.2d 115 (10th Cir. 1974), *cert. granted*, 421 U.S. 946 (1975) (No. 74-949), *rev'g* Civil No. C-4497 (D. Colo., July 20, 1973). In this case the United States won the race to the courthouse. The government brought suit in federal district court to determine the reserved water rights of the Southern Ute and the Ute Mountain Ute Indian Reservations, as well as its other reserved rights, in a complete watershed adjudication of the San Juan River and its tributaries in Colorado. Colorado, following the precedent set in United States v. District Court for Eagle County, 401 U.S. 520 (1971), and its companion case, United States v. District Court for Water Div. No. 5, 401 U.S. 527 (1971), served the United States in its statutory proceedings before the state water judge pursuant to 43 U.S.C. § 666 (1970); service occurred after the federal government initiated the watershed adjudication in federal district court.

Colorado's motion to dismiss the federal court suit was granted under the doctrine of abstention. The district court decided that it was proper to abstain from exercising its jurisdiction and to permit the state to proceed with its statutory adjudication of the watershed. In reaching this decision, the federal judge decided that the state court had jurisdiction of the Indians' water rights as well as other reserved water rights by reason of 43 U.S.C. § 666 (1970). The Tenth Circuit Court of Appeals reversed on the ground that it was not proper to apply the doctrine of abstention in this case since the federal water rights involved were established by federal law and the United States had the right to adjudicate its rights in federal court. The Tenth Circuit did not reach the question of the state court's jurisdiction over Indian water rights.

The Supreme Court has granted certiorari. In the event the Supreme Court should reverse the circuit court's order, the parties have briefed the question of the state court's jurisdiction over Indian water rights. Numerous Indian tribes and the National Tribal Chairmen's Association have intervened as amici curiae. Brief on the merits for Southern Ute Indian Tribe *et al.* as Amicus Curiae, United States v. Akin, 421 U.S. 946 (1975) (No. 74-949), *granting cert. to* 504 F.2d 115 (10th Cir. 1974). That brief, prepared by Robert S. Pelcyger of the Native American Rights Fund, is the source of much of the material presented in section III, *B, 2 infra*.

255. Squire v. Capoeman, 351 U.S. 1, 6-7 (1956); Seminole Nation v. United States, 316 U.S. 286, 295 (1942); United States v. Sandoval, 231 U.S. 28, 38 (1913); Choate v. Trapp, 224 U.S. 665, 675 (1912); United States v. Kagama, 118 U.S. 375, 381-84 (1886); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17-18 (1831).

256. United States v. Ahtanum Irr. Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied*,

rights are sufficient to fulfill the purposes for which the Indian reservations were created, regardless of when the water is put to beneficial use.[257]

The Indian tribes have always been fearful of losing their rights through the actions of state courts. The Supreme Court recognized long ago that the Indians had good cause to be apprehensive of state jurisdiction over their property.[258] The adjudication of water rights reserved for the use and benefit of Indians and Indian reservations involves questions of federal law arising under the Constitution, statutes, and agreements of the United States, and Congress vested jurisdiction over such questions in the federal district courts.[259] Thus, issues involved in the determination of the existence, scope, and measure of Indian water rights have historically been adjudicated in federal courts. In addition, state court jurisdiction has been denied where the title, right to use, or possession of any Indian property which the United States holds in trust is involved.[260]

To extend the scope of the McCarran Amendment to include Indian reserved water rights would dramatically alter this long-established relationship between federal and state jurisdiction over Indian property rights. Such an extension of the McCarran Amendment would be improper in light of the principle of tribal sovereignty, the relationship of that Amendment to other acts of

---

352 U.S. 988 (1957), *rev'd*, 330 F.2d 897 (9th Cir.), *rehearing denied*, 338 F.2d 307 (9th Cir. 1964), *cert. denied*, 381 U.S. 924 (1965).

257. For a discussion of the nature of the Indians' reserved water rights, including the right to fulfill future needs, and the purposes for which water was reserved see section II, *A supra*.

258. In United States v. Kagama, 118 U.S. 375, 383-84 (1886), the Supreme Court stated:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feelings, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

The Ninth Circuit Court of Appeals recently repeated concern on this subject. Santa Rosa Band of Indians v. Kings County, No. 74-1565 (9th Cir., Nov. 3, 1975).

259. General federal question jurisdiction is conferred on the federal district courts by 28 U.S.C. § 1331 (1970).

260. 18 U.S.C. § 1162(b) (1970); 28 U.S.C. § 1360(b) (1970). For a discussion of these statutes and 28 U.S.C. § 1362 (1970), see note 223 *supra* and notes 273-78 *infra* and accompanying text.

Congress, the provisions of various state enabling acts and constitutions, and the Amendment's legislative history. Each of these factors is a bar to subjecting Indian water rights to state court jurisdiction, as discussed below.

a. The principle of tribal sovereignty. A major purpose for the creation of reservations was to preserve Indian sovereignty and provide a place where the tribes, as sovereign entities, could conduct their affairs and enjoy their property rights without interference. In recognition of this, the Supreme Court has described Indian tribes as distinct, independent political communities[261] and has shielded their property rights from state jurisdiction since at least 1832.[262] For example, in 1973, the Supreme Court held unanimously in *McClanahan v. Arizona State Tax Commission*[263] that Arizona has no jurisdiction to levy income taxes on Indians who live and work on the Navajo Reservation. In its decision, the Court stated that questions involving state jurisdiction over Indian reservations must always be viewed against the "backdrop" of Indian tribal sovereignty.[264] This tradi-

261. In McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 168 (1973), the Supreme Court said:

> The principles governing the resolution of this question are not new. On the contrary, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." Rice v. Olson, 324 U.S. 786, 789 (1945). This policy was first articulated by this Court 141 years ago when Mr. Chief Justice Marshall held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832). It followed from this concept of Indian reservations as separate, although dependent nations, that state law could have no role to play within the reservation boundaries.

262. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 21-24 (1831). *See generally* Solicitor's Opinion, 55 Interior Dec. 14 (1934).

263. 411 U.S. 164 (1973).

264. The Court explained the principle of tribal sovereignty in these terms:

> It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens. They have the right to vote, to use state courts, and they receive some state services. But it is nonetheless still true, as it was in the last century, that "[t]he relation of the Indian tribes living within the borders of the United States . . . [is] an anomalous one and of a complex character. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." United States v. Kagama, 118 U.S. 375, 381-82 (1886).

Id. at 172-73.

tion of sovereignty and the unique nature of the Indian water rights are particularly important in determining whether the McCarran Amendment applies to the adjudication of such rights.

As political sovereigns, Indian tribes are immune from suit absent express congressional and tribal consent.[265] To preserve that immunity, the Supreme Court has recently and repeatedly held that congressional intent to subject Indians to state jurisdiction will not be lightly implied, that Congress has always been very careful about subjecting Indians to state jurisdiction, and that courts should not impute such an intention to Congress in the absence of a clear, specific, and express conferral of jurisdiction.[266] Thus, when Congress has wished the states to exercise civil or criminal jurisdiction over Indians, Congress has done so expressly.[267] Both tribal sovereignty and the congressional policy of encouraging, preserving, and protecting that sovereignty, as manifested in such statutes as the Indian Reorganization Act,[268] serve as principal reasons for requiring this kind of congressional exactitude before extending state jurisdiction over Indians.[269]

---

265. *See* Turner v. United States, 248 U.S. 354 (1919); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967); Green v. Wilson, 331 F.2d 769 (9th Cir. 1964); Morgan v. Colorado River Indian Tribe, 103 Ariz. 425, 443 P.2d 421 (1968); FEDERAL INDIAN LAW, *supra* note 219, at 492, 494 (1958). Where federal questions involving the rights of Indian tribes are involved, the Supreme Court in United States v. United States Fid. & Guar. Co., 309 U.S. 506, 514 (1940), stated as follows:

> It has heretofore been shown that the suability of the United States and the Indian Nations, whether directly or indirectly or by cross action depends upon affirmative statutory authority. Consent alone gives jurisidiction to adjudge against a sovereign. Absent that consent the attempted exercise of judicial power is void.

266. Note, for example, the Supreme Court's reference in Kennerly v. District Court of Mont., 400 U.S. 423, 427 (1971), to "[t]he comprehensive and detailed congressional scrutiny manifested in those instances where Congress has undertaken to extend the civil or criminal jurisdiction of certain States to Indian country." *See also* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Menominee Tribe v. United States, 391 U.S. 404 (1968); Seymour v. Superintendent, 368 U.S. 351 (1962); Williams v. Lee, 358 U.S. 217 (1959).

267. *E.g.*, Act of August 15, 1953, ch. 505, 67 Stat. 588. *See also* Williams v. Lee, 358 U.S. 217 (1959); Whyte v. District Court of Montezuma County, 140 Colo. 334, 346 P.2d 1012 (1959), *cert. denied*, 363 U.S. 829 (1960).

268. 25 U.S.C. §§ 461 *et seq.* (1970). *See also* Indian Self-Determination and Education Assistance Act, 25 U.S.C.A. §§ 450, 450a-n, 455-58, 458a-e (Supp. 1, 1975).

269. As stated in Williams v. Lee, 358 U.S. 217, 223 (1959):

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. . . . The cases in this court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.

The McCarran Amendment speaks of the water rights of the United States and clearly waives sovereign immunity with respect to those rights owned by the federal government for the benefit of the public as a whole. However, the Amendment is silent as to those rights held by the United States as trustee for the use and benefit of the Indians. Since the Amendment is silent on that matter and does not *expressly* grant state court jurisdiction over the party (the individual Indian or the tribe) holding an Indian water right, it should not, in light of the above-stated principles, be construed as conferring such jurisdiction. Without an express statutory grant of personal jurisdiction, state courts cannot adjudicate Indian reserved water rights. Furthermore, state courts cannot adjudicate Indian water rights unless they also have *subject-matter* jurisdiction over such rights. Thus, unless the McCarran Amendment is interpreted not only as a waiver of sovereign immunity, but also as a conferral of subject matter jurisdiction, Indian reserved water rights cannot be adjudicated in state courts. The Supreme Court has held in a similar context, however, that a waiver of federal sovereign immunity *does not* confer subject-matter jurisdiction on state courts because the "judicial determination of controversies concerning [Indian lands] has been commonly committed exclusively to federal courts."[270]

b. The relationship of the McCarran Amendment to other acts of Congress. Congress has passed a number of statutes which, unlike the McCarran Amendment, 43 U.S.C. § 666 (section 666),[271] deal specifically with Indian rights. In ascertaining the congressional intent behind the waiver of sovereign immunity in section 666, that section should be considered in relation to these other acts.[272] Two are of particular importance and, taken together, show that Congress intended that disputes involving Indian property subject to the federal trust relationship, specifically water rights, are to be adjudicated in a federal forum.

In 1966, Congress enacted 28 U.S.C. § 1362, which provides:

---

270. Minnesota v. United States, 305 U.S. 382, 389 (1939).

For an in-depth discussion of this concept and the effect of the cited case on the applicability of the McCarran Amendment see Brief on the merits for Southern Ute Indian Tribe *et al.* as Amicus Curiae, United States v. Akin, 421 U.S. 946 (1975) (No. 74-949), *granting cert. to* 504 F.2d 115 (10th Cir. 1974).

271. Hereafter in the text the McCarran Amendment is sometimes referred to as *section 666*. The appellation comes from 43 U.S.C. § 666 (1970).

272. *Cf.* Menominee Tribe v. United States, 391 U.S. 404, 411 (1968).