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John Shurts, Indian Reserved Water Rights: The Winters Doctrine in Its Social and Legal Context

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BOOK NOTES

JOHN SHURTS, INDIAN RESERVED WATER RIGHTS: THE WINTERS DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT, 1880S-1930S, University of Oklahoma Press, Norman, Okla. (2000); 333pp; \$39.95; ISBN 0-8061-3210-8, hardcover.

Indian Reserved Water Rights details the emergence of the *Winters* Doctrine in the context of Indian law and western water law in the early twentieth century. Shurts suggests the prior appropriation system worked to the disadvantage of many non-Indian settlers and farmers, as vested water rights interfered with attempts of junior appropriators to irrigate and develop arid western lands. *Winters* recognition of reserved water rights on federal Indian lands based on the date of reservation effectively divested many senior water rights. As a result, the reserved water rights doctrine provided a means of developing both Indian and non-Indian lands where water was scarce or entirely unavailable under the prior appropriation regime.

Chapter One provides the historical and geographical context for the *Winters* litigation. Shurts contends Montana's Milk River was over-appropriated by the late 1800s. During a drought in 1905, public-land settlers diverted the entire flow of the Milk River above Fort Belknap Indian Reservation ("Reservation"). The United States brought suit to protect then inchoate water rights on the Reservation. The *Winters* court reserved a significant portion of the Milk River's natural flow for the Reservation. Shurts argues non-Indian control of irrigable Indian lands and downstream non-Indian parcels raises the issue of whether the non-Indian farmers and ranchers were actually the intended beneficiaries of water made available under the reserved rights doctrine.

Chapter Two outlines the legal context of *Winters*. Although the priority system dominated the West, Shurts points out numerous examples of settlers, miners, lawyers and politicians who actively denounced the priority system as allowing unfair, private monopolization of a vital and limited resource. Many believed a riparian system would allow for more comprehensive and coordinated development of western water resources. Shurts argues that by 1905, Montana applied the riparian doctrine in administering water rights on federal and tribal lands within the state. Further, federal and Montana State court decisions recognized federal law as creating federal water rights on federal lands. Finally, Indian treaty rights provided an additional means of asserting water rights outside the prior appropriation system. Thus, Shurts concludes the *Winters* decision was not a legal anomaly, but a logical outgrowth of legal and

social contexts surrounding the litigation.

Chapter Three examines initial reaction in Montana to the *Winters* decision through newspaper accounts and other contemporary documents. Shurts contends only farmers upstream from Fort Belknap were actually alarmed by the courts recognition of the United States' reserved water right in Milk River. Towns along and below the Reservation saw *Winters* as an opportunity, because it required upstream users to leave most of the Milk River's natural flow for Indian land irrigation, benefiting Indian and non-Indian farmers alike. In addition, the Reservation would require a facility to store and deliver the river's floodwaters to irrigable Reservation lands, thus providing a constant water supply to the entire area. Shurts concludes that the majority of Milk River water users stood to gain from *Winters* recognition of a reserved right for the Reservation. As a result, towns in the lower valley never opposed the initial government lawsuit or any subsequent *Winters* litigation.

Chapter Four follows the *Winters* decision through federal court of appeals, arguing the legal theory behind the *Winters* doctrine was virtually unrecognized by any federal government agency. While the original government complaint in *Winters* emphasized riparian federal and treaty rights on the Reservation, ignoring prior appropriation claims, the 1902 Reclamation Act and development of the West turned on rejection of riparian doctrine. Further, the United States was enmeshed in *Colorado v. Kansas*, claiming the riparian doctrine did not apply in western states. Shurts argues this illustrates how complicated local and national issues often overshadow Indian water rights claims in federal litigation.

Chapter Five returns to the Milk River Valley after the court of appeals affirmed the *Winters* decision. Shurts points out the newly recognized reserved rights were widely understood as flexible based on irrigable reservation acreage, not only by the court and the federal government, but by local newspapers as well. Shurts contends the real problem with the *Winters* decision was one of implementation rather than interpretation, detailing numerous conflicts over how to quantify the reserved rights claims. Efforts to expand the right included a proposal by a sugar company to lease Indian lands for cultivation of sugar beets. Conversely, appropriators enjoined by the *Winters* decision attempted unsuccessfully to curtail reserved water rights by severing irrigable lands from the Reservation by an Act of Congress.

Chapter Six considers the *Winters* doctrine as part of the federal allotment program, attempting to quantify reserved rights for individual Indian farmers, thereby extinguishing tribal rights to reserved waters. Shurts focuses on the Blackfeet Reservation Allotment Legislation of 1906, arguing the legislation attempted to turn Indians into small-tract farmers, by effectively using federal reclamation water based on priority under state law. Shurts contends these legislative acts basically nullified federal Indian reserved rights, converting them into appropriative state water rights.

Chapter Seven looks at the United States Supreme Court's decision

in *Winters*. Shurts finds the opinion did nothing to explain whether a reserved right inhered in the federal government, the Indian tribe, or both. Further, the decision failed to provide any basis for quantifying reserved water rights claims. In the Milk River Valley, the decision did nothing to alter the ongoing battle between upper Milk River appropriators and Indian and non-Indian landowners in the lower Valley. In a larger legal context, Shurts suggests ambiguities in the opinion provided ample grounds for misunderstanding and misinterpretation, allowing proponents of the prior appropriation doctrine to question the validity and legal implications of *Winters* for decades.

Chapter Eight examines the diverse approaches to water allocation in the West that made the *Winters* decision possible. Delving into the backgrounds of the lawyers and judges involved in shaping the *Winters* doctrine, Shurts concludes prior appropriation was understood as one means among many for allocating scarce western water resources. *Winters* provided flexibility to develop land interests and further governmental policies outside constraints of the priority system, consonant with contemporary understanding of the role of water allocation systems in developing the West.

Chapter Nine explores how the *Winters* doctrine fared in the years following the Milk River litigation, looking at federal attempts to perfect Indian water rights on the Uintah reservation in eastern Utah from the late 1800s to 1914. Shurts argues the government failed to capitalize on the potential of *Winters*, abandoning the reserved right doctrine, and making a series of largely unsuccessful attempts to perfect Indian water rights under Utah's prior appropriation system. By 1911, the federal government concluded there was little chance of attaining sufficient water rights to allow development of Indian lands on the Uintah Reservation under Utah state law, and looked to the *Winters* doctrine as a possible solution.

Chapter Ten explains the reemergence of *Winters* after 1914 as part of an ongoing federal attempt to pursue Indian water rights outside of state appropriative regimes. Shurts suggests the absence of reserved rights lawsuits by the federal government following the *Winters* decision failed to flesh out the legal contours of reserved rights doctrine. Thus, issues related to Indian water rights were addressed neither by Congress nor the courts for nearly a decade following *Winters*. Shurts details a series of water disputes on reservation lands that prompted the Department of Interior and other federal agencies to push for national legislation recognizing Indian water rights. By 1913, the Indian Office initiated Indian water rights lawsuits in virtually every western state under the reserved rights doctrine. In addition, the Department of Justice began to consider the broader implications of *Winters* in obtaining water for acquiring water for Reclamation projects and other federal purposes.

Chapter Eleven returns to the Uintah Reservation to explore how the nationwide reassessment of *Winters* focused Indian water rights litigation in Utah on the issue of federal reserved rights. Shurts

analyzes the *Winters*-based approach to water rights litigation, following two federal court cases from preliminary filing of claims through entry of a final decree recognizing priority rights for reservation lands based on the date of reservation.

Chapter Twelve provides a detailed analysis of the Uintah Reservation cases. Shurts concludes the primary function of *Winters* in the Uintah litigation was to manipulate inflexible state priority allocations. Thus, *Winters* allowed western legislators and developers to use water not only to reclaim irrigable Indian lands, but also to apply reserved water to non-Indian lands as part of a comprehensive reclamation vision for the West.

Indian Reserved Water Rights provides an in-depth historical study of the complex social and political forces behind the *Winters* doctrine. Although prior appropriation remains the dominant force in western water law, this volume demonstrates that other alternatives exist to address difficult questions of water use and allocation in the modern West.

Alan Curtis