Underground, Undercover and Under Protected (Again): How the McCarran Amendment Eviscerates Indian Reserved Rights to Groundwater

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There has been a lot said about the sacredness of our land which is our body; and the values of our culture which is our soul; but water is the blood of our tribes, and if its life-giving flow is stopped, or it is polluted, all else will die and the many thousands of years of our communal existence will come to an end. – Frank Tenorio, Governor of the San Felipe Pueblo (1982)

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I. Introduction

Nevada has a long history of water grabbing. But then, so do all of the western states. After all, what else is appropriation other than grabbing and that is the law of water ownership in the west. In the east, where water is plentiful, water law gives everyone along a waterway the same rights. But in the west, the law is one of “first come, first served” and that first person may take all he or she can put to beneficial use, leaving little or none for late comers. That is, as long as that first person is not an Indian.

This paper will use the scenario currently playing out in Nevada in which the Southern Nevada Water Authority (SNWA) has proposed to drill wells into underground aquifers in east-central Nevada. One of the aquifers, the Snake Valley Aquifer, not only crosses state boundaries, thereby indicating that the proposed drilling is likely to impact residents in Utah dependent on the same aquifer for ranching and domestic purposes, but also abuts the Goshute Indian Reservation. The enduring legacy of the Winters Doctrine should protect any potential interest the Goshute Indians have in the water from the Snake Valley Aquifer. The Winters Doctrine, established over a century ago, states that when putting Indians on Reservations the government reserved water for the Tribes’ use so that the purpose of the Reservations could be fulfilled. However, what should be a foregone conclusion based on legal rights is complicated by the fact that the Winters Doctrine may not apply to groundwater. The Supreme Court has never addressed whether a reservation’s groundwater is included in its reserved water right.

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3 See generally, Rob Dubuc, Note, Snake Valley to Las Vegas: Keep your Pipes out of our Aquifer!, J. Land Resources & Env’tl L. 151 (2007).
Additionally, Indian reserved water rights are practically eroded by the power given to states through the McCarran Amendment.

In this paper I will set the foundation for the appropriate legal outcome of any potential dispute between the Goshute Indian Reservation and the SNWA based upon these three areas of law – the Winters Doctrine, Groundwater Law, and the McCarran Amendment. After setting up the facts of the situation, I will provide a brief history of the development of water law in the west and explain what the law is now. Then I will provide a few examples of how Indian tribes’ rights to water have traditionally been treated by white people in the western United States. An understanding of this history is important in the analysis of how a western court, in the era of the McCarran Amendment, will apply the Winters Doctrine to a groundwater dispute between the state or one of its citizens and an Indian tribe. The complete integration of these areas necessitates an explanation of the Winters Doctrine, including the case history that truly defines it, and finally, an exploration of Nevada’s groundwater law. Unfortunately, I will be forced to conclude that the once protective doctrine from *Winters*, though it logically should apply to groundwater, is for all practical purposes eviscerated by the power given to states through the McCarran Amendment.

A. Setting the Scene

At the dawn of the new millennium, the Southern Nevada Water Authority (SNWA), as part of its mission to “develop solutions that will ensure adequate future water supplies for the Las Vegas Valley”⁵ proposed a plan to gain rights to 167,000 acre-feet per year (afpy) of water. As a point of reference, the entire state of Nevada was allocated 300,000 afpy under the Colorado River Compact.⁶ This new groundwater plan would require: approximately 592 miles

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of buried water pipelines (some pipes as large as 84 inches in diameter),\(^7\) 5 pumping stations,\(^8\) 614 miles of overhead power lines,\(^9\) 5 electrical substations,\(^10\) and between 110 and 200 groundwater wells.\(^11\) All this construction is due to that fact that the water SNWA proposes to acquire is over 200 miles away, as the crow flies, from downtown Las Vegas, the primary beneficiary of the plunder. The Snake Valley Aquifer, which lies under White Pine County in Nevada and continues into the state of Utah, and the Spring Valley Aquifer which lies almost completely within White Pine County, adjacent to the city of Ely, are included in the plan.\(^12\)

It doesn’t take a natural resource expert to know that Nevada is a desert. Water located within (or under) the state is as valuable as gold once was in the original gold-rush days only now the rush is to the roulette table. Just like gold, water is limited in the arid western states. Some believe that the aquifers SNWA proposes to make use of will be resupplied (recharged) by runoff from mountain snow, but the bulk of the evidence suggests that the pools of underground water were actually created at the end of the last ice age when copious amounts of snow and ice melted, filling spaces in underground caverns and cracks. To assess water resources that would be impacted by SNWA’s proposal and under direction from the federal government,\(^13\) the United States Geological Survey (USGS), in cooperation with the Desert Research Institute and the State of Utah recently completed a 3-year-long scientific assessment of the “hydrologic processes that influence groundwater resources”\(^14\) in White Pine County, Nevada and adjacent areas. Through extensive research, the report shows a complicated interconnected system of

\(^7\) Southern Nevada Water Authority, *supra* note 2 at 1-3 and 2-46 (367 miles from first proposal and approximately 265 from further development of groundwater resources).
\(^8\) Id. at 1-3 and 2-47 (5 from first proposal and three from further development).
\(^9\) Id. (349 from first proposal and 265 miles of additional power lines and poles from further development as proposed).
\(^10\) Id. (2 substations from first proposal and three from further development)
\(^11\) Id. at 2-1.
\(^12\) See Id. map p. 1-5.
recharge and discharge between three separate mountain ranges (Snake, Egan and Schell Creek) and nine valleys with their accompanying aquifers (Snake, Spring, Tippet, Steptoe, Lake, White River, Butte, Long, and Jakes) with water flowing in all directions. Researchers talk about the discharge to recharge values as forming a budget. It is helpful for us to think of this as a monetary budget. The winter snows and rain recharging the aquifer is like money earned (putting money into the bank). Water discharge is like using a check card for that bank account to make purchases (money leaving the bank). The variety of water budgets range from Steptoe Valley which has a recharge that exceeds its discharge by 50,000 afpy to White River Valley which has a discharge that exceeds its recharge by 40,000 afpy. Thus, Steptoe Valley maintains a nice savings, but White River Valley has a high credit card balance. Unlike people, the valleys seem to live somewhat communally. Much of the excess recharge from Steptoe Valley supplies the deficit in White River Valley. For the entire study area, “the difference between recharge and discharge indicates that about 90,000 acre feet of ground water exits the study area by subsurface outflow.”

All these numbers were evaluated under pre-development conditions. Under current development conditions, one of the largest aquifers and one which SNWA proposed to tap into, the Snake Valley Aquifer which has an annual groundwater discharge of 29,000 afpy, is currently getting pumped out at 24,000 afpy, thus leaving 5,000 afpy unallotted. Think of this like the amount of excess cash available for the reservoir to give to additional water users. Development is currently using nearly all the available “excess” of groundwater from this aquifer. Although the report found a significant amount of water stored in these aquifers (36 million acre feet of water stored within 100 feet of the surface – 9 million in Snake Valley

Aquifer, the largest\textsuperscript{16}), any development above what already exists would tap into these resources rather than simply using the “excess.” Thus reducing the amount of water in the aquifers and negating any potential recharge expected. “When pumping ceases, water levels will not recover to previous levels if the amount of water removed is not replaced by an equal amount or if the declines may have altered the hydraulic or physical properties of the aquifer.”\textsuperscript{17}

B. The Goshute Indian Reservation

One of the communities striving to live in this arid climate are the Goshute Indians. Similar to most American Indian Reservations, the Goshute Reservation was established by treaty, this one in 1863.\textsuperscript{18} The 112,000 acre Reservation is located in White Pine County, Nevada at “the southern one-third of Deep Creek Valley, a portion of Tippett Valley to the west and Pleasant Valley (Snake Valley) to the south.”\textsuperscript{19} This puts the reservation at the most northern tips of the Snake and Tippett Valley Aquifers. According to the USGS report, discharge from Spring Valley runs through Tippett Valley and through the Reservation.\textsuperscript{20} A complete and accurate understanding of how the Reservation’s water is impacted by the flow of water in the study area was not addressed by the USGS. This is unfortunate, but not unexpected given the historical treatment of Indian water rights in the West. The Bureau of Indian Affairs states that the Goshute’s surface water comes primarily from the Deep Creek Mountains (a range not included in USGS’s research) but that there are numerous springs in the valley whose origins are unknown.\textsuperscript{21} It is possible, according to the 2007 USGS report, that these springs and other man-made wells on the reservation are supplied by the same water the SNWA would divert through

\begin{itemize}
\item \textsuperscript{16} Id. at 43.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} 13 Stat. 681-684 (Other sources state that Executive Order No. 1539 in 1912 established the original 160 acres).
\item \textsuperscript{19} BIA Summary for Goshute Indian Reservation, http://water.nv.gov/hearings/spring%20valley%20hearings/USBIA/BIA_summary.pdf (last visited April 16, 2008).
\item \textsuperscript{20} Water Resources, supra note15 at 6.
\item \textsuperscript{21} BIA Summary, supra note 19.
\end{itemize}
their groundwater development proposal. As sections III and V of this paper explain, determining where groundwater comes from and how much is available is one of the issues that must be addressed when determining water rights.

Another important piece of information necessary for making water right determinations is the amount of land that could be put to beneficial use if it had water to support that use.22 “Today, the Goshute Tribe derives its income largely from ranching and leasing rangelands.”23 There are an estimated 34,410 potentially irrigable acres on the reservation.24 They also maintain fish hatcheries to propagate Bonneville and Lahonton cutthroat trout. The Lahonton trout is listed as threatened under the Endangered Species Act.25

II. Western Water Law

A. Prior Appropriation

Following the California gold rush, miners spread throughout the west as some of the first settlers to areas. Mining adhered to the rule that whoever first staked a claim to an area had the sole right to mine that area (“first in time, first in right”26). The work required use of water for separating soil from gold. Miners directed water their way, if none was available on site, from the nearest creek. It was only natural for the miners to treat their right to the water the same way they treated their right to the gold they were mining.27 Thus, the birth of appropriation in water law arose. As population grew, ranching and farming families coming to the West

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22 See Section III of this paper.
24 Id.
26 David H. Getches, Water Law in a Nut Shell, 6 (West Publishing 1997).
followed the same assumptions of rights to water as did the miners. It served the ranching and farming purposes just as well as it had served miners. Especially in arid areas, those who homesteaded first were able to gain a sense of security through their belief that the water they appropriated for their use could not be taken away or used, even by someone higher up the watercourse, in such a way as to damage their property value and livelihood. This new form of water law was recognized by the federal government as early as 1866 in an act in which the U.S. Supreme Court stated that:

rights of miners, who had taken possession of mines and worked and developed them and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect, before the passage of the act of 1866.

Even through political development and federal attempts to change the law, appropriation held out as the law in the west and is now, generally, the law today. A modern statement of prior appropriation defines it as “Rights . . . belong to anyone who puts water to a ‘beneficial use’ anywhere . . . with superiority over anyone who later begins using water.”

B. Prior Appropriation Applied to Indians

Not all homesteaders were able to take advantage of the law of prior appropriation. This was not because all the water was allotted but because, for later settlers, the closest water source was not located on their property and they did not have the money to divert it for their use. With the political push for settlement, the federal government was pressured to do something to help the settlers obtain needed water. The Reclamation Act of 1902 was to be the savior of arid-

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28 Id. 234.
30 Wilkinson, supra note 27, at 238-40 and 243-45.
31 California and Oregon use a dual system of both riparian doctrine and prior appropriation.
32 Getches, supra note 26, at 6.
33 Wilkinson, supra note 27, at 242.
land farmers but it also proved to be the enemy of Native American Tribes. The Act was not meant to enable later settlers to take water away from earlier settlers. The law of prior appropriation was now firmly established, protecting early settlers who were putting water to beneficial use. The Act was meant to enable later settlers to take the “extra” water not already being put to beneficial use through dams and other improvements. Indians, however, were not given the same benefits of the law of prior appropriation as white settlers were even though most reservations were established prior to the Reclamation Act of 1902 and were thus already using water on their reservations at the time dams began to divert that water.

1. Pyramid Lake

Nevada had the honor of having the first dam built under the Reclamation Act. The Derby Dam, built in 1905 on the Truckee River, diverted water bound for Pyramid Lake on the similarly named Pyramid Lake Indian Reservation. “The Pyramid Lake Paiute occupied the lake area when it was first mapped by John C. Fremont in 1844.” Fifteen years later, the Bureau of Indian Affairs (BIA) set the area aside for the Northern Paiute. President Grant created the Reservation by Executive Order in 1874. The lake housed a population of Lahonta cutthroat trout that tribal members relied on as fishermen. The Lahonta cutthroat trout are now listed as threatened under the Endangered Species Act due to the increased salinity of the lake caused by the reduced inflow of fresh water. No concern was shown for the rights the Indians had over the use of the water on their reservation when the decision was made to build the dam.

35 Id. at 1188-89.
36 Id.
From 1913 to the present, the Pyramid Lake Reservation has been embroiled in litigation attempting to secure water rights and keep water in the Truckee River and Pyramid Lake. The first litigation lead to a settlement recognizing 32,000 afpy of reserved water from the Truckee River for tribal irrigation. This allocation left excess water for other users, but the Tribe needed to preserve the water for fishing purposes, so in 1972, the Pyramid Lake Paiute Tribe sued the federal government for violation of its trust obligation and won. The District Court ruled “that the government had breached its fiduciary responsibility by allocating excess water on the basis of a ‘judgment call’” and ordered that a more “closely developed” plan be formulated to preserve water for the tribe. The federal government attempted to do this the following year by reopening the first water allocating decree in order to preserve Truckee River water for the Tribe’s fisheries, but the Supreme Court shut them down on res judicata grounds, concluding that Congress had not violated its trustee relationship with the tribe. After this point, the tribe has “used Nevada state water law . . . to secure additional instream flows in the Truckee River and into Pyramid Lake.”

2. The San Juan-Chama Project

One might excuse the federal government for treading on the water rights of the Northern Paiute, even though it arguably had the duty to protect those same rights under the federal trust responsibility, since the Pyramid Lake debacle occurred prior to the formation of the Winters Doctrine discussed below. However, no similar excuse is available for the government in the

37 Id. at 1190-93.
39 Id. at 256.
41 Blumm, supra note 34 at 1191.
42 See infra Section III.
San Juan-Chama Project. Motivated by the “use it or lose it” mentality of western water development, New Mexico embarked on a multi-million dollar project that diverts 110,000 afpy of water from the San Juan River, near Farmington, to the Rio Grande, over 140 miles away, primarily to supply the city of Albuquerque. The project was authorized in 1962 after nearly 3 decades of research and political wrangling, and more than half a century after the 1908 *Winters* decision.

Instead of taking water directly from the San Juan River, the San Juan-Chama project dammed its tributaries. The Navajo River, one of the tributaries now dammed, is the “only year-round stream on the entire 750,000 acre reservation” of the Jicarilla Apaches. What was once a seasonally raging river is now a quiet, constantly flowing trickle. The Jicarilla Apaches were granted reservation land in 1887 after two treaty attempts and two executive orders had failed during the previous forty years. Located in a remote, high mountain area, the fiercely independent tribe thought they were now safe from further intrusion by white men. Given the *Winters* doctrine, one would think they were right. Charles F. Wilkinson in his book *Crossing the Next Meridian: Land, Water, and the Future of the West* states:

> On paper, there was no problem. The Jicarilla Apaches had an unimpeachable legal right, superior to that of Albuquerque or any other participant in the San Juan-Chama project, to Navajo River water. Further, the tribe already had been making good use of the water before the San Juan-Chama Project ever went on line – the Jicarilla Apaches had developed a prosperous recreational fishery in the scenic Navajo River Canyon for native cutthroat and rainbow trout.

However, the reclamation project went forward and the Jicarilla Apaches were left to litigate after the fact. It should have been an easy case, the tribe was already putting the water to

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43 Wilkinson, *supra* note 27 provides a picturesque description of the Navajo River and the San Juan-Chama Project at 219-30.
46 *Id.* at 225.
beneficial use, the Supreme Court had stated in *Winters* that establishment of a reservation brought with it an implied right to the water necessary for operations of the tribe on the reservation land, and New Mexico’s claim of beneficial use was for recreational purposes (a use never before identified as “beneficial”). The water diverted from the Jicarilla Apaches was not needed yet, so it evaporated from canals and sat in reservoirs used for recreational purposes. The Circuit Court did think it was an easy case\(^{47}\) but, that same year, the federal government enacted Public Law no. 97-140\(^{48}\) which explicitly made recreation an authorized beneficial use for San Juan-Chama water thereby overriding the court opinion.

The San Juan-Chama Project’s impact on the Jicarilla Apache Tribe shows that trying to regain lost water rights is, for all practical purposes, impossible. Once a multi-million dollar project is completed, or even just started, the political pressure to protect that investment is great, no matter the injustice. This also stands as one of many examples of how Indian water rights have historically (sometimes not too far in the past) been treated by local, state, and federal government.\(^{49}\) That history is not one to be proud of.

### III. The Winters Doctrine

In January, 1908, the U.S. Supreme Court decided a case and created a rule that seemed to protect Indians from the kind of treatment that occurred at Pyramid Lake in 1905. The opinion recognized Indian rights to water from the time a reservation was established; an even greater right than that of prior appropriation.\(^{50}\) The Fort Belknap Indian Reservation in Montana was created by an Act of Congress on May 1, 1888. The United States Government set apart 650,000 acres on which the Gros Ventre and Assiniboine bands of Indians could live in exchange for their

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\(^{47}\) Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).


\(^{49}\) For more examples see Blumm, et. al. *supra* note 33.

\(^{50}\) Winters v. United States, 207 U.S. 564 (1908).
ceding the surrounding lands for settlement. One side of the reservation bordered on Milk River.
Near this river, the Indians grazed their cattle and horses, because the water made the land
productive as pasture. In 1889, the government diverted 1,000 miners’ inches of water from the
Milk River to recently built houses on the reservation. The water was used for domestic purposes
and irrigation. In that same year, the case estimates that 10,000 miners’ inches of water were
being used to irrigate 30,000 acres.51 Eleven years later, cattle ranchers lawfully settled the area
on the opposite bank of the Milk River. The settlers organized an irrigation company to
cooperatively dam the Milk River and build canals to divert the water for their multiple irrigation
and domestic use purposes. The settlers, following the proper law of the time, posted notices on
the river of intended diversion and appropriation as well as filed notices in the county office.
They had found no record of any prior users. When the government brought suit against Winters
and the other settlers, there was a small community, including churches, schools, highways and
“other improvements usually . . . enjoyed in a civilized community,”52 dependent on the water
diverted from Milk River.

Justice McKenna, in writing for the court, looked at what the 1888 Act had created –
what was ceded by the Indians and what was not, and what the purposes were for creating a
reservation. He restated what is often written in treaties creating Indian Reservations: the
purpose of such reservation is to “civilize” the Indians. Originally, the Indians roamed vast areas
“adequate for the habits and wants of a nomadic and uncivilized people.”53 Once they were
restricted to the smaller reservations, the government proposed to civilize them by teaching them
agriculture and ranching skills. In order for this purpose to be fulfilled the Indians would need
adequate irrigation. Therefore, resolving ambiguities in the treaty in favor of the Indians, the

51 Id. at 566.
52 Id. at 569.
53 Id. at 576.
court found an implied reservation of the water necessary for the purpose of the reservation and
that such reservation of water began on May 1, 1888, the day Congress created the reservation.\textsuperscript{54}
From this simple beginning, the Winters’ Doctrine was created.

A. Filling in the Gaps: 1908-1976

In May, 1908, the 9\textsuperscript{th} Circuit applied this doctrine in, \textit{Conrad Investment Co. v. United
States}, a nearly identical case.\textsuperscript{55} The Blackfeet Indian reservation was also created May 1, 1888
and the infringers, a Montana corporation, began to divert water from the river bordering the
reservation in 1890. The Circuit court reiterated the civilization rationale for implying a reserved
water right on reservations and went on to say that

what amount of water will be required for these purposes may not be determined
with absolute accuracy at this time; but the policy of the government to reserve
whatever water of Birch creek may be reasonably necessary, not only for present
uses, but for future requirements, is clearly within the terms of the treaties as
construed by the Supreme Court in the Winters Case.\textsuperscript{56}

The Montana corporation did not entirely lose out; the lower court determined how much water
the Reservation needed and allowed the defendant to have the excess. Thus, the court began
playing its role of determining the quantity of water that was reserved for Indian use on
Reservations based on both use and need.

The 9\textsuperscript{th} Circuit decision was in accordance with an amended act for the survey and
allotment of lands in the Flathead Reservation.\textsuperscript{57} The Act of May 29, 1908 provided in part that
“the land irrigable under the systems herein provided, which has been allotted to Indians in
severalty, shall be deemed to have a right to so much water as may be required to irrigate such

\textsuperscript{54} Id. at 577.
\textsuperscript{55} 161 F. 829 (9\textsuperscript{th} Cir. 1908).
\textsuperscript{56} Id. at 832.
\textsuperscript{57} Act of May 29, 1908, ch. 216, Pub. L. No. 60-156, §9, 35 Stat. 444 (1908).
lands . . .” In *United States v. McIntire*, Agnes McIntire challenged this provision.\(^{58}\) She believed that her predecessor in interest had acquired water rights in Mud Creek in 1907 when, as an Indian on Indian land, he filed a notice of appropriation of 560 inches and recorded the interest. The Flathead Irrigation System did not build their dam and canal until 1914. The general allotment act required that, in the event that the supply of water was insufficient to furnish the amount required by each Indian on a Reservation, then a ‘just and equal distribution’ of the water would be determined by the Secretary of the Interior.\(^{59}\) Unfortunately for Agnes, the allotment act did not apply to her since her predecessor had not been allotted his water rights by the Secretary of the Interior but by other means. Later cases concluded that Indians allotted land with accompanying water rights could sell the land and the new owner would also retain the water right.\(^{60}\) *McIntire* is important for two additional facts. First, the court affirms federal control over Indian water rights when it states that “the Montana statutes regarding water rights are not applicable because Congress at no time has made such statutes controlling in the reservation.”\(^{61}\) And second, the discussion that the United States could not be sued without consent is a good example of the role federal courts and laws played in Indian water-rights disputes prior to the McCarran Amendment.

**B. Quantification of Indian Reserved Water Rights**

Several cases developed the basis for determining the quantity of water reserved under Indian reserved water rights. The first case arose in 1956, when the 9th Circuit was able to reaffirm and flesh-out its statement made in *Conrad Investment Co.*, that the reservation of water was not merely for present but for future uses, when it provided direction for an ultimate remand

\(^{58}\) 101 F.2d 650 (9th Cir. 1939).

\(^{59}\) 25 U.S.C. 381, Feb. 8, 1887, ch. 119, § 7, 24 Stat. 390 (1887); as quoted in McIntire, 101 F.2d 650 at 654.

\(^{60}\) See Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) and In re Rights to Use Water in the Big Horn River System, 899 P.2d 848 (Wyo. 1995).

\(^{61}\) 101 F.2d 650, 654.
in United States v. Ahtanum Irrigation District.\textsuperscript{62} The Yakima Indian Reservation in the State of Washington was created by treaty in 1855 (ratified by the Senate in 1859).\textsuperscript{63} Its northern boundary was the Ahtanum Creek. In 1908, the Secretary of Interior entered into an agreement with white settlers granting them 75\% of the flow of Ahtanum Creek with the remaining 25\% allocated to Indians on the Yakima Reservation. The issue of interest for this paper was whether this agreement was binding nearly 50 years later. Winters had established the fact that the “Treaty of 1855 reserved rights in and to the waters of this stream for the Indians.”\textsuperscript{64} But, how much of that water did they have rights to? In answer to this question, the court reiterated what it had said before: “It is obvious that the quantum is not measured by the use being made at the time the treaty reservation was made. The reservation was not merely for present but for future use.”\textsuperscript{65} The court then reasons its way to the conclusion that though the Indians may only have been using 25\% of the water in 1908, they were not limited by this original allotment, since they had a reserved right to as much water as they may need in the future.\textsuperscript{66} Referencing both the Winters and the Conrad decisions, the 9th Circuit recognized that at the time treaties create Indian Reservations, Indians are not generally making full use of the irrigable potential of the land because they are only beginning to be ‘civilized’ and learn the ways of agriculture. Any water not being used at the time could be used by white settlers, but that allotment would change as the Indians developed and began to use more of their land for agriculture.\textsuperscript{67}

\textsuperscript{62} 236 F.2d 321.
\textsuperscript{63} 12 Stat. 951 (1855) as quoted in Ahtanum supra note 62.
\textsuperscript{64} Id. at 325.
\textsuperscript{65} Id. at 326.
\textsuperscript{66} Id. at 327 (“the paramount right of the Indians to the waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation.”); see also 336-37 (where the court comes to the conclusion that the Secretary of State did have the power to make this agreement but did so improvidently).
\textsuperscript{67} Id. (the court explains that both the Milk River and Birch Creek had improvements made on them, after the date of the treaties, which made more water available to and used on the Indian Reservations); see also 335 (“The rights of
Seven years later, the Supreme Court weighed in on this issue in *Arizona v. California*. Known primarily for its determination of the Lower Basin states’ rights in Colorado River water according to the Colorado River compact, the court was also called upon to answer the claims of the United States for water used on Indian Reservations. After reasserting the holding in *Winters*, the Supreme Court added that “the water was intended to satisfy the future as well as the present needs of the Indian Reservations and . . . enough water was reserved to irrigate all the practicably irrigable acreage on the reservations.” Restated, “the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.” The Supreme Court clarified this determining factor in *Cappaert v. United States* by stating that “when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation.” The court believed that this was implied by *Winters* and *Arizona v. California*. Therefore, if the purpose of an Indian reservation is to civilize the Indians and make an agrarian community out of them, then “irrigable acreage,” will be the measurement. But when the purpose of an Indian reservation includes other purposes (e.g., hunting and fishing) then there will have to be a different means used to quantify the water necessary to support those purposes.

**IV. The McCarran Amendment**

Typically, water law is state law, but the federal government owns a lot of land and accompanying water rights in Western states. Consistent with the western conservative value of

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69 Id. at 595.
70 Id. at 600, emphasis added.
71 Id.
73 Id. at 139.
state rights, those states grew increasingly bitter concerning the federal government’s power over such a valuable natural resource. In a move similar to those made earlier in American history, the federal government again conceded to the Western water law of prior appropriation and in 1952, passed what is known as the McCarran Amendment. This amendment waives United State’s sovereign immunity in the class of suits involving state water disputes. The current version of this law uses the same language as the original 1952 statute and states:

Consent is 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.

A. Interpretation of the McCarran Amendment

The first attempts by states to make use of the McCarran Amendment failed. For example, within only a couple of years, the United States Attorney General “ordered federal attorneys to withdraw from pending stream adjudications on the basis that they were not comprehensive proceedings.” Senator McCarran, himself, had stated that the purpose of the Amendment was

to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.

77 Senator McCarran’s statement to Senator Magnuson reported in United States v. District Court in and for the County of Eagle, 401 U.S. 520, 525 (1971) (emphasis added).
This legislative history may have been at least one of the elements that lead to the Attorney General order and contemporary dismissals of other court cases. States didn’t act on the requirement of having a “comprehensive proceeding” until after the United States Supreme Court decided *Dugan v. Rank* in 1963 \(^78\) and made it clear that the United States could only be joined in proceedings that “included the water rights of all claimants on a given stream system.” \(^79\) Thereafter, several states began adapting their laws to ensure McCarran Amendment application. \(^80\)

The United States Supreme Court reaffirmed this requirement and also answered the question of whether federal reserved rights could be adjudicated in state courts in *United States v. District Court in and for the County of Eagle*. \(^81\) A Colorado court had issued notice to all owners and claimants of water rights in Eagle River and its tributaries, including the United States pursuant to the McCarran Amendment, of water-right adjudication. The United States water interests in Eagle River were on a National Forest. The United States claimed that its reserved water rights did not fit within the Amendment language. However, the Court stated that the clause “‘rights to the use of water of a river system’ is broad enough to embrace ‘reserved’ waters.” \(^82\)

Five years later, the United States brought suit in the United States District Court for the District of Colorado for adjudication of Indian water rights. Subsequently, one of the defendants brought suit in state court to adjudicate the same claims. In *Colorado River Water Conservation District v. United States (Akin case)* \(^83\) the Court clarified jurisdictional issues. The first question

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80 Id. at 333.
81 401 U.S. 520 (1971)
82 Id. at 524.
was whether the District court or the state court had jurisdiction over the claims. Title 28 U.S.C. 1345 provides: “Except as otherwise provided by act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.” Justice Brennan, writing for the Court, held that “the McCarran Amendment in no way diminished federal-district-court jurisdiction under (29 U.S.C.) 1345,” thus meaning that both state and federal courts had continuing jurisdiction in water disputes. The second question was whether the McCarran Amendment extended state jurisdiction over Indian reserved water rights. The Court referred to Eagle and its companion case and then stated that the “logic of those cases clearly extends” to Indian reserved water rights. Thus, the McCarran Amendment gave states jurisdiction to adjudicate Indian reserved water rights along with all other interested parties. Since the purpose of the McCarran Amendment was to improve efficient water-right adjudication by requiring that all users be involved in and bound by those adjudications, it would not make sense not to include the “ubiquitous nature of Indian water rights in the Southwest.” Then Brennan makes a fateful statement: “Indian interests may be satisfactorily protected under regimes of state law.” His faith in state courts, whether well founded or not, led him, on behalf of the Court, to conclude that the dismissal in the federal case in favor of the state one was proper.

The judicial leaning in favor of state courts over federal ones in water adjudication was pushed off the fence and onto the side of state courts in Arizona v. San Carlos Apache Tribe of

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84 Id. at 809.
85 Id. at 810.
86 Id. at 811.
87 Id. at 812.
Arizona. This was a consolidation of three cases from the 9th Circuit. In each case, an Indian tribe or the United States on behalf of an Indian tribe had brought a claim in federal district court for adjudication of the Indian reserved water rights. Subsequent to these claims, other parties brought claims in state court and moved to dismiss the federal cases. The District courts had been waiting for determination of the Akin case and once decided they dismissed the cases pending before them in favor of state court actions, similarly as the Supreme Court had done in Akin. However, the 9th Circuit reversed these dismissals based on the state enabling acts which reserved “‘absolute jurisdiction and control’ over Indian lands in the Congress of the United States.”\(^{89}\) The Supreme Court, in turn reversed, stating that State courts do have jurisdiction over Indian water rights regardless of Enabling Act language because “whatever limitation the Enabling Acts or federal policy may have originally placed on state court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment.”\(^{90}\) Even though the McCarran Amendment does not take jurisdiction away from federal courts, it is now clear that the Supreme Court believes state courts are the more appropriate forum for water right disputes. In San Carlos, The Court upheld the District Court dismissals of the pending water right cases based on the following considerations: (1) both claims cannot go forward since this may lead to “duplicative litigation, tension and controversy between the federal and state forums, hurried and pressured decisionmaking, and confusion over the disposition of property rights;”\(^{91}\) (2) the policy of the McCarran Amendment is to avoid “piecemeal adjudication of water rights in a river system;”\(^{92}\) (3) state courts have “the expertise and administrative machinery available”\(^{93}\) for

\(^{88}\) 463 U.S. 545 (1983).

\(^{89}\) Id. at 549.

\(^{90}\) Id. at 564.

\(^{91}\) Id. at 569.

\(^{92}\) Id. at 552.

\(^{93}\) Id. at 570.
these adjudications; and (4) the federal suits had not progressed so far that “dismissal would itself constitute a waste of judicial resources.”

State Courts had won the long battle. After three decades of wrangling, it is now settled that the most appropriate forum for water right adjudication lies with the states. The adjudication must be comprehensive (include all right holders in the stream or river to be adjudicated), it must include the United States as federal reserved water rights holder, and Indian water rights are not only subject to the same adjudication but must be part of it in order for it to meet the requirement of being comprehensive. In fact, if the federal government or Indian Tribes do not assert their rights at proceedings which they are given notice of, they may lose those rights. Indians’ fears that states would be “inhospitable” to Indian rights are only protected by the fact that state courts must follow federal law and that state court decisions are subject to Supreme Court review. Only time would tell whether the Supreme Court’s trust in State courts was well placed.

B. Application of the McCarran Amendment

A recent review of five state court water right adjudications found that the Court’s “optimism was quite misplaced.” Although expected to apply federal law, each state court has interpreted those laws in different ways. For example, the Klamath Tribes reserved water rights are subject to quantification and administration under the Klamath Basin Adjudication initiated by the state of Oregon in 1975 and governed by an administrative agency that excludes certain classes of water rights holders. As a result, “although the federal courts acknowledged the tribes’ paramount water rights nearly a quarter-century ago” the state is still waiting on the administrative quantification before they will protect those rights. The Klamath Tribes’ treaty

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94 Id. at 569.
95 Id. at 571.
96 Blumm, supra note 33, at 1158.
97 Id. at 1169.
allowed them to hunt and fish, but fishing requires water and the water has not yet been protected. As a result, “Klamath River salmon runs have reached critically low levels, requiring the closure of the off-shore salmon harvesting along the Oregon and northern California coasts.”

A brief review of other state adjudications shows that Wyoming has refused to recognize reserved water rights for fisheries even though other courts have recognized such rights or to allow Tribes to transfer irrigation water to other uses even though the Supreme Court has upheld this right. The Washington Supreme Court, while acknowledging that the 1855 treaty establishing the Yakama Reservation had reserved to the Tribe a fishing right, refused to find that the Yakima Basin dam had either terminated or abrogated the tribe’s fishing rights but found it had only encroached upon them and that such encroachment was permissible. This “interpretation of diminishing – or partially abrogating – treaty rights, despite a lack of clear intent to abrogate, was inconsistent with Supreme Court standards.” There are more inconsistencies: Wyoming and Arizona disagree as to whether groundwater can be the subject of reserved rights claims, Arizona has replaced the federally created irrigable acreage measurement with a two-part feasibility test, and the tribes are resorting to seeking rights to unappropriated water through applications submitted to the state engineer. “These new tribal water rights are junior to existing rights and are subject to state law.”

It appears that the Winters’ Doctrine has been abrogated by the McCarran Amendment.

What started out as a federally reserved right for Indians, created with the signing of a treaty, has

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98 Id. at 1170.
99 Id. at 1173.
100 Id. at 1175.
101 Id. at 1180.
102 Id. at 1186.
103 Id. at 1187.
104 Id. at 1193 (The Pyramid Lake Paiute Tribe submitted applications to the Nevada state engineer).
105 Id.
become a right to be determined alongside other water users in the state and according to state bias. Though it took 30 years for the McCarran Amendment to get its teeth, it took less than a decade for those teeth to wreak havoc on the rights of Indians. The United States Supreme Court and the federal government, once again succumbed to the political pressure of western water law interests. The legitimate desire to have comprehensive water adjudications for each stream has been used as a tool that allows “the more experienced and local state courts” to adjudicate those rights in a manner that has caused Indians to lose what was before deemed reserved. A Colorado Supreme Court Justice has indicated that state judiciary who are elected may be too prone to political pressures to be expected to follow federal precedent rather than state interests. A federal right should be determined the same no matter where it occurs, but that is not now the case. As stated by Michael C. Blumm:

> In short, by authorizing state courts to interpret federally-reserved water rights, the McCarran Amendment has forced tribes into hostile forums in which tribes must be prepared to compromise their claims for streamflows that fully support the purposes of the reserved rights . . . . in practice the McCarran Amendment Era has reduced these claims to mere bargaining chips rather than vehicles for achieving the purpose of reservations. . . .

V. Groundwater

A. The Development of Hydrological Sciences and Its Impact on Water Law

For legal purposes, ground water has traditionally been divided into (a) subflow of surface streams, (b) underground streams, and (c) percolating waters. The first is the least common, but sometimes a surface stream does go underground when the ground becomes very porous. Percolating water is stored in underground crevices, cracks and spaces. Under

\[107\] *Id.* at 1161.
\[109\] See for example Idaho’s lost rivers that re-emerge at Thousand Springs waterfalls.

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common law developed by state courts in the nineteenth and twentieth centuries, landowners were considered the owners of any percolating water beneath the land, just as they owned any other natural resource attached to the land, such as oil, gas, or mineral deposits.”

Underground streams “must have substantially the same characteristics as a surface stream, including a channel and a well-defined bed and banks, and a current of water.” An underground stream may be “subject to the law of surface streams rather than groundwater” whereas an aquifer would be subject to groundwater laws. Rights to these underground waters have at various times and places been “classified as overlying, appropriative, and prescriptive.” Historically, underground waters were found to be so mysterious that they were difficult to regulate. In states following the law of prior appropriation, generally those who drill a groundwater well and put that water to beneficial use are protected from wells drilled at later dates. Therefore, if the first well’s production is reduced the owner of the later well must discontinue use. However, the complexity of some groundwater systems can at times make such a causation difficult to ascertain. For example, if several wells are drilled over a period of time, perhaps at quite a distance from the first well, that first well owner may not feel the impact for a number of years and thus not be able to prove that use of the later wells is what has caused her own loss. With general changes in climate and weather, the other parties have grist to argue that the changing water conditions have primarily impacted the first well.

Modern Hydrologists are much better at determining the existence, extent, and flow of subterranean waters than in the past. They also have the means of quantifying water in aquifers

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112 109 ALR 395(c)(1).
113 Getches, supra note 110, at 242.
114 78 Am. Jur. 2d §213.
115 Getches, supra note 110 at 8.
with tools that were unheard of only a few decades ago. Relying on geological analysis, it can be determined which kinds of rocks underlie and surround potential aquifers. This information helps determine how accessible the water is. For example, “the greater the porosity, the more freely water can move through the rock and the more water that can be stored within.”116 The extensive study performed by USGS discussed above used older techniques of “(d)rilling records and accompanying geophysical logs for oil and gas wells and exploration wells . . . to understand down-hole lithology and stratigraphy, to estimate relative permeabilities of different rock types. . . .” as well as modern technology that assesses “density, magnetic, electrical, and acoustic properties of different rocks in a way that provides additional insight into the subsurface geology. Detailed gravity, magnetic, electromagnetic, and seismic geophysical data are used to identify faults, subsurface structure, and the interconnectivity of adjacent basins.”117 With these more accurate measures of groundwater, States and courts are better able to issue appropriate permits and monitor water rights than in the past. The proposition that a court or administrative agency must know the amount of water available before allocating it is now much more of a reality.

B. The McCarran Amendment Applied to Groundwater

The legal question, for purposes of this paper, is whether the McCarran Amendment applies to groundwater. You will remember that the Amendment applies to adjudication of water rights in a “river system or other source.”118 In the General Adjudication of all Rights to use Water in the Gila River System and Source,119 the Supreme Court of Arizona, in emphasizing the necessity of comprehensive adjudication of water rights, rejected the City of Phoenix’s claim that

116 Id. at 237.
the court could not include non-appropriable groundwater. The United States argument that Oregon’s Klamath Basin adjudication did not meet the McCarran Amendment requirement of comprehensiveness because it “failed to include groundwater claims” was rejected by the 9th Circuit. The 9th Circuit made a textual interpretation of the Amendment, focusing on the word, “or” which implies that an adjudication can be comprehensive of a river system or comprehensive of other sources. The reasoning was based on a legal need to limit the extension of what “comprehensive” means in relation to the McCarran Amendment. Since all water is necessarily interrelated, a truly comprehensive adjudication could get out of hand. The legal system has historically treated groundwater and surface water distinctly, for example applying the law of appropriation to surface water and riparian law to groundwater. The 9th Circuit concluded that even though there is a trend toward a greater legal recognition of the connection between ground and surface waters, that recognition is too recent and too incomplete to infer that Congress intended to require comprehensive stream adjudications under the McCarran Amendment to include the adjudication of groundwater rights as well as rights to surface water.

By dismissing the United State’s argument, the 9th Circuit implied that the McCarran Amendment does apply to groundwater. However, groundwater adjudications and surface water adjudications do not have to be administered in the same proceeding in order to meet the comprehensiveness requirement. The general belief is that McCarran Amendment language is broad enough to encompass groundwater adjudication. And, since previous cases state that Indian reserved rights are included in the federal rights that may now be adjudicated in state

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120 Id. at 744.
121 44 F.3d 758 (1994).
122 Id. at 768.
123 Id. (“On its face, the statute applies to the ‘water of a river system or other source.’ Groundwater may be included as an ‘other source,’ but the use of ‘or’ strongly suggests that the adjudication may be limited to either a river system or some other source of water, like groundwater, but need not cover both.”).
124 Id. at 769-70.
courts, Indian reserved rights in groundwater may be adjudicated in state courts if they have such rights.

C. The Winters Doctrine Applied to Groundwater

Traditionally, Indian reserved water rights applied to water within or on the boundary of reservations. Only after the institution of the McCarran Amendment was the question asked as to whether Indians also had rights to groundwater. Thus, this determination has, in large part, been made on a state-by-state basis. “The developing majority opinion of state and federal courts is that the Winters doctrine of tribal reserved water rights encompasses groundwater as well as surface water.” For example, Arizona holds that a reserved right to groundwater exists despite its bifurcated system of water rights. In Arizona, the law respecting surface water is the law of prior appropriation. However, the law regulating groundwater has traditionally been the doctrine of reasonable use. Historically defined “subflow” waters are “governed by the same law that governs the stream.” Even though the court, in In re Gila River, recognized that this bifurcated system is based on a misunderstanding of hydrology, it declined to change the law, but still found that the two ‘types’ of water could be regulated by the Winters Doctrine as well as under the McCarran Amendment. Wyoming, in In re All Rights to Use Water in the Big Horn River System, declined to find a reserved right in groundwater even though it recognized that logically, both surface water and groundwater should be reserved as both are necessary for the purposes of Indian reservations. Montana has implicitly found a reserved right to

126 989 P.2d 739, 746.
127 Id. at 743 (“The doctrine of reasonable use permits an overlying landowner to capture as much groundwater as can reasonably be used upon the overlying land and relieves the landowner from liability for a resulting diminution of another landowner’s water supply.”).
128 Id.
129 753 P.2d 76 (Wyo. 1988).
130 Id. at 99.
groundwater. The District Court in Montana stated that “the same implications which led the Supreme Court to hold that surface waters had been reserved (to benefit the Indian Reservation) would apply to underground waters as well.” And, “most recently, a federal district court in Washington held unequivocally that ‘reserved Winters rights on the Lummi Reservation extend to groundwater. . . ’”

Other western states have yet to consider the issue and the United States Supreme Court found it unnecessary to reach the question in the only case which directly brought this question before it. Judith V. Royster, professor of law at the University of Tulsa, makes a good argument that the U.S. Supreme Court has implicitly ruled on this question in United States v. Shoshone Tribe by stating that “when land is set aside for the benefit of Indian tribes, tribal rights to the land extend as well to the ‘constituent elements of the land itself.’” No court or state has yet implemented this “Shoshone doctrine.” Debbie Shosteck’s article in the Columbia Journal of Environmental Law comes to the opposite conclusion based on the Supreme Court’s three-part test for when it is appropriate to borrow state law rather than create a uniform federal law. Since each state has such varied laws pertaining to both groundwater and surface water (e.g., riparian for all, split between riparian and appropriation, or other bifurcated systems), the Supreme Court is likely to find “no need for a uniform rule; to the contrary, it would likely conclude that a national rule would be unnecessarily disruptive to holders of existing

132 Id. at 385.
135 304 U.S. 111, 116 (1938).
136 Royster, supra note 124 at 495.
137 Debbie Shosteck, Beyond Reserved Rights: Tribal Control over Groundwater Resources in a Cold Winters Climate, 28 Colum. J. envtL. L. 325 at 339 (2003) (The factors are: “(1) if there is no need for a uniform national rule; (2) if the use of state law would not impede federal policy or functions; and (3) if the creation of an incompatible federal rule would have calamitous consequences for state and private landowners.” from United States v. Kimbell Foods, Inc. 440 U.S. 715 (1979)).
Therefore, whether Indians have a reserved right to groundwater may continue to be determined on a state-by-state basis.

V. Conclusion

If the Goshute were to bring a groundwater claim in a federal court to protect their water rights in relation to the SNWA proposal, what would the outcome be? Since the federal court would be sitting in Nevada, and Nevada has never ruled on whether the Winters Doctrine applies to groundwater (nor does it have a Supreme Court ruling with which it must comply), this is an open-ended question. If the Nevada district court followed the reasoning of Arizona, Montana, and Washington then it would find that the Indian Tribe had a reserved right in groundwater just as it does in surface water. Most of the irrigation in Nevada and other arid western states is dependent on pumping from underground sources and thus the purpose of the reservation could not be fulfilled without a right to the groundwater necessary for irrigation. Most courts are going this direction and with the increasing understanding of the interconnected nature of ground and surface water, such an understanding is the most logical conclusion. Though the United State Supreme Court has not decided a case on the issue of whether The Winters Doctrine applies to groundwater, it has said that a comprehensive water right adjudication must include groundwater and that the rights to land on a reservation include the elements of that land. The treaty establishing the reservation indicates an expectation that the Goshute would become “herdsmen or agriculturalists” which, in Nevada would require pumping water from underground sources for irrigation purposes since surface water is not sufficient.

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138 Id.
139 Royster, supra note 124 at 768.
140 Id. at 495.
141 13 Stat. 681.
The district court should then apply the practicably irrigable acreage standard to determine how much water to allot to the Goshute Indian Reservation. Assuming the accuracy of my source, this would be 34,410 acres. At this time, we know that they use their land for grazing purposes, but it is likely to be dry-land grazing which allows for fewer cattle than irrigated land would support. Making a gross estimation: In *Winters*, the Fort Belknap Indian Reservation was diverting 10,000 miners’ inches to irrigation 30,000 acres. Using an online conversion table, this translates into 180,992 afpy. If the Goshute were to irrigate the 34,410 irrigable acres on their reservation, it would, therefore, take more than the SNWA proposal is requesting. According to *Ahtanum*, the fact that the Goshute are not currently making use of this amount of water does not mean that they do not have a reserved right to its use if they begin to irrigate in the future. This number obviously reflects an absurd request and a court is likely to allot less, however, it does indicates the fact that the Indians should have a reserved right to a substantial amount of water under the *Winters* doctrine as originally interpreted.

If, however, the Nevada District Court were to follow the example of Wyoming and refuse to find a reserved right to groundwater, then the Goshute Tribe would have to proceed through state adjudicative proceedings to be allocated permits for the water they desired. In fact, this is what the Tribe has already done.

The reality is that the Goshute Indians’ claim would be heard in a state court or, even more likely, an administrative proceeding in Nevada. Though state courts and administrative agencies are supposed to abide by federal law when adjudicating Indian reserved water rights, history has indicated that each state’s bias influences their interpretation and application of those

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142 Tiller, *supra* note 22.
143 Winters at 566.
144 [http://www.western-water.com/ConversionTable.htm](http://www.western-water.com/ConversionTable.htm) (last visited April 2, 2008).
145 BIA Summary *supra* note 19 (through the purchase of ranches it has obtained senior state water rights).
146 See McIntyre, *supra* note 58.
laws. Nevada Revised Statutes include an entire chapter on underground water and wells.\textsuperscript{147} Section .020(1) states: “All underground waters within the boundaries of the State belong to the public, and, subject to all existing rights to the use thereof, are subject to appropriation for beneficial use only under the laws of this State relating to the appropriation and use of water and not otherwise.” Nevada law requires that an application be submitted to the State Engineer for a permit to appropriate groundwater. Whether Nevada has this power over federal reserved water went undecided in \textit{Nevada ex rel. Shamberger v. United States},\textsuperscript{148} where the state sued for a declaration that the United States could not make use of underground waters on a naval ammunition depot without submitting an application to the State Engineer. The 9\textsuperscript{th} Circuit recognized that the McCarran Amendment only waived immunity for adjudication of rights to use water not for “a declaration of [a state’s] sovereign proprietary right to corpus or control of waters in general.”\textsuperscript{149} However, in the case preceding this decision,\textsuperscript{150} the District Court in Nevada held that the Federal Government did not need to seek permission from the state to drill wells on its reserved land. The case referred to a United States Supreme Court decision\textsuperscript{151} that distinguished between public land and reserved land, including Indian reservations, and concluded that the federal government does not have to seek permission from states when taking action on reserved land. Therefore, if the Goshutes had drilled wells on their reservation, the Nevada State Engineer would have no authority to regulate the use of those wells. However, if the Goshutes were joined in the adjudication of rights to the water from the Snake and Spring Valley Aquifers, the entire adjudication could be undertaken by the State of Nevada and the tribe could, and even must, be joined as a party.

\textsuperscript{147} Nev. Rev. Stat. Title 48 ch. 534.
\textsuperscript{148} 279 F.2d 699 (1960).
\textsuperscript{149} Id. at 701.
In such an adjudication, where all party interests are at stake, the Goshute Tribe should be treated like all the other users. The outcome is uncertain, but what is certain is that the Winters Doctrine is not a shield to any and all water needs of a Reservation. Maybe this is an acceptable outcome given the scarcity and necessity of water in the West and the assumption that an equitable distribution will be determined for all users, not just Indians. However, the historical treatment of Indian water rights, let alone treatment of native people in other ways, indicates that they will not be treated equitably in state-run water adjudications. I believe that one of the underlying purposes of Winters was to swing the pendulum in the other direction by providing greater protection for a native people continually taken advantage of by white settlement. Though only marginally effective, Winters lent a sense of security for a time. The future is not all bleak. Many tribes have successfully used their reserved rights as a bargaining chip in water-rights settlements and this does seem to be the direction such determinations are going.152 The hope that Indian reserved water rights would forever support the needs of Indians, as indicated by early judicial decisions reserving water for the Reservation use now and in the future, has been dashed. Unfortunately, history indicates that the wealthy and the politically powerful prevail to the detriment of Indians. Las Vegas and the SNWA are in that powerful category. The Goshute must now fight for the water they need to survive. That we are back to this situation is an unfortunate reflection that history does indeed repeat itself.

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152 See e.g. John E. Thorson, Sarah Britton, and Bonnie G. Colby, eds., TRIBAL WATER RIGHTS (University of Arizona Press 2006); and Shosteck supra note 129.