Ciotti II - Better to Adjudicate Than Litigate

Mike O'Hagen
I. INTRODUCTION

“The exclusive right of taking fish in all streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fishes at all usual and accustomed places with citizens of the Territory...”1

When land was set aside for Indian reservations in the western United States, “thought was rarely given to expressly reserving waters for use of the tribes.”2 However, necessity has created a substantial body of law that expressly deals with the issue of Indian water rights. Indian water rights reserve large, but for the most part unquantified, amounts of water throughout the western United States.3

The Montana Supreme Court recently addressed the problem of unquantified Indian water rights as they relate to adjudication and state water law in Confederated Salish and Kootenai Tribes v. Clinch (Ciotti II).4 In Ciotti II, the Confederated Tribes (the Tribes) of the Flathead Indian Reservation (the Reservation) petitioned the court to accept original jurisdiction and enjoin the Montana Department of Natural Resources and Conservation (DNRC) and its director, Bud Clinch, from issuing water use permits on the Reservation until the Tribes’ reserved water rights had been quantified.5 In a six to one decision written by Justice Trieweiler,6 the court accepted original jurisdiction and granted the relief requested.7 The Ciotti II decision was the third time in fifteen years the court defined the pervasive nature of the

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1. Treaty with the Flatheads, United States-Flathead; Kootenay - Upper Pend d'Oreilles Indians, Jul. 16, 1855, 975, 796 (hereinafter the Treaty).
3. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 575 (Michie Bobbs-Merril 1982).
4. 992 P.2d 244 (Mont. 1999) [hereinafter Ciotti II].
5. Id. at 246.
6. Joining Justice Treiwieler were Justices Hunt, Nelson, Regnier. Three Justices did not participate in the decision. The Honorable Thomas M. McKittrick, Judge of the District Court, sat for Justice Leaphart, The Honorable Jeffery M. Sherlock, Judge of the District Court, sat for Justice Gray, and The Honorable Judge Roy C. Rodghiero sat for Justice Turnage. No reason is given in the opinion as to why the three Justices did not participate in the decision. MONT. CODE ANN. § 3-1-803(2001), Disqualification of judges, states that any [Supreme Court] justice must not sit or act in any action or proceeding: 1. To which he is a party or interested; 2. When he is related to either party or an attorney or member of a firm of attorneys of record for a party by consanguinity or affiliation within the third degree, computed according to the rules of law; 3. When he has attorney or counsel in the action or proceeding for any party or when sitting on a case on appeal he as a judge in the lower court rendered or made judgment, order, or decision appealed from. 7. Ciotti II, 992 P.2d at 246.
Tribes’ reserved water rights. The dispositive issue in Ciotti II was whether the DNRC had statutory authority under Mont. Code Ann. § 85-2-311, to issue water use permits on the Reservation prior to quantification of the Indian reserved water rights. Beyond the immediate issues and holdings in Ciotti II exists a history of tension between the State of Montana, non-Indian fee holders on the Reservation, and the Tribes. The court has played the role of an intermediary, interpreting the federal and state law controlling the definition and adjudication of Indian reserved water rights. On one hand, the State has been ostensibly trying to make the waters of the state, including those on the Reservation, subject to appropriation for beneficial use by its citizens. On the other hand, the court has been interpreting and applying the law to preserve Tribal reserved water rights on the Reservation. As this note will show, these two goals have been mutually exclusive.

Section II provides the legal framework for the creation of water rights on the Reservation, for water rights doctrines and adjudication of Indian reserved water rights. Section III addresses the procedural background of the Ciotti II decision. Section IV discusses the court’s reasoning behind the Ciotti I decision. Finally, Section V eyes the future of Indian reserved water rights in Montana after Ciotti II.

II. LEGAL FRAMEWORK AND EXISTING LAW

The Ciotti II decision is based on a substantial body of law developed


10. A non-exhaustive list of cases involving the Tribes, non-Indian fee owners, and the State includes: United States v. McIntire, 101 F.2d 650, 653 (9th Cir. 1939) (The waters of Mud Creek were impliedly reserved by the [Hellgate] treaty to the Indians. The United States became a trustee, holding the legal title to the land and waters for the benefit of the Indians. Being reserved no title to the waters could be acquired by anyone except as specified by Congress (citations omitted)); United States v. Alexander, 131 F.2d 359, 360 (9th Cir. 1942) (The reservation in question is situated in Montana and was created by [the Hellgate] treaty in 1855. The treaty impliedly reserved all waters on the reservation to the Indians. Being reserved, water rights could be obtained only as specified by Congress); The Big Four v. Bisson, 314 P.2d 863-864 (1957)("By the creation of the reservation, title to the waters was vested in the United States as trustee for the Indians." (citations omitted)); Joint Board of Control v. United States and Confederated Salish and Kootenai Tribes, 832 F.2d 1127 (9th Cir. 1987), cert. denied, 486 U.S. 1007 (1988) (The Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts brought suit to enjoin the Bureau of Indian Affairs from continuing to implement its 1986 operating strategy for the flathead Irrigation Project. The district court granted the preliminary injunction and the Tribes appealed. The circuit court reversed the district court's grant of injunctive relief); and Greely, Ciotti I, and Ciotti II discussed herein.
over the past 150 years. The development of the doctrine of Indian reserved water rights in the context of the Indian Reservation system is critical to understanding Ciotti II. The concept of reserved water rights was first articulated by the United States Supreme Court in Winters v. United States in 1908 and reaffirmed in Arizona v. California.\textsuperscript{11} One author has written that the "most succinct and lucid" explanation of reserved water rights was provided by the Court in Caeppert v. United States:

This Court has long held that when the Federal Government withdraws its land from public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In doing so the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

In determining if there is a federally reserved water right implicit in a federal reservation of public land the issue is whether the Government intended to preserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purpose for which the reservation was created.\textsuperscript{12}

A. Creation of Reserved Water Rights on the Flathead Reservation

The Treaty with the Flatheads (the Treaty) created the Reservation "[f]or the exclusive use and benefit of said confederated tribes as an Indian reservation."\textsuperscript{13} Within the external boundaries of the Reservation, the Tribes were to enjoy:

"[T]he exclusive right of taking fish in all streams running through or bordering the reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open an unclaimed land."\textsuperscript{14}

Thus the Treaty, often called the Hellgate Treaty, impliedly reserved all waters on the Reservation to the Tribes.\textsuperscript{15}

\textsuperscript{11} Cohen, supra note 3 at 575 – 76 (citing 207 U.S. at 564 (1908); 373 U.S. 546, 600 (1963)).
\textsuperscript{12} Cohen, supra note 3 at 576 (citing 426 U.S. 128 (1976)).
\textsuperscript{13} Treaty with the Flatheads, 975.
\textsuperscript{14} Id.
\textsuperscript{15} United States v. Alexander, 131 F.2d 359 (9th Cir. 1942) (citing Winters v. United States, 207 U.S. 564, 577 (1908); United States v. Powers, 94 F.2d 783, 785 (9th Cir. 1938)).
B. Water Rights Doctrines

1. The Doctrine of Prior Appropriation

The doctrine of prior appropriation was developed in the mining camps of California in the 1850s, and eventually became the dominant method of water allocation in the arid and semi-arid west. Essentially, rights are based on "first in time, first in right," so an appropriator's right is first established when she puts the water to beneficial use. The traditional elements of a valid appropriation are:

1. Intent to apply water to a beneficial use;
2. An actual diversion of water from a natural source; and
3. Application of the water to a beneficial use within a reasonable time.

Montana has adopted the doctrine of prior appropriation by statute. In Montana, a person may only appropriate water for a beneficial use. If the appropriator does not use her right for a period of ten successive years there is a prima facie presumption the appropriator has abandoned her right.

2. Indian Reserved Water Rights

The following discussion examines Indian reserved water rights in the context of surface water and groundwater. Indian reserved water rights cases primarily deal with the appropriation of surface water. However, several cases have involved the issue of extending reserved water rights to groundwater underlying Indian or federal reservations. Examination of this issue is important because the dissent in Ciotti argued the majority decision extended the reserved water rights doctrine to groundwater.

a. Surface Water Appropriation and Winters Rights

The development of Indian reserved water rights was first considered

17. WILLIAM GOLDFARB, WATER LAW 32 (Lewis Publishers, Inc. 2d ed. 1988).
18. DAVID H. GETCHES, WATER LAW IN A NUTSHELL 74-75 (West Publishing Co. 1997).
20. See MONT. CODE ANN. § 85-2-102(2)(2001). ("Beneficial use" unless otherwise provided means: a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses).
by the U.S. Supreme Court in *Winters v. United States*.24 In *Winters*, homesteaders built diversion works on the Milk River for irrigating their land that adjoined the Fort Belknap Indian reservation in Montana.25 The diversion works diverted water from the river channel, effectively depriving the Indians of water for their irrigation projects.26 In response, the federal government brought suit, on part of the Indians, against the homesteaders alleging the stream diversion caused "[i]reparabie injury of the United States [and Indians], for which there is no adequate remedy at law."27 The Court found that under the reservation system, the federal government’s policy to promote the transformation of tribal members to a “pastoral and civilized people” would be defeated, and the land would become “practically valueless” unless the tribe’s supply of irrigation water was protected from the homesteaders.28 The Court held that even though the homesteaders had perfected their water rights under Montana law, the Indians had a senior water right that was established as part of the Fort Belknap reservation.29

Consequently, water rights created as appurtenances to a reservation are generally termed “Winters rights.” In contrast to appropriative rights, Indian reserved water rights are not forfeited if they are not used.30 Further, Winters rights are consumptive. That is, water used to irrigate may not return to the stream from where it was diverted; instead the water may be lost to evaporation, transpiration, or a groundwater aquifer.31

In *Arizona v. California*, Winters rights were found to protect future reservation uses, extending Indian reserved water rights beyond the present needs of the Indians.32 The basic issue in *Arizona* was the share of water each state was entitled to from the Colorado River.33 Collaterally, the Court analyzed the amount of water from the Colorado River that would be reserved on behalf of five Indian reservations in Arizona, California and Nevada.34 The Court held that the irrigable acreage within each reservation

25. Id. at 567.
26. Id.
27. Id.
28. Id. at 576.
29. Id. at 577.
33. Id. at 551.
34. Id. at 595-97.
was the only equitable and feasible measure for reserved water rights.\(^\text{35}\)

b. *Surface Water Appropriation – Adair Rights*

A second type of reserved water right was defined in *United States v. Adair*.\(^\text{36}\) In *Adair*, the Federal government filed suit in federal district court seeking a declaration of water rights within the former area of the Klamath Indian Reservation in Oregon.\(^\text{37}\) In 1976, the state of Oregon initiated proceedings under state law to adjudicate water rights in the Klamath Basin, including that portion subject to the government’s suit.\(^\text{38}\) Subsequently, the state of Oregon and the Klamath Tribe intervened in the federal suit as plaintiffs.\(^\text{39}\) The *Adair* court found the Klamath Indians engagement in an “aboriginal use of water to support a hunting and fishing lifestyle” established a water right that predated the 1864 treaty creating the Klamath Indian Reservation.\(^\text{40}\) Therefore, their aboriginal water right had to be considered as part of the overall adjudication of the Klamath basin.\(^\text{41}\)

“Adair rights” are derived from aboriginal hunting and fishing water needs,\(^\text{42}\) and consist of “the right to prevent other appropriators from depleting the stream waters below a protected level in any area where the right applies.”\(^\text{43}\) Unlike Winters rights, Adair rights are generally nonconsumptive, in that the water is immediately available for downstream appropriators.

In summary, Indian reserved water rights have the following attributes:

1. The right are created without diversion or beneficial use;
2. The priority dates from the time of land withdrawal (hereinafter formation of the Flathead Reservation) or the time of aboriginal first use;
3. The right is not forfeited by nonuse; and
4. The right is limited to the amount of water reasonably necessary to satisfy the purposes of the reservation.\(^\text{44}\)

35. *Id.* at 600-02.
37. *Id.* at 1398-99.
38. *Id.* at 1399.
39. *Id.*
40. *Id.* at 1397-98 (Citing the Treaty between the United States and the Klamath and Modoc Tribes and Yashooskin Band of Snake Indians, October 14, 1864, 16 Stat. 707).
41. *Id.*
42. See *Mazurek*, *supra* note 2 at 190.
43. United States v. Adair, 723 F.2d at 1411.
The "elusive nature" of Indian reserved water rights makes adjudication difficult as compared to appropriative rights, because the reserved water rights frequently remain unquantified.

c. Application of the Reserved Water Rights Doctrine to Groundwater

In the decades since Winters, Caepert v. United States is the closest the Supreme Court has come to addressing the applicability of reserved water rights to groundwater. In Caepert, the defendant used pumps to divert groundwater that was the source for a spring in Devil's Hole. Devil's Hole was within a federal reserve withdrawn from the public domain and made part of the Death Valley National Monument in 1952. As part of the land withdrawal, the unappropriated waters in, on, under and appurtenant to Devil's Hole were withdrawn from private appropriation and reserved to the extent necessary to provide a habitat for the preservation for the endangered Devil's Hole pupfish (Cyprindon diabolis).

The Court held that the defendant could not pump any more groundwater, because scientific evidence established a hydrologic connection between groundwater and surface water at Devil's Hole. That is, the defendant's pumping of groundwater caused a decline in spring's water level and too great of a decline would threaten the pupfish. The Court held, since the reserved water rights doctrine is based on the necessity of water to accomplish the purpose of a federal reservation, the United States can protect reserved water from diversion, whether it is a diversion of surface water or groundwater.

The holding, which was based on the evidence showing a hydrologic connection between the groundwater and surface water, was limited to that amount of reserved water necessary to fulfill the purpose of the reservation, no more.

Lower courts have not been so reticent in addressing the applicability of reserved water rights to groundwater. The question of whether federal reserved water rights extend to groundwater was recently addressed in In re the General Adjudication of All Rights to Use Water in the Gila River System and Source. The Gila III litigation arose from comprehensive water

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45. Ciotti I, 923 P.2d at 1079.
47. See Shane, supra note 22 at 402.
49. Id. at 132.
50. Id.
51. Id. at 143.
52. Id. at 141 citing Arizona, 373 U.S. 546.
53. 989 P.2d 739 (1999); [Gila III].
resource adjudication in Arizona that included Indian reserved water rights.\textsuperscript{54} In \textit{Gila III}, the Arizona Supreme Court reasoned that groundwater and surface water are essentially a unitary, not a bifurcated resource.\textsuperscript{55} Consequently, the court held that the reserved water rights doctrine applies not only to surface water but also to groundwater.\textsuperscript{56} However, the \textit{Gila III} court, limited the application by holding that, "a reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation."\textsuperscript{57}

In \textit{Shamberger v. United States}, the federal district court for Nevada ruled that when the use of groundwater was necessary for a federal reservation to achieve its purpose, the federal government had an implied right to groundwater, even though the legislation reserving the land made no mention of groundwater.\textsuperscript{58} In \textit{Tweedy v. Texas Co.}, the federal district court for Montana ruled that, even though \textit{Winters} addressed surface water, the same implications which led the Supreme Court to hold that surface water had been reserved would apply to underground water as well. That is, if the land was arid and water would make it more useful, whether the water was found on the surface of the land or under it should make no difference.\textsuperscript{59} In a somewhat similar ruling, ground water under the Gila River Reservation was said to be impliedly reserved for the Indians. However, the [Plaintiff's] right to protection of groundwater resources extended only to groundwater that could have been put to beneficial use on the Reservation.\textsuperscript{60}

In contrast, where litigation arose from a general adjudication concerning several basins, the Wyoming Supreme Court held that Winters rights do not extend to groundwater.\textsuperscript{61} However, the court acknowledged "[T]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater."\textsuperscript{62} Thus, the extension of Winters rights to groundwater is not yet settled.

As the preceding cases generally show, in the context of federal reservations, there is an implied reserved right for the groundwater. However, the right is limited to that which is necessary to fulfill the purpose of the

\textsuperscript{54} \textit{Id.} at 744.
\textsuperscript{55} \textit{Id.} at 746.
\textsuperscript{56} \textit{Id.} at 748.
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} 165 F.Supp 600 (D. Nev. 1958).
\textsuperscript{60} See Gila River Pima-Maricopa Indian Community v. United States, 9 Cl. Ct. 660, 700 (1986).
\textsuperscript{61} In re: The General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76, 100 (1988).
\textsuperscript{62} \textit{Id.} at 99, citing Tweedy, 286 F. Supp. at 385.
C. Adjudication of Indian Reserved Water Rights

Unquantified Indian reserved water rights create economic uncertainty in a permit-based prior appropriation scheme. Therefore, states generally favor adjudication of all water rights, including inchoate reserved rights. However, with Indian tribes, uncertainty regarding the amount of reserved water on a reservation is less of a concern. Instead, the tribes may perceive adjudication as a limit on future economic development.

The McCarran Amendment gives states authority to exercise limited jurisdiction by expressly permitting joinder of the federal government in state suits involving the adjudication of water rights. Therefore, both federal and state courts may exercise jurisdiction over adjudication of Indian reserved water rights. The underlying policy of the McCarran Amendment is to encourage the determination of water rights between all the appropriators on a stream or river, i.e. an inter sese adjudication of water rights.

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63. See Gila III, 989 P.2d at 747 ("In summary, the cases we have cited lead us to conclude that if the United States implicitly intended when it established reservations, to reserve sufficient unappropriated water to meet reservations' needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand. The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation [emphasis added]").

64. Donald D. MacIntyre, Quantification of Indian Reserved Water Rights in Montana: State ex rel. Greely in the Footsteps of the San Carlos Apache Tribe, 8 Pub. Land & Resources L. Rev. 33, 35, nl0 (1987).

65. Id.

66. Id. at 36.


(a) Joinder of the United States as a defendant; costs. Consent is hereby given to join the United States as a defendant in any suit:

(1) for the adjudication of rights to use the 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 right by appropriation under state law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

The United States, when a party to such a suit, shall:

(1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of it sovereignty, and

(2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, that no judgment for cost shall be entered against the United States in any such suit.

(b) Service of summons. Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State. Nothing in this section shall be construed as authorizing the joinder of the United States in a suit or controversy in the Supreme Court of the United States involving the right of states to the use of water of any interstate stream.

68. Nelson, supra note 30 at 134-35.
Such a basin-wide adjudication of all water appropriators is thought to be more efficient and economic than a piecemeal adjudication involving a limited number of appropriators.\(^\text{70}\)

Federal courts have generally deferred to state determination of Indian reserved water rights under the McCarran Amendment. In *Colorado River Water Conservation District v. United States*, the Supreme Court extended the McCarran Amendment waiver of federal sovereign immunity to state court adjudications of Indian reserved water rights.\(^\text{71}\) In *Colorado River*, the federal government, brought suit in federal district court under 28 U.S.C. § 1345,\(^\text{72}\)\(^\text{73}\) seeking declaration of the government’s rights to certain rivers in Colorado.\(^\text{74}\) Several defendants filed a motion to dismiss the suit, alleging the district court was without jurisdiction to determine federal water rights under the McCarran Amendment.\(^\text{75}\) The Court ruled the McCarran Amendment effectively gives concurrent jurisdiction to federal and state courts over controversies involving federal reserved water rights, including determination of reserved rights held on behalf of Indians.\(^\text{76}\) The Court reasoned the Amendment did not require the government to abdicate its responsibility to defend Indian reserved water rights in state courts.\(^\text{77}\) Moreover, the Court said questions arising from conflicts of private water rights and federal reserved water rights are federal questions, which, if preserved, can be reviewed by the Supreme Court after final judgment by the Colorado court.\(^\text{78}\)

The groundwork for Montana’s adjudication of water under the McCarran Amendment was laid in *Arizona v. San Carlos Apache Tribe of Ari-

\(^{69}\) *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 819 (1976)[hereinafter *Colorado River*].

\(^{70}\) MacIntyre, supra note 64 at 41.

\(^{71}\) *Colorado River*, 424 U.S. at 820.

\(^{72}\) 28 U.S.C § 1345 (1988) (“United States as Plaintiff. 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.”).

\(^{73}\) 28 U.S.C.A. § 1345, n1 (West 1993 & Supp. 2001) (The McCarran amendment, as is clear from its language and legislative history and from the fact that there is no irreconciliability in the operation of two statutes [43 U.S.C. § 666 and 28 U.S.C § 1345], did not divest the district courts of jurisdiction over federal water rights litigation under this section giving the district courts “Except as otherwise provided by Act of Congress” original jurisdiction of all civil actions, suits, or proceedings commenced by the United States.”) (citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976)).

\(^{74}\) *Colorado River*, 424 U.S. at 805.

\(^{75}\) Id. at 806.

\(^{76}\) Id. at 811.

\(^{77}\) Id. at 812.

\(^{78}\) Id. at 813 (citing United States v. District Court for Eagle County, 401 U.S. 520, 526 (1971)).
In San Carlos, the Northern Cheyenne Tribe brought an action in the federal district court for Montana, seeking an adjudication of its rights in certain streams in the state. Soon after, the Federal government brought two suits seeking determination of federal water and tribal water rights, including the Northern Cheyenne's. Thereafter, all three of the actions were consolidated. Simultaneously, the state of Montana was planning to begin comprehensive water adjudication under the Montana Water Use Act, which established a judicial procedure for statewide comprehensive water adjudication. The proceedings were stayed pending the Supreme Court's decision in Colorado River.

In 1979, the federal government brought four more suits to adjudicate its rights and those of various Indian tribes. One month later Montana amended its water adjudication procedures "to expedite and facilitate the adjudication of existing water rights." The amended procedures recommended that the Montana Supreme Court order all claimants (i.e. present and potential appropriators), including the federal government, to file a statement of claim with the DNRC by a date set by the court or be deemed to have abandoned their water right. The federal government was served with notice to file a claim when the court issued the order. In November of 1979, the federal district court dismissed the federal actions, reasoning it would be wiser to follow Colorado River and defer the comprehensive adjudication to Montana.

The Court of Appeals reversed, ruling that Montana might lack jurisdiction to adjudicate Indian claims in state court. The Court of Appeals based its conclusion on the Enabling Act under which Montana was admitted to statehood, and the Montana Constitution promulgated in response to the Act. Both the Act and the Montana Constitution provided, in identical

80. Id. at 553.
81. Id.
82. Id. at 553-54.
83. Id. at 554.
84. Id.
85. Id. (citing Act to Adjudicate Claims of Existing Water Rights in Montana, Ch. 697, § 1(1), 1979 Mont. Laws 1901).
87. Id. at 555.
88. Id.
89. Id. at 556 (citing Northern Cheyenne Tribe of Northern Cheyenne Indian Reservation v. Adsit, 668 F.2d 1080 (9th Cir. 1982) [hereinafter Northern Cheyenne]).
terms, that Montana disclaimed control of all lands held by the Indian tribes to the Congress of the United States. The court pointed out that Montana may have acquired such jurisdiction under a 1953 Congressional Act, allowing states with such disclaimers to remove any legal impediment to assumption of certain aspects of civil and criminal jurisdiction over Indian affairs. The Court of Appeals held that "even if we were to find that Montana had validly repealed the disclaimer language in its constitution, . . . the limited factual circumstances of Colorado River prevent its application to the Montana litigation."

On certiorari, the Supreme Court decided the Montana case with two similar cases from the state of Arizona. The Court ruled that, in light of the McCarran Amendment, the Enabling Acts did not pose an obstacle to state jurisdiction to adjudicate Indian water rights. With regard to Montana conducting a comprehensive adjudication of its water, the Court held that because the underlying policy of the McCarran Amendment was to encourage state adjudication of water resources, the expertise and administrative resources available to the states, and a judicial bias against piecemeal adjudication and the convenience of the parties, the federal district court was correct in deferring to the state proceedings. As will be discussed in the next section, the holdings in San Carlos are significant for confirming the framework for adjudicating Indian reserved water rights in Montana.

Although Colorado River and San Carlos fulfilled the purpose of the McCarran Amendment, by allowing the states to adjudicate Indian reserved water rights, the interests of states may be adversarial to those of the tribes. From the perspective of Western states, undefined Indian reserved water rights leaves great uncertainty regarding the amount of water available for present and future uses; therefore, the states generally favor adjudication of water rights. On the other hand, to most Indian leaders, quantifi-

91. Arizona, 463 U.S. at 556-57.
93. Northern Cheyenne, 668 F.2d at 1087.
94. Id. at 1090 (In reaching this conclusion, the Court of Appeals relied in part on (1) the infancy of both the federal and state proceedings in the Montana litigation, (2) the possible inadequacy of the state [adjudicatory] proceedings (which it did not discuss in great detail), and (3) the fact that the Indians (who could not be joined involuntarily in the state proceedings) might not be adequately represented by the United States in state courts in light of conflicts of interest between the Federal Government’s responsibilities as trustee and owner of its own water claims).
95. Arizona, 463 U.S. at 564.
96. Id. at 570.
97. Maclntyre, supra note 64, at 34-35.
98. Id.
cation means a limitation of water rights. Additionally, there is the potential for insufficient federal review in a state adjudication. However, abridgement of Indian water rights can result in review of a “particularized and exacting scrutiny” by the Supreme Court. Federal abstention from proceedings to adjudicate Indian reserved water rights may also ignore the Federal government’s longstanding role of “of a guardian to his ward” to the Indian tribes.

An alternative to federal abstention from the adjudication of Indian reserved water rights was provided in *Adair*. In *Adair*, as discussed earlier, the Federal government and the Klamath Indian Tribe sued the state of Oregon in federal court for a declaration of water rights within former area of the Klamath Indian Reservation. The court did not abstain from the proceedings, as it could have done based on *Colorado River* and *San Carlos*. It declared water rights under federal law within the general boundaries of the Reservation. It did not undertake a general stream adjudication, instead limiting its exercise of jurisdiction to applying federal Indian law of reserved water rights. On review, the Ninth Circuit found the district court coordinated its adjudication with the state court, allowing each court to consider the matters most appropriate to its expertise.

This coordinated federal/state adjudication represents an alternative that may be preferable to pure state adjudication. Under coordinated efforts the federal government retains authority to exercise jurisdiction over federal reserved water rights, including Indian reserved water rights.

As these cases indicate, there is a tension between preserving state’s rights and protecting Indian or federal interests when conducting a general stream adjudication. In *Adair*, the decision to use a coordinated approach was a factual determination that restricted the federal participation to water rights created under federal law.

III. Procedural Background

*Ciotti II* was a unique case because it was both a petition for exercise

99. *Id.* at 36 (citing Comment, The Adjudication of Indian Water Rights in State Courts, 19 U.S.F. L. Rev. 27 (1984)).
100. *Greely*, 712 P.2d at 766.
102. 723 F.2d at 1398-99.
103. *Id.* at 1405 n.8.
104. *Id.* at 1406.
105. *Id.* at 1407.
106. *Id.* at 1405.
107. *Id.*
of original jurisdiction\textsuperscript{108} and a request for supervisory control.\textsuperscript{109} It was partly controlled by the Montana Supreme Court's precedent in \textit{Greely} and \textit{Ciotti I}. \textit{Ciotti II} was also a direct response to Senate Bill 97 (hereinafter the Permit Amendments), passed during the 1997 legislative session.\textsuperscript{110} The legislative intent of the Permit Amendments was to negate the court's holding in \textit{Ciotti I}.\textsuperscript{111} This section will discuss \textit{Greely}, \textit{Ciotti I} and the Permit Amendments as precursors to \textit{Ciotti II}.

\section*{A. \textit{Greely} v. Confederated Salish and Kootenai Tribes of the Flathead Reservation}

\textit{Greely} was a watershed case that defined Montana's authority to exercise jurisdiction over Indian reserved water rights. On July 13, 1979, the Montana Supreme Court ordered a statewide adjudication of water rights in Montana.\textsuperscript{112} Several Montana Indian tribes argued the people of Montana had not consented to the State adjudicating or controlling water on Indian lands.\textsuperscript{113} The State did not want to risk the resources to proceed with a statewide adjudication of water rights that might ultimately be found defi-
cient under Indian reserved water rights law. Consequently, on August 3, 1984, the State of Montana filed an application for writ of supervisory control of the Montana Water Court. The underlying dispute in Greely, in conjunction with the San Carlos decision, opened two questions in Montana:

1) Was the Water Court of Montana prohibited from exercising jurisdiction over Indian reserved water rights based on the 1972 Montana Constitution?

2) Was the Water Use Act adequate to adjudicate reserved Indian water rights?

The court answered both questions affirmatively, stating that although the Water Use Act did not explicitly require the Water Court to apply federal law in adjudicating Indian reserved rights, state courts were required to follow federal law with regards to those water rights. The court added a rejoinder that, should the Water Court abridge Indian reserved water rights by improperly applying the Act and/or federal law, the abridgement could be appealed to either the Montana Supreme Court or the United States Supreme Court. Thus, Greely provided a constitutionally tested framework for the adjudication of Indian reserved water rights in Montana using the Montana Water Use Act.

B. Ciotti I

Ciotti I provided unmistakable direction to potential appropriators on the Reservation. The court ultimately ruled that until the Tribes' reserved water rights on the Reservation were quantified by a compact negotiation, no new water appropriation permits could be issued. Between October 5, 1984 and August 4, 1987, four non-tribal fee landowners filed various water use permit applications with the Montana Department of Natural Resources and Conservation (DNRC) to change or obtain new water rights from sources on the Reservation. Prior to the passage of Senate Bill 97 in

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114. MacIntyre, supra note 64, at 48.
115. Greely, 712 P.2d at 757.
116. Id. at 758.
118. Greely, 712 P.2d at 762. (The Act included Indian and Federal Water Rights — Water Rights within Reservations, MONT. CODE ANN. §§ 85-2-701-708. According to the statute, it was the intent of the legislature to conduct unified proceedings under authority granted by the McCarran Amendment, 43 U.S.C § 666 to conclude compacts between the state and Indian tribes claiming reserved water rights).
119. Id. at 765-66.
120. Id. at 766.
121. Ciotti I, 923 P.2d at 1080.
122. Id at 1075.
1997, the requirements for a water use permit required the DNRC to issue a permit if the applicant proved, by a preponderance of the evidence, that the relevant criteria were met.\textsuperscript{123} The Tribes argued that because they possessed senior unquantified reserved water rights, it was impossible for an applicant to satisfy the statutory requirements for a water use permit on the Reservation. The Tribes requested each of the applications be denied in their entirety, maintaining the DNRC did not have authority to grant new water use permits on the Reservation pursuant to the 311 Criteria.\textsuperscript{124} The DNRC consolidated the Tribes’ objections, and on April 30, 1990, issued an order concluding it had jurisdiction to issue water use permits, even though the Tribes’ reserved water rights had not been quantified.\textsuperscript{125} After additional hearings, the DNRC affirmed its April 30, 1990, order.\textsuperscript{126}

Following a complex path, the case was reviewed by the Montana Supreme Court.\textsuperscript{127} The court focused on the DNRC’s authority to grant new

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  \item [123.]{Mont. Code Ann. § 85-2-311 (1995). Criteria for issuance of permit [hereinafter 311 Criteria]; sections applicable to this note are: (1) Except as provided in subsection (3) and (4), the department shall issue a permit if the applicant proves by a preponderance of the evidence that the following criteria are met: (a) there are unappropriated waters in the source of supply at the proposed point of diversion: \(B^2\) the “(a)” is here – I don’t think section needs to be renumbered as you have done below) (i) at times when the water can be put to use by the proposed applicant; (ii) in the amount that the applicant seeks to appropriate; and (iii) during the period in which the applicant seeks to appropriate, in the amount requested and that is reasonably available (a) the water rights of a prior appropriator will not be adversely affected; (b) the proposed means of diversion, construction, and operation of the appropriation works are adequate; (c) the proposed use of the water is a beneficial use; (d) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or \textit{for which water has been reserved} [emphasis added]; (e) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; (f) the water quality of a prior appropriator will not be adversely affected; (g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and (h) the ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4 will not be adversely affected.}
  \item [124.]{Ciotti 1, 923 P.2d at 1078.}
  \item [125.]{Id. at 1075.}
  \item [126.]{Id.}
  \item [127.]{Nelson, supra note 30, at 139 (On May 15, 1992 the Tribes filed a petition for judicial review of the order in First Judicial District Court in Lewis and Clark County and a complaint for declaratory and injunctive relief in the federal district court for Montana. The state court stayed any action pending a federal decision. The federal court, however, ordered the action stayed until the state issues were resolved. The federal court expressly held that the Tribes had properly reserved the federal claims for later review. On January 12, 1995 the state court issued its decision affirming the DNRC’s jurisdiction, holding that the DNRC had jurisdiction pursuant to Montana’s Water Use Act to issue new use permits}
water use permits on the Reservation prior to quantification of the Tribes’ water rights. Justice Triewieler reasoned, that because Indian reserved rights had yet to be quantified, it would be impossible for an applicant to meet the burden imposed by the Montana Water Use Act. That is, an applicant could not show a proposed use would not interfere unreasonably with an Indian reserved water right, until the Tribes’ rights were quantified either by a compact negotiation, or by a general inter sese water rights adjudication. Therefore, the court held the DNRC did not have authority to grant water use permits on the Reservation until a compact negotiation or a general inter sese water rights adjudication was completed.

C. The Permit Amendments

In 1997 the Montana Legislature responded to Ciotti I by adopting the Permit Amendments. The Permit Amendments requested by the DNRC, were written specifically to negate the Ciotti I holding. The bill imposed several major changes on the 311 Criteria. These changes included amending the language “unappropriated waters” to water “physically available” and the addition of a “legal availability standard.” In regard to reserved water rights within the Flathead (and other) reservations was the removal of subsection (e) from Mont. Code Ann. §85-2-311 (1995), which formed the basis of the court’s holding in Ciotti I. Under the amended statute, appli-

128. Id. at 140-141.

129. Specifically, MONT. CODE ANN. § 85-2-311(e) (The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. . .[emphasis added].)

130. Such a negotiation would be conducted pursuant MONT. CODE ANN. § 85-2-702 (2001), Negotiations with Indian tribes.

131. Ciotti I, 923 P.2d at 1073.

132. Id. at 1080.

133. Montana Water Use Act, 1997 Mont. Laws, ch. 497 sec 7, § 311 at 2790. (From the Statement of Intent: The Legislature intends that the Montana Supreme Court’s decision in In the Matter of the Application for Beneficial Water Use Permit Nos. 63023-76L, Ciotti; 64988-g76L, Sterner; and Application for Change of Appropriation Water Right No. G15152-S76L, Pope, 53 St. Rep. 777 at 784, 923 P.2d 1073, be negated by the passage and approval of this bill. [A] statement of intent is desired for this bill in order to provide guidance to the department [of Natural Resources and Conservation] under 85-2-311 concerning implementation and interpretation of the physical availability of water and reasonable legal availability of water criteria. To find that water is available for the issuance of permit, the department shall require a three-step analysis involving the following factors: identify physical water availability, identify existing legal demands on the source of supply, and compare and analyze the physical water supply at the proposed point of diversion with the existing legal demands on the source of supply.)

134. See Ciotti II 992 P.2d at 248.

135. See Ciotti I 923 P.2d at 1080.
cants for a water use permit were no longer required to show their proposed use would not interfere with an existing reserved water right.\textsuperscript{136} Applicants were only required to demonstrate that there was water physically available at the point of diversion and that use would not interfere with those of prior appropriators.\textsuperscript{137} Thus, the court's holding in \textit{Ciotti I} and the Montana legislature's "reactive end-run"\textsuperscript{138} of amending of the 311 Criteria set the stage for \textit{Ciotti II}.\textsuperscript{139}

\textsuperscript{136} \textit{MONT. CODE ANN.} § 85-2-311(1997). Applicable sections to this note are:

(1) A permit may be issued under this part prior to the adjudication of existing water rights in a source of supply. In a permit proceeding under this part there is no presumption that an applicant for a permit cannot meet the statutory criteria of this section prior to the adjudication of existing water rights pursuant to this chapter. In making a determination under this section, the department may not alter the terms and conditions of an existing water right or an issued certificate, permit, or state water reservation. Except as provided in subsections (3) and (4), the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate; (d) the proposed use of water is a beneficial use; and

(e) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4 will not be adversely affected.

\textsuperscript{137} \textit{Id.} at (1)(a).

\textsuperscript{138} Nelson, \textit{supra} note 30 at 142.

\textsuperscript{139} During the hearings on S.B. 97 Senator Dale Mahlum asked an attorney for the DNRC, "[i]f this bill were to pass along the proposed amendments to it, if someone wanted to bring it to the Supreme Court again, could they [the Montana Supreme Court] throw it out like they did the last one \textit{[Ciotti I]}? The attorney responded "[t]he intent of this bill is to put state law in the position that they cannot issue the same decision they did before, and the anticipation is that it is going back up to the Supreme Court, most likely with respect to groundwater, initially." Hearing on S.B. 97 Before the Senate Comm. on Natural Resources, Draft Unofficial Legislative Committee Minutes, January 17, 1997, \textit{55th} Legislature (Mont. 1997).
IV. Ciotti II

Based on the Permit Amendments, on August 21, 1997, the DNRC issued a notice of intent to issue new water use permits on the Reservation. On November 4, 1997, the Tribes filed an "Application for Exercise of Original Jurisdiction, Writ of Supervisory Control or Other Appropriate Writ", naming DNRC Director Clinch and the DNRC as respondents. The Tribes petitioned the court to accept original jurisdiction and enjoin the DNRC from issuing water use permits on the Reservation until such time as the Tribes’ water rights had been quantified.

The court identified two issues for consideration:

A. Was it appropriate for the court to exercise original jurisdiction? and

B. Should the DNRC be enjoined from issuing further water use permits on the Reservation until the Tribes’ water rights were quantified by compact negotiations or by a general inter sese water rights adjudication?

A. Original Jurisdiction

In its petition for original jurisdiction, the Tribes argued DNRC’s intent to issue new water use permits on the Reservation “ignore[d] the sound guidance and ruling of the [Montana Supreme] Court in a most flagrant manner, causing immediate and irreparable damage to the tribe.” Further, because the Permit Amendments allowed the DNRC to issue new water use permits prior to the time the Tribes’ water rights were quantified, the Tribe argued that the case presented exigent circumstances of a statewide nature that justified the court’s acceptance of original jurisdiction.

The DNRC contended the case was not appropriate for the exercise of original jurisdiction because the factual record was inadequate to determine whether the Tribes’ rights had been affected. The DNRC argued the trial process would have been adequate for development of the factual and legal
issues presented by the Tribes' petition, and still leave the court open to hear the case on appeal. The court agreed with the Tribes, and exercised original jurisdiction for the following reasons:

1. The petition raised constitutional issues;
2. Tribal water rights were of statewide importance;
3. The dispositive issue of the case was a purely legal or constitutional issue; and
4. The normal litigation process was inadequate.

The DNRC argument was rejected because allowing the case to proceed through the court system could take years. During that time, any number of water use permits could be issued on the Reservation, despite the court's holding in Ciotti I.

B. DNRC Injunction

In support of its petition, the Tribes maintained they possessed unquantified, pervasive Winters and Adair rights that carried a priority date from at least the date of the Treaty. Because the nonconsumptive Adair rights included the right to in-stream flow, the Tribes argued they had the right to prevent other appropriators from depleting the stream's waters below a protected level, which had not yet been determined. Further, they reasoned Ciotti I precluded the DNRC from issuing water use permits on the Reservation until reserved water rights had been quantified. The Tribes contended the Permit Amendment violated Article IX, Section 3(1) of the 1972 Montana Constitution, which protected existing water rights, including Indian reserved water rights.

In contrast, while acknowledging that the Montana Constitution protected existing water rights, including Indian reserved water rights, the DNRC argued reserved water rights were not affected by the passage of the Permit Amendments. According to the argument, Indian reserved water

147. See Ciotti II, 992 P.2d at 244.
148. Id. at 246-47.
149. Id. at 247.
150. Id.
151. Id. at 249.
152. Id.
153. See Ciotti I, 923 P.2d at 1080. (Reserved water rights would be quantified either on the terms of MONT. CODE ANN. 85-2-311(1)(e) (1995) or through a compact negotiations conducted under MONT. CODE ANN. § 85-2-702.)
154. See Ciotti II, 992 P.2d at 249 (Article IX, Section 3 (1) of the Montana Constitution: All existing rights to the use of any waters for any beneficial or useful purpose are hereby recognized. (hereinafter Water Rights Article)).
155. See Ciotti II, 992 P.2d at 248.
rights would be considered in the analysis conducted under the Permit Amendments to determine if water was "legally available." Further, the DNRC argued it had the same statutory obligation to consider Indian reserved water rights that it had prior to the passage of the Permit Amendments. Contending that there were some uses of appropriated water that would not affect Adair type water rights, it reasoned water use permits could be issued without affecting Indian reserved rights prior to the rights being quantified. Lastly, it maintained the new water use permits would be "provisional" and would not cause injury to the Tribes' senior reserved rights, because the permits were subject to revocation upon final adjudication of the Tribes' water rights.

The dispositive question was whether the Permit Amendments eliminated the protection of Indian reserved water rights provided by the 311 Criteria. The Permit Amendments limited permits to legally available water. "Legally available" was not statutorily defined, leaving it to the DNRC to interpret its meaning. However, the Permit Amendments' "existing water right" included federal non-Indian and Indian reserved water rights created under federal law. Thus, the 311 Criteria continued to require consideration of prior appropriators, which included Indian reserved water rights created under federal law.

In response to this confusion, the court conducted an analysis of statutory construction, balancing the intent of the Permit Amendments against the protection of the Water Rights Article, which protected existing water rights whether the rights were adjudicated or unadjudicated. The court concluded it was preferable to construe the 311 Criteria, as changed by the Permit Amendments, in a manner that sustained their "constitutional valid-

156. Id. at 248-49.  
157. Id. at 249.  
158. Id.  
161. See Ciotti II, 992 P.2d at 250.  
162. Mont. Code Ann. § 85-2-102 (8) (2001) ("Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.)  
163. See Ciotti II, 992 P.2d at 248.  
164. Id. at 250 ("Our effort to interpret "legal availability" is complicated in this case by two competing rules of statutory construction. On the one hand, we are guided by the principle that "where two constructions of a statute are possible, one of which would render the act unconstitutional, and the sustain its validity, the latter interpretation must be adapted." (citing City of Phillipsburg v. Porter, 190 P.2d 676, 679 (1948). On the other hand, we are told that "in the construction of a statute, the intention of the legislature must be pursued if possible." (citing Mont. Code Ann. § 1-2-102).]
Therefore, the court interpreted "legally available" to mean there was water available which was not reserved for purposes of the reservation. The court ruled that until the Tribes' reserved water rights were quantified, the DNRC could not determine if there existed "legally available" water for new water use permits on the Reservation. Accordingly, the court ordered the DRNC to refrain from issuing additional water use permits on the Reservation until the Tribes' reserved water rights had been quantified.

C. Analysis of Ciotti II

The court's decision in Ciotti II reaffirmed its holding in Ciotti I and Greely. All three decisions are predicated on the necessity of the Tribes' reserved water right being quantified before additional water use permits are issued within the external boundaries of the Reservation. However, Ciotti II goes further than its predecessors and can be distinguished on three points.

1. Further Defined Water Rights on the Reservation

Ciotti II is important because the court further defined the nature of water rights on the Reservation:

"We conclude that is it preferable to construe § 85-2-311(1), MCA in a manner which sustains its constitutional validity and to do so requires that we interpret "legally available" to mean there is water available which, among other things, has not been federally reserved for the Indian tribes."169

In other words, on the Reservation, there are both Indian reserved water rights and other water rights. As a result, until the Tribes' reserved water rights are quantified, existing nonreserved rights cannot be quantified. Non-Indian fee owners on the Reservation own significant irrigable acreage. If these landowners are found to have water rights junior to those of the Tribe, it is claimed their land will be "severely" devalued. Consequently, the adjudication of Indian reserved water rights and non-Indian

165. Id.
166. Id.
167. Id.
168. Id.
170. Amicus Curiae Brief of the Flathead Joint Board of Control at 4, Ciotti II (No. 97-609) (the districts and their constituents and the Tribes compete for the same federal reserved water rights. Approximately half the District's constituents own 67,791.21 acres of land that was once allotted to a tribal member under the 1904 Flathead Allotment Act, of April 23, 1904, 33 Stat. 302 or supplements thereto).
171. Amicus Curiae Brief of the Flathead Joint Board of Control, supra note 170, at 4.
water rights must be conducted equitably. For example, non-Indian water used to irrigate the holdings of non-Indian fee holders should be included when the measure of the Winters rights is adjudicated. Unless this is done, sufficient water may not be reserved for the irrigable acreage of the Reservation.

2. Avoided Questioning the Constitutionality of the Permit Amendments

The court’s opinion was carefully crafted to avoid questioning the constitutionality of the Permit Amendments. Instead the opinion focused on the fact that the Water Rights Article protected Indian reserved water rights. The court pointed out that existing water rights, which included federal non-Indian and Indian reserved water rights created under federal law, were constitutionally protected. The court noted that the DNRC had acknowledged this protection. Although the court found it was clear the legislature intended the Permit Amendments to allow the DNRC to issue water use permits prior to the quantification of the Tribes’ reserved water rights, use of the permits would possibly require use of water belonging to the Tribes, and therefore would violate the Water Rights Article.

Based on the court’s holding, a proper interpretation requires viewing the Permit Amendments through the lens of the Water Rights Article and Mont. Code Ann. § 85-2-102(8)(defining an existing water right.) Although this approach leaves the Permit Amendments intact, it is not judicially efficient or especially understandable.

Another approach might have been for the court to declare the Permit Amendments unconstitutional in light of Ciotti I. In its brief, the Tribes requested the court enter an order declaring the Permit Amendments unlawful, contending the enactment of the Permit Amendments violated the Water Rights Article and prior court decisions. Instead, the court presumed the Permit Amendments were valid and construed them in a manner passing constitutional scrutiny.

Regardless, both approaches appear to yield the same result – until the Tribes’ reserved water rights are quantified, the DNRC may not issue further water use permits on the Flathead Reservation. However, the court’s approach, despite its unwieldiness, is the most prudent, given that declaring

172. Id.
173. Id.
174. Id.
175. Id.
176. Ciotti II, 992 P.2d at 449.
the Permit Amendments unconstitutional would have probably distracted the Tribes and the DNRC from the necessary task of adjudication.

3. Judge Rodeghiero's Dissent

Judge Rodeghiero's dissent indicates his belief Ciotti II applies the doctrine of reserved water rights to groundwater. Judge Rodeghiero wrote:

"The majority's holding apparently precludes DNRC from issuing permits for groundwater use in the fastest growing area of the state even though uncertainty exists as to whether groundwater is included within the [Indian] reserved water rights doctrine."

Judge Rodeghiero's dissent is important because it points out that the potential economic and social fallout from the State and the Tribes' failure to cooperate on the issue of water rights adjudication, including groundwater, on the Reservation.

As discussed earlier in this note, some cases have extended Winters rights to groundwater beneath a federal reservation, although the law is not yet settled in this regard. A general limitation to the scope of Winters rights in regard to groundwater is provided by Caeppert: "The implied-reservation-of-water doctrine reserves only the amount of water necessary to fulfill the purpose of the reservation, no more." Gila III refines this limitation with regard to groundwater: "[w]here other waters are inadequate to accomplish the purpose of a reservation." Although the Ciotti II decision does not say it, it is only rational to include groundwater resources within the Reservation when quantifying Indian Reserved water rights.

Hydrologists and engineers have long recognized the interconnected nature of surface and groundwater. That is, surface water may seep into groundwater aquifers, and groundwater may seep into streams and springs. Such a relationship was recognized at Devil's Hole in Caeppert: "[g]roundwater and surface water are physically interrelated as integral parts of the hydrologic cycle." Additionally, optimum development of a water resource system requires that both surface and groundwater sources be studied, in isolation and as a complimentary surface/subsurface sys-

177. Ciotti II, 992 P.2d at 251.
179. Gila III, 989 P.2d at 748.
181. Id.
182. Caeppert, 426 U.S. at 142, [citing C. Corker, GROUNDWATER LAW, MANAGEMENT AND ADMINISTRATION, NATIONAL WATER COMMISSION LEGAL STUDY NO. 6, p. xxiv (1971)].
However, whether a reserved right for groundwater exists depends upon the purpose of the Reservation. To determine the purpose of a reservation and the amount of water necessary to accomplish that purpose is inevitably fact-intensive inquiry that must be made on a reservation-by-reservation basis.\textsuperscript{184} Winters rights, as discussed earlier, initially developed to protect and support an agrarian lifestyle for Indians. Given the advent of alternate reservation-based economic activities such as electronics,\textsuperscript{185} energy,\textsuperscript{186} and gambling\textsuperscript{187} since the Winters decision in 1908, a reservation’s “purpose” now must be broadly construed. Consequently, it would seem to make sense that sufficient water, including groundwater and surface water, be reserved for the Reservation to support a wide variety of activities, including, but not limited to, agriculture.

In contrast to “the amount necessary” approach of Caeppert and Gila III, the Tribes have proposed, as a starting point for negotiations, that “[A]ll water on and under the Flathead Indian Reservation is owned by the United States in trust for the [Confederated Salish and Kootenai] Tribes.\textsuperscript{188} Regardless of the approach taken, groundwater must be considered in the adjudication of Reservation water resources.

The consequences of not adjudicating the groundwater resources of the Flathead Reservation becomes apparent when considering the city of Polson, located within the exterior boundaries of the Reservation. From 1990 to 1996 it experienced a 31.5% population increase.\textsuperscript{189} It has a projected annual 3% population increase.\textsuperscript{190} Potentially, Ciotti II prohibits Polson

\textsuperscript{183} DAVID F. MAIDMENT, HANDBOOK OF HYDROLOGY, §27.2.2 (McGraw-Hill, Inc. 1992).

\textsuperscript{184} Gila III, 989 P.2d at 748.

\textsuperscript{185} Dan Morse, Tribal Pursuit, WALL ST. J., March 27, 2002, at R16 [But in a brutal year for the electronics manufacturing industry – S&K Electronics (a printed-circuit-board and electronics manufacturing company established by the Salish –Kootenai governing council in 1984) had net income of $119,272 on sales of $8.8 million according to their most recent filing with Dun & Bradstreet Credit Reports]. B\textsuperscript{2} – Mike’s note said he could not find this – I have included a hardcopy in the reference book.

\textsuperscript{186} Robert Gavin, Inheriting the Wind: Indian Tribes Look to Tap Energy Source for Income; Sweet Irony on History, WALL ST. J., June 11, 2001, at B1 (the Blackfeet, while furthest along in developing wind power, are just one of a dozen economically depressed tribes hoping to take advantage of the recent energy crisis).

\textsuperscript{187} Micah Morrison, El Dorado at Last: The Casino Boom, WALL ST. J., July 18, 2001, at A18 (Gambling sponsored by Indian Tribes has exploded from bingo games in the late 1970s to full-fledged casinos owned by 196 legally designated “gaming tribes” and generating approximately $10 billion in revenues last year [2000] – with approximately 175 more groups petitioning for tribal recognition and casino rights).

\textsuperscript{188} (Letter from Matt to Tweeten of 6/13/2001, at 4).

\textsuperscript{189} Brief of the City of Polson at 3, Confederated Salish and Kootenai Tribes v. Clinch, 992 P.2d 244 (Mont. 1999) (No. 97-609).

\textsuperscript{190} Id.
(and other Montana cities within the exterior boundaries of reservations with unadjudicated water rights) from developing groundwater resources until the Indian reserved water rights are quantified. At the same time, Polson, as a water utility, is statutorily required to furnish water to all customers within its service area. Thus, Ciotti II may effectively prevent the City of Polson from performing its statutory duty to supply water to its customers, essentially acting as a de facto limitation on growth.

V. Conclusion

Overall the opinion in Ciotti II is well-balanced. The court avoided a potentially inflammatory constitutional issue, while further defining the scope of water rights on the reservation. Founded on the decisions in Greely and Ciotti I, the decision lays out a clear road map for the Tribes and the DNRC for adjudicating Indian reserved water rights on the Reservation.

Whereas the court's previous decisions in Greely and Ciotti I correctly interpreted federal Indian water law and provided a framework for adjudication, Ciotti II forcefully tells the Tribes and the DNRC that it is time to get to work on the important issue of water rights adjudication. One approach could utilize Water Use Act as envisioned in Greely. This approach would utilize the existing expertise of the Montana Water Court and administrative resources available to the State. Further, litigation in San Carlos and Greely has shown this approach to be constitutionally robust. Alternatively, an approach similar to that in Adair could possibly be implemented, with the Federal government limiting its exercise of jurisdiction to applying federal Indian law of reserved water rights. Additionally, the Tribes have suggested a third approach, wherein all water including groundwater and surface water be held on the Reservation by the United States in trust for the Tribes.

Lastly, the dissent in Ciotti II interprets the majority holding to extend the doctrine of reserved water rights to groundwater beneath the Reservation. Given the interconnected nature of surface water and groundwater, it would be prudent to quantify any potential need for groundwater underlying the reservation. Additionally, given the changing face of reservation economics, all water resources need to be considered for the future uses of the Tribes.

In summary, the court's holding in Ciotti II clearly points to adjudica-

191. Id. at 4-5.
193. Adair, 723 F.2d at 1407.
tion, rather than the litigation, of Indian reserved water rights. In 2001, the adjudicative process was just beginning.\textsuperscript{195} Initially, the Tribes have proposed a Reservation-wide tribal administration ordinance, encompassing both surface and groundwater.\textsuperscript{196} In contrast, the State said it had no intention of giving up jurisdiction, instead it suggested creating a dual jurisdiction, similar to other state-tribal water agreements.\textsuperscript{197} The adjudicative process is expected to take several years.\textsuperscript{198} Whatever adjudicative approach is chosen, it must balance the competing interests of the Tribes and the non-Indian fee holders on the Reservation.\textsuperscript{199}


\textsuperscript{196} See FN 200 (Letter from Matt to Tweeten of 6/13/2001, at 3) (proposing that the focus of the negotiations be development of a Reservation-wide Tribal administration ordinance which guarantees due process and equal protection under a prior appropriation system to all people who use water on the Flathead Reservation).

\textsuperscript{197} Id.

\textsuperscript{198} Id.

\textsuperscript{199} John Stromes, \textit{County Asks State Not to Give Up Water Rights Control}, MISSOULIAN, February 7, 2002, at B1 [Lake County commissioners and Citizens of Lake County "overwhelmingly believe that state jurisdiction of water rights appropriation must be maintained for fee (privately owned) properties."].