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FEDERALLY RESERVED RIGHTS AND INTERSTATE GROUNDWATER ALLOCATION

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I. INTRODUCTION

This post explores the intersection of two topics that have historically been neglected in interstate water allocation, and in particular in interstate compacts: groundwater and tribal reserved rights to water. Against the backdrop of the *Agua Caliente* case currently before the Ninth Circuit of the U.S. Court of Appeals, which raises the potential for broader recognition of tribal reserved rights to groundwater, this post focuses on interstate dimensions of recognizing such rights. Interstate waters may be allocated in three ways: 1) an equitable apportionment decree from the U.S. Supreme Court; 2) legislation by the U.S. Congress that allocates water between states; or 3) interstate compacts. This piece focuses on how tribal reserved rights have been dealt with under interstate compacts.

II. FEDERAL RESERVED RIGHTS AND GROUNDWATER

The recognition of federally reserved Indian rights to surface water is well entrenched in water law jurisprudence, dating back to U.S. Supreme Court cases such as *Winters* in 1908. As the *Agua Caliente* case before the Ninth Circuit highlights, tribal reserved rights to groundwater remain less established. We first set out some background for tribal reserved rights claims to groundwater. Then, we explore the interaction between federally reserved Indian and state rights to groundwater in the context of interstate allocations.

Even within individual states, the recognition of tribal groundwater claims may be problematic when addressing the allocation and governance of water rights. While rights to surface water are well established, tribal rights to groundwater were typically not considered when initial allocations of water rights occurred. Independent of tribal reserved rights, states have experienced difficulty in formulating regulatory frameworks to conjunctively manage both surface water and groundwater, particularly where different state water rights systems apply for surface water and groundwater. The introduction of tribal reserved rights to groundwater, which may predate current claims, could have cascading effects on long-established uses of water. The displacement of these claims and the unsettling of long-settled expectations of continued use pose an issue that we feel should be prophylactically addressed.

III. INTERSTATE ALLOCATIONS AND FEDERAL RESERVED RIGHTS

Inconveniently, aquifers do not always follow state lines. In the case of transboundary aquifers, which extend across two or more states, it is unclear how federally reserved rights interact with the different states' allocations from

the aquifer. At least two possible approaches exist: either 1) the federal reserved right takes priority, with the remaining groundwater allocated between the states; or 2) the federal allocation is taken from the allocation of the state in which the federal reserve is located. The Supreme Court followed the latter approach in *Arizona v. California*, which allocated Colorado River water between these states. In that case, the Special Master upheld the federal government's reserved rights claim to water on behalf of various tribes, and the Special Master to the U.S. Supreme Court determined in his report that "all consumption of mainstream water within a state is to be charged to that state, regardless of who the user may be" (Rifkind, Special Master's Report, at p. 247). Thus, water used on Indian reservations would be chargeable to the state within which the use was made. The Supreme Court accepted this analysis, but it did not explain why.

Nevertheless, while the limited jurisprudence on this issue would take reserved rights from the allocation of the state in which the reservation is located, *Arizona v. California* may not establish a general rule for the allocation of Indian water rights. Importantly, it seems that all parties (including the United States) agreed to this approach, so that the merits of an alternative approach may not have been fully ventilated. Further, any broadly applicable rule may be limited by the Special Master's reliance on the specific legal framework in that case, including the 1928 Boulder Canyon Project Act and pre-existing federal contracts for the delivery of water in the region.

Of the 24 interstate compacts dealing with the allocation of interstate water resources listed on the National Center for Interstate Compacts database, only nine mention Indian rights, and none use the phrase "federally reserved rights." The compacts that do refer to Indian rights generally do not deal with this issue beyond a boilerplate acknowledgement that nothing in the compact "shall be construed as affecting the obligations of the United States of America to Indian tribes," such as the Colorado River Compact of 1922 and the Klamath River Compact of 1957.

Unfortunately, should a tribal claim to the use of surface water or groundwater be made, this boilerplate language is not helpful in divining who is responsible for satisfying such rights. One exception to the silence on this issue is the Snake River Compact, which explicitly states that reserved Indian rights are to be deducted from the state allotments in which the reservation is located. Similarly, the California-Nevada Compact of 1969, which is not technically in force as it never gained U.S. Congressional approval, specifically notes that "there is allocated to Nevada for use on the Walker River Indian Reservation a maximum of 13,000 acre-feet per year."

Charging tribal reserved rights to state allocations, however, is not the only possible approach. In *Montana v. Wyoming*, the Special Master noted Montana's position that because the Northern Cheyenne Tribe's water rights predated the Yellowstone River Compact of 1950—they dated to as early as 1881—the Tribe's rights should take priority over both states' post-1950 rights. In 1991, Montana and the Tribe had agreed to the Northern Cheyenne-Montana Compact, which assigned the Tribe a 20,000 acre-foot storage right with a priority date "equal to the senior-most right for stored water in the Tongue River

Reservoir," which is April 21, 1937 (Thompson, second interim report, at 158). Wyoming, however, expressed its concern that Montana should not be able to "give away" water rights to the Tribe and then ask Wyoming to curtail its own rights to make up any shortfall for Montana users. Because neither the Tribe nor the United States were parties to the case, the Special Master did not consider the case to be an appropriate venue to decide the nature of the Tribe's water rights. Accordingly, this question remains to be decided another day.

Meanwhile, interstate compacts similarly neglect groundwater; only six interstate compacts contain any mention of groundwater, and these references are fairly cursory. In the Bear River Compact and Klamath River Compact, for instance, groundwater is mentioned to clarify that it falls outside the scope of the surface water apportionment in the Compacts. By contrast, the Alabama-Coosa-Tallapoosa River Basin Compact provides that "[w]ater resources" or "waters" means "all surface waters and ground waters contained or otherwise originating within the ACT Basin," signaling an intention that the Compact applies to both sources. The Upper Niobrara River Compact of 1962 treads a middle ground, as it is confined to surface water apportionment, but expresses an intention to later apportion groundwater as soon as "adequate data on ground water of the basin are available." Studies have subsequently been undertaken in the Upper Niobrara Basin, but some fifty years later, the Compact has not been updated to encompass groundwater. In the absence of express wording in the relevant compact, the Supreme Court has found that surface water allocations can be extended to groundwater; this appears to represent the default position. For instance, in *Kansas v. Nebraska,* the Supreme Court found that, although the Republican River Compact did not address groundwater, it could be framed to prevent groundwater use within a state that affected interstate surface water flows.

IV. WHO SHOULD BE RESPONSIBLE FOR SATISFYING FEDERAL RIGHTS?

Accordingly, how should future courts, and states while negotiating compacts, approach the allocation of liability to satisfy federal reserved rights water claims? As adverted to above, the dominant theory and practice is that, unless provided otherwise, reserved rights shall be charged to state allocations. The possible basis for this approach is the argument that a compact made between states and ratified by Congress estops Congress from later asserting a federal interest to modify the specific allocation identified in the compact. This is because compacts are authorized by the Compact Clause in the U.S. Constitution and then approved by Congress, so they may enjoy some measure of quasi-constitutional status. However, Professor A. Dan Tarlock suggests that this legal position may be outdated in light of cases suggesting that an interstate compact cannot limit Congressional exercise of its power to regulate interstate commerce (see, e.g., *Pennsylvania v. Wheeling*). A related explanation is a pragmatic one founded in the very purpose of interstate compacts. That is, states enter into compacts, surrendering some of their sovereignty, to secure certainty of supply. Allowing later federal claims to modify this allocation would risk upsetting and reopening established interstate compacts. Professor Tarlock suggests that the

best approach is to treat Indian claims as "analogous to interstate waters allocated to another state by interstate compact" (Tarlock, at p. 653). This would involve federal claims being satisfied out of the state's allocation. Within that framework, he suggests that federal reserved rights would usually take priority over state uses (see, e.g., *Hinderlider v. La Plata & Cherry Creek Ditch Co.*).

Conversely, other states have taken the position that satisfaction of Indian rights is a basin-wide responsibility. There are compelling arguments in support of this approach; it may be unfair to charge one state with responsibility for satisfying the entirety of a federal reserved claim to water in a shared water basin because in some cases, the quantum of the potential federal right may be greater than the state's entire allocation (as may be the case in Arizona), or federal claims may arise in relation to already over-allocated basins. This would upset the affected state's interests under the compact and drastically change the nature of the bargain struck.

On a principled level, prior federal reserved rights generally preempt *all* subsequent state claims. Therefore, it is misleading for a state to talk about "giving away" water rights, as Wyoming argued in *Montana v. Wyoming,* because the federal reserved right was never within the state's power to give. Moreover, the concern expressed by the Tribe in that case was that characterizing their reserved rights as falling within the state's allocation could result in relegation of that right. Although in that case, this concern rests largely on the terms of the Yellowstone River Compact itself, broader vindication of tribal rights may weigh in favor of a basin-wide response. This issue arises when we consider the dynamics of tribal water settlements, which are usually negotiated between the federal government, tribes and the relevant state. A state that is required to satisfy any tribal settlement with its own water allocation alone may be more likely to take a hard-nosed approach to negotiations than one that has greater resources available from the basin. Moreover, because the McCarran Amendment of 1952 waives federal sovereign immunity for adjudication tribal reserved water rights, these proceedings often take place in state courts, which have traditionally been seen as less sympathetic to Indian interests than federal courts. Therefore, any federally reserved allocation arguably should not factor into the quantity of water that is available for division between states.

This distinction may be easier to draw on paper than in practice, particularly when states allocate water before federal claims are officially recognized, because it assumes that the federal reserved right is both fixed and quantifiable. This is not necessarily the case, particularly when states are negotiating compacts where inchoate federal claims exist that have not yet been advanced. That is, in order to reserve water for potential federal claims, it would be necessary to first identify the scope of such claims. Moreover, where less information exists to guide management of groundwater, it may not be feasible to preemptively identify how much water needs to be set aside to insure against all possible future claims. This is by no means a straightforward undertaking, and it would most likely require engagement with relevant federal and tribal interests. The risk of this approach is that quantifying federally reserved rights is in itself a vexed and lengthy process, and so interstate co-management of water basins could be delayed.

While these issues complicate the matter, we suggest they are not insurmountable. The existence of federally recognized tribes and reservations overlying groundwater is easily ascertainable, so it may be that, where possible, states should proactively reserve water based on the "practicably irrigable acreage" standard. Further, an approach that prioritizes federal reserved rights may well encourage earlier, more meaningful engagement with tribal stakeholders when states negotiate water allocations. Ultimately, it is important that tribal water rights are not undermined through the willful failure of states to address these issues.

V. CONCLUSION

These issues will only become more contentious and problematic as demand for water continues to grow, and as a changing climate leads to increasingly drought and scarcity in some parts of the American Southwest. Greater demands will be placed on already stressed aquifers as groundwater is increasingly looked to as a supplemental source. States should look not only to collaboration with both tribal and private parties, but to other states in attempting to proactively address these inevitable problems.

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