Water Law Review

Volume 3 | Issue 1 Article 11

9-1-1999

Article Update

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Volume 2, Issue 2 of the *Water Law Review* provided readers with a dialogue between two authors, Ms. Alison Maynard and Mr. Scott McElroy, on the Southern Ute Tribe's claims to reserved water rights with a priority date of 1868. Ms. Maynard's article, *Deconstructing a Water Project*, presented the view that an 1880 Act of Congress extinguished the Ute Reservation, consequently extinguishing any of the Southern Ute Tribe's claims to reserved water rights. Mr. McElroy's article, *History Repeats Itself — A Response to the Opponents of the Colorado Ute Indian Water Rights Settlement Act of 1988*, presented the view that the Tribe's claims were viable. The following, a Department of the Interior Solicitor's Opinion addressing the issues raised by Ms. Maynard and Mr. McElroy, presents an update to their dialogue.

UNITED STATES DEPARTMENT OF THE INTERIOR
September 9, 1999
MEMORANDUM

TO: Acting Deputy Secretary David Hayes

FROM: Solicitor John Leshy

RE: Southern Ute Tribe's Water Rights Priority Date

You have requested that this Office evaluate the validity of the Southern Ute Tribe's water rights claims, as a result of issues raised during the NEPA process associated with the Administration proposal for final implementation of the Colorado Ute Water Rights Settlement. Specifically, you requested an analysis of whether the Tribe has reserved water rights with an 1868 priority date or whether such rights were extinguished by the Act of June 15, 1880. For the reasons explained below, we conclude that the Southern Ute Tribe's water rights have a priority date of 1868.

As a threshhold matter, it is important to note that the Southern Ute Tribe's 1868 priority date was judicially established through approval of Consent Decrees on December 19, 1991, by Colorado District Court, Water Division 7. Under the 1986 Settlement Agreement, as implemented by Congress through the 1988 Settlement Act, all tribal water rights claims in the Animas and La Plata rivers, including the priority date of those water rights, were properly before

the Court in 1991, and included in the order of the Court accepting the Consent Decree. Accordingly, further judicial review on the propriety of the 1868 priority date is now barred by the doctrine of res judicata. Danielson v. Vickroy, 627 P.2d 752, 761 (Colo. 1981) (an issue is res judicata if it was before the court in proceedings which resulted in a decree.) Thus, even if we were to find a basis on which to question the validity of the Tribe's priority date, which for reasons explained below we do not, the time to raise this issue has long since passed.

Notwithstanding the jurisdictional bar to raising such an issue at this time, the Southern Ute Tribe never lost its 1868 priority date. The Tribe's reserved water rights arise from its 1868 Treaty with the United States which established the Ute reservation in southwestern Colorado. It is well-settled that establishment of an Indian reservation carries with it an implied reservation of the amount of water necessary to fulfill the purposes of the reservation with a priority date no later than the date of creation of the reservation. See Winters v. United States, 207 U.S. 564, 576-77 (1908); see also Arizona v. California, 373 U.S. 546, 599-601 (1963); United States v. Winans, 198 U.S. 371 (1905).

No congressional action has done anything to change the priority date of the Tribe's water rights. Two statutes did, however, substantially affect the Tribe's land ownership. In 1880, Congress passed an act to allot the Southern Ute reservation. See Act of June 15, 1880, ch. 223, 21 Stat. 199 (1880). Under this Act, all "surplus" lands of the Reservation (lands not allotted) were deemed to be public lands of the United States, available for entry by non-Indians. Then in 1943, the Indian Reorganization Act (IRA), 25 U.S.C. § 463 et seq. (1994), officially ended the allotment era and authorized the Secretary to restore unclaimed "surplus" lands of any Indian reservation to tribal ownership. Restoration of the present Southern Ute reservation occurred on September 14, 1938. See 3 Fed. Reg. 1425 (1938).

The 1880 Act did not extinguish the Tribe's rights in "surplus" lands and did nothing to affect the Tribe's water rights for unclaimed "surplus" lands later restored to tribal ownership under the IRA. Termination or diminution of treaty rights "will not be lightly inferred," Solem v. Bartlett, 465 U.S. 463, 470 (1984), and requires express litigation or a clear inference of congressional intent gleaned from surrounding circumstances and legislative history. Bryan v. Itasca Cty., 426 U.S. 373, 392-93 (1975). The 1880 Act did not contain clear congressional intent to change the boundaries of the Tribe's reservation and did not provide the Tribe with full compensation for the land ceded, the combination of which might have indicated that the reservation had been diminished. See Solem v. Bartlett, 465 U.S. at 469-70. Similarly, the 1880 Act's complete silence on the issue of water rights must be interpreted as leaving in place, not terminating,

these valuable rights. Although much tribal land did, in fact, become divested from tribal ownership, the overwhelming majority of land which now makes up the Southern Ute Indian Reservation was retained in federal ownership and never conveyed to non-Indian parties.

Because lands declared "surplus" by the 1880 Act could be sold only under certain conditions, including for the benefit of the Ute bands, the Tribes retained an interest in the unsold land. This interest included all property rights not specifically divested. As the Department has noted previously, during the time between allotment in 1880 and restoration of unclaimed lands in 1938, the United States became a "trustee in possession" for the disposal of the ceded land and the Tribe retained an equitable interest until it received payment for the land. Restoration to Tribal Ownership—Ute Lands, I Dep't of Interior, Op. Solicitor 832, 836-37 (1938). The promise of payment created a trust between the United States and the Tribe. See Minnesota v. Hitchcock, 185 U.S. 373, 394-95 (1902); Ash Sheep Co. v. United States, 252 U.S. 159, 164-66 (1920).

The decision of the Supreme Court in United States v. Southern Ute Tribe, 402 U.S. 159 (1971) has been put forth as a reason why the Southern Ute's water rights were extinguished. However, this Supreme Court decision is not relevant to the current inquiry. Southern Ute discussed the res judicata effects of the Tribe's claims in front of the Indian Claims Commission (ICC). The ICC claims at issue, however, concerned "surplus" lands which had passed into private ownership or were reserved for other federal purposes, not, as is the case here, unclaimed lands which were later restored to tribal ownership. Some have suggested that the Southern Ute decision also affected the water rights claims of the Ute Mountain Ute Tribe. However, the western half of the pre-1880 reservation, which is today's Ute Mountain Ute reservation, was never allotted. See Southern Ute, 402 U.S. at 171. Neither the 1880 Act nor any subsequent congressional action affected the Ute Mountain Ute's water rights which also retain an 1868 treaty date priority.

All cases which have addressed the issue conclude that the original treaty-date priority to water applies to unclaimed "surplus" lands which are restored to tribal ownership. See United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984); In re Big Horn River System, 753 P2d 76 (Wyo. 1988) (Big Horn I), aff'd without opinion be an equally divided court; and In re Big Horn River System, 899 P.2d 848 (Wyo. 1995) (Big Horn IV). Anderson developed a three-prong test for extinguishment of a Winters right; namely, there must be: 1) cessation of the reservation, 2) opening of that land to homesteading, and 3) conveyance into private ownership. Anderson, 736 F.2d at 1363. While the Ninth Circuit held that no Indian reserved water rights exist

"on those reservation lands that have been declared public domain, opened to homesteading, and subsequently conveyed into private ownership," id. at 1361 (emphasis added), it left in place the district court's decision which awarded a treaty-date priority for water rights to "lands open to homesteading which were never claimed." Id. at 1361 (emphasis added). In the case of the Utes, the land restored to the Southern Ute Indian reservation was never conveyed into private ownership. Since the land was never conveyed into private ownership, the 1868 priority date was never affected.

The Wyoming Supreme Court reached the same conclusion when it found a treaty-date priority for "all the reacquired lands on the ceded portion of the [Wind River] reservation." 753 P.2d at 114 (Big Horn I). Similarly, Big Horn IV held that a treaty-date priority for reserved water rights extends to "restored, retroceded, undisposed of, and reacquired lands owned by the Tribes; fee lands held by Indian allottees; and lands held by Indian and non-Indian successors to allottees." 899 P.2d at 855.

The Department notes that Big Horn IV also held that the reservation purpose and reserved water rights "no longer existed for lands acquired by others after they had been ceded to the to the United States for disposition." Id. at 854 (emphasis added). This reasoning, which comports with Anderson's three-prong test, was used by the Court to conclude that non-Indian settlers, under the Homestead Act and other land-entry statutes, did not have a treaty-date priority. This holding, however, does nothing to alter the fact that lands ceded by the Southern Ute Tribe, which were opened to settlement but were unclaimed by settlers and later restored to tribal ownership, retain water rights with a treaty-date priority. Anderson, Big Horn I, and Big Horn IV stand for the proposition, and the Department concludes, that the Tribe retains its original 1868 priority date for all restored "surplus" lands.