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Navigating the Waters of Settling with Indian Tribes

WHEN DOES ENFORCEABILITY REQUIRE SECRETARIAL OR CONGRESSIONAL APPROVAL?

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Introduction

Governmental and private entities are faced with claims for alleged injury to Indian lands in a variety of circumstances. This can arise as a result of direct use of Indian lands: states lease Indian lands for freeway expansion; corporations conduct retail and other business on reservations; and mining companies and natural resource developers utilize rights-of-way for pipelines, reservoirs, and other uses on Indian lands.

Claims can also arise from activity that occurs entirely off-reservation, but which a tribe alleges nevertheless impacts tribal lands or tribal resources. This occurs perhaps most commonly in the context of water right adjudications, where the relative rights to a common water source are determined among Indian water users and non-Indian water users. Other examples are off-reservation energy or natural resources transportation projects that a tribe claims will impair tribal water rights (cue the claim of extensive, unquantified, *Winters* reserved rights[1]) or harm to other natural resources.

When faced with claims for impacts to Indian lands, it is important to consider what authorizations will be needed to settle the claims. Even if settlement terms can be reached with the claimant tribe, federal law renders some agreements invalid and unenforceable unless Congress authorizes the agreement as required by the Indian Non-Intercourse Act[2] or, in other circumstances, unless the Secretary of the Interior consents to the agreement pursuant to 25 U.S.C. § 85.[3]

It is also important to consider whether the United States has an independent claim in its capacity as trustee for the settling tribe. If so, waivers should be obtained from the United States as well as the tribe in order to ensure finality.

If the involvement of the federal government will be necessary in order to achieve a complete and enforceable settlement, this is a reality best confronted at the outset of the dispute, rather than on the eve of settlement or, much worse, years later when the tribe or the United States reinstitutes litigation of the same issues (and long after the previously-disbursed settlement funds have been spent).

A brief overview of Indian water rights is useful because these issues arise so frequently in the context of water rights disputes. That overview is followed by discussions of the Indian Trust Doctrine, the Indian Non-Intercourse Act and congressional approval, the consent of the Secretary of the Interior pursuant to 25 U.S.C. § 85, and waiver of separate claims held by the United States as trustee.

I. Overview of Indian Water Rights

Since the 1970's, the federal government has endorsed a policy of encouraging negotiated settlements of water rights disputes between Indian tribes and other water users. The McCarran Amendment[4] compelled the United States, as trustee for Indian tribes, to participate in the general stream adjudications that were getting underway in several western states. The enormity of the tribes' claimed water rights and the lack of federal precedent to guide the states' actual determination of those rights heightened the risk of litigation and raised awareness among federal, state, tribal and private interests of the benefits of a negotiated solution.

A. The *Winters* Doctrine

In *Winters v. United States*[5] the Supreme Court held that when Congress set aside land for the creation of an Indian reservation it impliedly reserved a sufficient quantity of water to fulfill the purpose of the reservation. The Court reaffirmed the *Winters* doctrine in *Arizona v. California,*[6] holding that Congress intended to reserve enough water to satisfy the future as well as the present needs of the Indian reservations.[7]

B. Ambiguity in the Doctrine and its Application

Although the Supreme Court announced the *Winters* doctrine over a century ago, numerous questions concerning the application of the doctrine remain unanswered. These include the appropriate measure for quantifying a *Winters* right,[8] whether the doctrine extends to groundwater,[9] and whether state, federal, or tribal governments should administer and control these rights once they have been quantified and decreed.

These uncertainties add complexity and difficulty to already complex and difficult state proceedings to adjudicate water rights. State courts must apply federal law to Indian water rights claims, but scarce federal precedent exists to guide the states in their application of the doctrine. In addition, the concept of "reserved rights" conflicts directly with the prior appropriation doctrine that governs the rights of non-Indian water users in most western states.

C. Conflict with the Prior Appropriation Doctrine

Under the prior appropriation doctrine, the right to divert water from a stream or to pump it from the ground is acquired by putting a specific quantity of water to beneficial use.[10] In times of shortage, those who have diverted first have priority. The priority of a *Winters* right is determined according to the date the reservation was created, which in most cases assures that the right will have a higher priority than competing non-Indian uses.[11] *Winters* rights are also "reserved," so Indian communities are not required to put their water rights to beneficial use in order to secure and maintain them.[12]

The difficulties associated with integrating claimed *Winters* rights - the quantification of which is not based on actual quantities of water being put to beneficial use - are immense. This is particularly so because the amounts claimed but not yet quantified are often enormous. For example, a March, 1989 report prepared by the Arizona Department of Water Resources ("ADWR") calculated that the quantity of reserved rights claimed by the United States and Indian tribes totaled approximately 4.1 million acre-feet per year, or approximately the entire renewable water supply of the state.[13]

II. Application of the Trust Doctrine to Indian Lands and Water Rights

A. The Indian Trust Doctrine

The conduct of all federal agencies toward Indian tribes is governed by a relationship of trust that exists between the United States and the tribes.[14] In addition, if the government has assumed management or control of a tribal resource, then the agency exercising such control has a specific fiduciary responsibility to manage the resource for the benefit of the tribe.[15] Indian lands and reservations are the quintessential trust resource. The Secretary of the Interior has a specific statutory obligation to manage Indian trust property.[16]

B. Water Rights as Trust Property

It is well-accepted among courts and federal agencies that the federal trust obligation extends to Indian water rights.[17] The status of these rights as valuable property rights has been recognized in the United States Court of Claims in cases awarding tribes monetary damages arising out of the Secretary's failure to assert and protect water rights.[18] The Department of the Interior characterizes Indian water rights as "vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians."[19]

The status of Indian water rights as trust property makes the United States a necessary party to any Indian water rights settlement.

III. The Indian Non-Intercourse Act and congressional Approval

A. The Indian Non-Intercourse Act

The Indian Non-Intercourse Act invalidates any "purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians,...unless the same be made by treaty or convention entered into pursuant to the Constitution."[20] The purpose of the Act is to prevent "unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties" without the consent of Congress, and to enable the government to vacate any such disposition that occurs without congressional authorization.[21]

Although the Act refers expressly to "conveyance of lands" and not water, no court has ever directly addressed whether the Act covers a conveyance or extinguishment of Indian water rights; they have instead assumed that it does.

For example, in a case challenging the authority of the Secretary of the Interior to enter into an agreement for the management of the waters of a creek between Indian and non-Indian users, the Ninth Circuit Court of Appeals held that the Secretary had the power to enter into such an agreement and could do so without violating the Non Intercourse Act because agreeing to an allocation of the waters between Indians and non-Indians was not the same thing as conveying water belonging to an Indian tribe to non-Indians.[22] The Ninth Circuit affirmed the distinction between the Secretary's authority to litigate and resolve by consent decree an Indian tribe's water rights and the Secretary's authority to extinguish or convey such rights to others in the *Orr Ditch* litigation, a case involving the Pyramid Lake Paiute Tribe's claims to water for Pyramid Lake.[23]

Other circuits have held that "the Act broadly protects Indian tribes' rights to and *interests in* land," including nonpossessory interests.[24] Courts have also held that the Act imposes on the federal government a fiduciary duty to protect the lands covered by it.[25]

To the extent the terms of a settlement can be construed as a conveyance or extinguishment of a tribe's water rights, the Indian Non-Intercourse Act requires congressional authorization of such settlements. Settlements that provide for the waiver or subordination of a tribe's existing or future water rights are very likely to be construed as a conveyance or extinguishment under the Act. It is well-settled that Indian water rights are valuable property rights. Indian water rights by their nature are also inextricably bound up with the land a tribe inhabits

B. Federal Common Law

In addition to the Indian Non-Intercourse Act, several well-defined principles of federal common law govern the nature of a tribe's interest in its property and how those interests can be conveyed. Before the Revolutionary War, Indians were held to have aboriginal title to lands they occupied from time immemorial.[26] The United States, as a "discovering nation" was held to have fee title to Indian lands subject to the Indians' right of occupancy and use.[27] With the adoption of the Constitution, trade and commerce with Indians became a matter governed by Congress.[28]

In modern times, the trust doctrine has been held to apply to the government's management and disposition of Indian property, whatever its forms.[29] The executive branch of the government does not have the authority to extinguish title to Indian lands or to dispose of property held in trust for Indian tribes without congressional approval.[30]

IV. 25 U.S.C. § 85 and Secretarial Approval

Section 85 provides that "[n]o contract made with any Indian, where such contract relates to the tribal funds or property in the hands of the United States, shall be valid, nor shall any payment for services rendered in relation thereto be made unless the consent of the United States has previously been given."[31]

There is very little case law interpreting this nearly century-old statute. On its face, the statute's scope is enormous, governing any contract that so much as "relates" to tribal funds or trust property, which would include, without limitation, tribal lands and tribal waters. It is difficult to draw the line where the statute's applicability ends - any agreement to settle claims related to Indian lands or water rights would at least arguably, if not by definition, fall within the scope of this statute.

The Tenth Circuit potentially limited Section 85's scope in *Western Shoshone Business Council v. Babbitt*,[32] when it agreed with the district court that the statute only applied to contracts entered with an individual "Indian," as opposed to a tribe.

However, at least one court has construed Section 85 as applying to contracts with Indian tribes.[33]

V. Release of Separate Claims Held by the United States as Trustee

We have recently been faced a circumstance where the settling tribe agreed to explicit approval by the Secretary (thereby satisfying our Section 85 concerns), but resisted inclusion of the United States as a party to the settlement, which meant that there would be no separate waiver by the United States.

In a dispute involving alleged injury to trust resources, where the United States therefore has a separate claim as trustee, it is recognized that the rights of a tribe to sue on its own are distinct from the United States' claim as trustee. For example, the Tenth Circuit has held that the "obligation of the United States to fulfill its fiduciary duties to the [tribes] does not diminish the rights of the [tribes] to sue on their own behalf."[34]

A well-founded concern is whether, even where Section 85 is satisfied, the United States' claim as trustee nevertheless survives a valid waiver of the tribe's claim. Typically, settlements with an Indian tribe involve separate releases from both the tribe and the United States; unsurprisingly, therefore, no case has been identified directly addressing whether a tribe's valid release of its claim results in the release of the United States' claim as trustee.

However, under traditional trust law, from which the Indian Trust Doctrine was developed,[35] a beneficiary may not settle a claim belonging to the trustee,[36] and, in many circumstances, settlement by the beneficiary does not give the obligor a defense to the claim of the trustee. [37]

Accordingly, a party should always seek to obtain waivers from both the settling tribe and the United States as trustee any time a claim related to any trust resource is being settled.

[1] *See Winters v. United States* 207 U.S. 564, 28 S. Ct. 207 (1908), discussed *infra*.

[2] *E.g.* 25 U.S.C. § 177 (2007).

[3] 25 U.S.C. § 85 (1913).

[4] 43 U.S.C. § 666 (2007).

[5] 207 U.S. 564, 28 S. Ct. 207 (1908).

[6] *Arizona v. California*, 373 U.S. 546, 83 S. Ct. 1468 (1963).

[7] *Id.* at 599-600, 83 St. Ct. at 1497-98.

[8] In *Arizona v. California* the court approved a quantification based on the number of irrigable acres contained within an Indian reservation. 373 U.S. at 601, 83 S. Ct. at 1498. Whether this standard is applicable to all Indian reservations remains unsettled. *See, e.g., United States v. Adair*, 723 F.2d 1394, 1408-10 (9th Cir. 1983).

[9] *See United States v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974) (stating that the reserved rights doctrine is not limited to surface water, and that the federal government can reserve groundwater as well if it is needed to accomplish the purpose intended for the federal land); *In re All Rights to Use Water in the Gila River System*, 989 P.2d 739, 748 (Ariz. 1999) (holding that reserved water rights applied to groundwater); *but see In re All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 99-100 (Wyo. 1988) (rejecting a tribal claim to groundwater, despite admitting to the logic supporting the claim, because no court had yet held that the reserved right doctrine applied to groundwater).

[10] *See, e.g., Arizona v. California*, 373 U.S. at 555-56, 83 S. Ct. at 1475-76. In Arizona, the prior appropriation doctrine governs the use of surface water, but not the use of groundwater, which is governed instead by the doctrine of reasonable use. *Brady v. Abbott Laboratories*, 433 F.3d 679, 682 (9th Cir. 2005).

[11] *Winters*, 207 U.S. at 577, 28 S. Ct. at 212.

[12] *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 574, 103 S. Ct. 3201, 3217 (1983).

[13] Since ADWR has issued its 1989 report, a number of tribes in Arizona have entered into comprehensive water rights settlements that fully quantify each tribe's water rights (either comprehensively or with respect to a particular source), including any *Winters* rights. These include the Fort McDowell Indian Community, the Yavapai-Prescott Tribe, the Pueblo of Zuni, and the Gila River Indian Community. Indian water rights settlements require congressional approval as discussed in Section IV., below.

[14] *See, e.g., Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981).

[15] *See United States v. Mitchell*, 463 U.S. 206, 224-25, 103 S. Ct. 2961, 2971-72 (1983).

[16] 25 U.S.C §§ 2, 9, 81 & 476 (2007).

[17] *See, e.g., Nevada v. United States*, 463 U.S. 110, 127-28, 103 S. Ct. 2906, 2917 (1983) (discussing federal government's trust obligation to manage water rights for the benefit of the tribe); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999) (noting that the United States has a duty as trustee for Indian tribes to protect tribal rights and resources).

[18] *Pyramid Lake Paiute Tribe v. United States*, 36 Indian Cl. Comm'n 256 (1975).

[19] Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian water Rights Claims, 55 Fed. Reg. 9223 (1990).

[20] 25 U.S.C. § 177.

[21] *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119, 80 S. Ct. 543, 555 (1960); *see also Tonkawa Tribe v. Richards*, 75 F.3d 1039, 1045 (5th Cir. 1996).

[22] *United States v. Ahtanum Irr. Dist. (Ahtanum I)*, 236 F.2d 321, 336-38 (9th Cir. 1956); *see also United States v. Ahtanum Irr. Dist. (Ahtanum II)*, 330 F.2d 897, 902 (9th Cir. 1964) (affirming the lower court's characterization of the agreement as one intended to settle a dispute among the parties as to the quantity of their respective water rights in the creek and not a conveyance or contract to convey the Tribe's interests in the creek).

[23] *United States v. Truckee-Carson Irr. Dist.*, 649 F.2d 1286, 1300-01 (9th Cir. 1981), *aff'd in part and rev'd in part on other grounds sub nom. Nevada v. United States*, 463 U.S. 110, 103 S. Ct. 2906 (1983); *accord In Re General Adjudication of All Rights to the Gila R. Sys. & Source*, 127 P.3d 882, 896-97 (2006), *cert. denied sub nom. San Carlos Apache Tribe v. Arizona*, 127 S. Ct. 928 (2007).

[24] *Tonkawa Tribe*, 75 F.3d at 1045 (emphasis added); *United States v. Devonian Gas & Oil Co.*, 424 F.2d 464, 467 n.3 (2nd Cir. 1970) (applying Indian Non-Intercourse Act to oil and gas leases).

[25] *United States v. University of New Mexico*, 731 F.2d 703, 706 (10th Cir.), *cert. denied*, 469 U.S. 853, 105 S. Ct. 177 (1984).

[26] *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 233-34, 105 S. Ct. 1245, 1251 (1985).

[27] *Id.* at 234, 105 S. Ct. at 1251.

[28] U.S. Const. Art. I, § 8, cl. 3 (Indian Commerce Clause); *University of New Mexico*, 731 F.2d at 706 (noting that "Congress has 'pervasive authority, rooted in the Constitution, to control tribal property'") *quoting Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83, 97 S. Ct. 911, 918 (1977).

[29] *See, e.g., Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975).

[30] *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935, 945 (Fed. Cir. 1974).

[31] 25 U.S.C. §81 also requires Secretarial approval of any "agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years...." One court has found that Section 81 must be analyzed in the context of underlying contracts even though the settlement agreements themselves do not require approval under section 81:

Despite the fact that §81 does not apply to the Settlement Agreements, and thus the Settlement Agreements function to release [the tribe's] remaining claims, we must briefly consider whether §81 applies to the underlying agreements at issue in this case. We pursue this inquiry to deter potential abuse stemming from the execution of a settlement agreement in the context of §81. We are particularly concerned that parties to an agreement [subject to §81] relative to Indian trust lands may seek to avoid securing Secretarial approval of such agreement pursuant to §81 by executing a release of all claims arising out of such transaction. Theoretically, one party could then assert that this release did not constitute an agreement with an Indian tribe...relative to Indian lands, and that a party to the release initiates subsequently to void the underlying agreement pursuant to §81.

Penobscot Indian Nation v. key Bank of Maine, 112 F. 3d 539, 555 (1st Cir. 1997).

[32] 1 F.3d 1052, 1059 (10th Cir. 1993) (agreeing with the district court's "conclu[sion] that 25 U.S.C. § 85 would not provide relief when the contract in question obligated only the tribe and not any individual Indian.").

[33] *Concerned Rosebud Area Citizens v. Babbitt* 34 F.Supp.2d 775, 775 (D. DC. 1999) (describing Sections 81 and 85 as "requiring approval by the Secretary of Interior and consent of the United States for *contracts with Indian Tribes* concerning property") (emphasis added).

[34] *State of New Mexico v. Aamodt*, 537 F.2d 1102, 1107 (10th Cir. 1976).

[35] *See, e.g., Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (citing traditional trust case law in holding that, as a trustee for the tribe, the United States is held to "the most exacting fiduciary standards" and "has charged itself with moral obligations of the highest responsibility and trust."). However, traditional trust law has not been applied unvaryingly to the Indian trust relationship. *See, e.g., Nevada v. United States*, 463 U.S. 110, 140-41 (1983) (disagreeing with the Ninth Circuit's reliance on the Restatement (Second) of Trusts in determining that "'[b]y representing the Tribe and the Project against the Orr Ditch defendants, the government compromised its duty of undivided loyalty to the Tribe,'" reasoning that "the Government is simply not in the position of a private litigant or a private party under traditional rules of common law or statute.").

[36] *See e.g., Ricke v. Armco Inc.*, 92 F.3d 720, 724-25 (8th Cir. 1996).

[37] *Id.*

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