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BOOK REVIEW

THE GENESIS AND EARLY POWER OF *WINTERS*— A BOOK REVIEW OF INDIAN RESERVED WATER RIGHTS: THE *WINTERS* DOCTRINE AND ITS SOCIAL AND LEGAL CONTEXT, 1880'S TO 1930'S

BY JOHN SHURTS

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INDIAN RESERVED WATER RIGHTS is important reading for tribal members, tribal leaders, lawyers, judges, historians and scholars interested in water rights, federal Indian policy and the history of the settlement of the West. In 1908, the United States Supreme Court decided *Winters v. United States*, 207 U.S. 564 (1908), and established the "Reserved Indian Water Rights Doctrine." The short

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and sparse opinion affirmed lower court rulings that the Gros Ventre and Assiniboine Indians had reserved water rights in the Milk River. The water rights were reserved by virtue of an 1888 treaty creating the Fort Belknap Indian Reservation in Montana. Despite the opinion's brevity and ambiguity, the *Winters* decision remains the a powerful legal doctrine today.[1]

The "*Winters* Doctrine"—also called the Indian Reserved Water Rights Doctrine—has played an important role in determining the water rights of Indian tribes and water rights in the arid West generally. In *Winters*, the Supreme Court held that although non-Indian diversions of water were "first in time," the tribal right to use water had been applied to the creation of the reservation for the benefit of the Indians.

According to the Supreme Court, the Indians held reserved water rights that made their reservations—that is, their designated tribal lands—"valuable or adequate." The Court combined two previous decisions to find that, even if a treaty did not specifically mention water, Indians hold a federally protected right to use such water as may be needed to fulfill the purposes of establishing the reservation.[2] The Court found that the right to use water had been "reserved" when the reservation came into existence. This right existed independently of the common and usual state law requirements (in force exclusively in all but three western states) that water rights depended upon "prior appropriation" or continuous beneficial use.[3]

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1. Since *Winters*, the Supreme Court has consistently held that the federal government has the power to exempt reserved water for Indian reservations from contrary state prior appropriation law. United States v. New Mexico, 438 U.S. 696 (1978); Cappaert v. United States, 426 U.S. 128, 138 (1976); United States v. District Court for Eagle Country, 401 U.S. 520, 522-23 (1971); Arizona v. California, 373 U.S. 546, 597-600 (1963), *decree entered*, 376 U.S. 340 (1964).

2. *See* United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690 (1899) (federal government intrinsically possesses water rights by virtue of the government's proprietary capacity as owner of federal lands) and United States v. Winans, 198 U.S. 371 (1905) (although non-Indian water diversions were "first in time," the tribal right to use water had been implied in the creation of the reservation for the benefit of the Indians).

3. "Prior appropriation" water law systems prevail in the arid West. The system is used in all states west of the 100th meridian, including Alaska, running from the Dakotas south through Texas. Robert E. Beck, *Prevalence and Definition*, 2 WATERS & WATER RIGHTS §12.01 (Robert E. Beck ed., 1991). Fifteen western states use the prior appropriation system exclusively, while three including California, Nebraska and Oklahoma employ a dual system incorporating both prior appropriation and riparian rights. *Id.* & §12.02(c)(2) (1991 & Supp. 1999).

The "riparian" water rights system, which prevails in the eastern United States where water is relatively abundant, came from England. Riparian water rights systems recognize water rights of owners of property adjoining streams, lakes and other water courses. Water owners share water with other adjoining land owners and must respect the rights of other Riparian owners in the future. Riparian owners cannot use the water in such a way as to diminish possible future water development. *See generally*, DAVID GETCHES, WATER LAW IN A NUTSHELL 14 (2nd ed. 1990).

"Prior Appropriation" water rights systems conversely allow a person to enforce rights to use water only after he or she diverts water from a natural source and supplies the water to a "beneficial use." *Id.* at 99. Prior appropriation is often referred to as "first in time, first in right." Accordingly, under prior appropriation, a person must have a senior right to enforce the use. Water users are assigned a legal "priority date," a date the diversion actually occurs to determine the senior user. The senior user has a priority right over subsequent water rights holders. *Id.* at 101.

Two congressional enactments held cement the prior appropriation water rights system in the West: (i) the Mining Act of 1866, ch. 262, 14 Stat. 253 (current version 43 U.S.C. § 661) and (ii) the Desert Land Act of 1877, ch. 107, 19 Stat. 377, as amended by Act of Cong., March 3, 1891, ch. 561, 26 Stat. 1096

The *Winters* decision was controversial. The Indian Reserved Water Rights Doctrine flew in the face of state prior appropriation laws. Despite its brevity and ambiguity, the *Winters* decision establishing the doctrine became a powerful common law tool for the vindication of the Indians' claims to water in the West. One historian, Norris Hundley, has called the *Winters* Doctrine "a kind of legal Magna Carta for the Indian."[4] Nevertheless, because the *Winters* Doctrine was judge-created law and not statutory law, it was often a very difficult doctrine for tribes or the federal government acting on their behalf to enforce. Still, the threat of exercising the less-than-clear Indian reserved water rights under *Winters* has often been enough to help negotiate definite water rights for Indian people.

INDIAN RESERVED WATER RIGHTS is the first book-length treatment of the history of the *Winters* case and the early creation and use of the Reserved Water Rights Doctrine. John Shurts argues that the *Winters* Doctrine became an important policy and litigation tool for the Department of Justice and the Bureau of Indian Affairs to litigate and negotiate water rights for Indian tribes across the west in the decades following the 1908 decision. He explains how the evolving and competing federal water rights policies gave rise to the doctrine.

According to some scholars, the *Winters* Doctrine was little used after 1908 and had to be rescued from obscurity by the United States Supreme Court in *United States v. Powers*, 305 U.S. 527 (1939), and *California v. Arizona*, 373 U.S. 546 (1962), *decree entered*, 376 U.S. 340 (1964). John Shurts disagrees. Through extensive quotations from primary sources, including the Congressional Record, statutory histories, newspaper accounts, original federal district court and state district court pleadings, Shurts shows that the *Winters* Doctrine was not an ignored Indian right but rather was always at the forefront in the Department of Justice policy decisions regarding Indian reserved water rights.

John Shurts persuasively and eloquently describes the tension that shaped and formed water rights in the West. On one side, Indian people, through the allotment process and the government's plan to make Indians into farmers, wanted water for irrigation. In arid northern-Montana, as with the vast majority of the West, people could not farm without irrigation.[5] Shurts notes that on many reservations Indian people did not readily make the transition to farming. They held to traditional ways of hunting, gathering and fishing. Sometimes farming efforts failed through disinterest, lack of capital and expertise; sometimes farming efforts failed because federal officials could not or did not deliver water through the planned irrigation projects.

(current version 43 U.S.C. §§ 321-323, 325, 327-329). *See generally*, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 577-604 (R. Strickland, et al. eds. 1982). For a recent analysis of Indian water rights in the eastern United States, *see* Judith V. Royster, *Winters in the East: Tribal Reserved Rights to Water in Riparian States*, 25 WM & MARY ENVTL. L. & POL'Y REV. 169 (2000) (*Symposium Issue I—Water Rights and Watershed Management: Planning for the Future*).

4. Norris Hundley, Jr., *The Dark and Bloody Ground of Indian Water Rights: Confusion Elevated to Principle*, IX WESTERN HISTORY QUARTERLY 463 (1978).

5. One informal definition of "the West" is the point where rainfall falls below fourteen inches. Susan D. Brienza, *Wet Water vs. Paper Rights: Indian and Non-Indian Negotiated Settlements and Their Effects*, 11 STAN. ENVTL. L.J. 151, 153 (1992).

On the other side were arrayed the local interests of non-Indian settlers. Those upstream from Indian reservations did not want to observe and honor implied treaty rights for the reservation Indians. Some settlers wanted to take the water as "first in time" under theories of prior appropriation. Those settlers used water for irrigation of their own lands and to sell to others at a profit. However, some other local non-Indian settlers did not oppose the Indians' assertion of the implied treaty rights. They could benefit also from the excess water flowing down the remote Milk River in Montana.

Federal agencies and departments had conflicting visions for water rights policy in the West. The United States Department of Justice, litigating on behalf of the Indian tribes and pursuant to the Trust's responsibility to protect Indian people, had to contend with the Bureau of Reclamation. The Bureau of Reclamation sought a unified policy of prior appropriation across the arid west to carry out its mission. To be sure, the federal government's reclamation projects across the arid West have had a huge impact. Irrigation in modern times accounts for ninety percent of all western water consumed.[6]

To Bureau of Reclamation leaders, anything that smelled of "riparian rights"—that is, rights to water based upon geographic proximity to a river—and of equitable distribution of rights, was suspect. The Reclamation leaders wanted to build irrigation systems and appropriate water for public use. To them, Indian reserved water rights conflicted fundamentally with their vision of a unified policy of water for the arid west and public water development. Also, Indian Reserved Water Rights created hostility because the doctrine seemed like a blended, hybrid riparian water rights doctrine at odds with state prior appropriation systems. One reason for the dismay was that tribal rights to water were uncertain and undermined predictability for a national policy.

Significantly, the *Winters* Doctrine did not exist in a vacuum. The federal government had many competing and poorly defined water rights policies to balance. Although the Bureau of Reclamation and the Bureau of Indian Affairs (BIA) were both housed within the Department of Interior, the two agencies had very different interests. Shurts argues persuasively that the Reclamation Bureau had more political influence than the BIA. The Reclamation Bureau advocated the *California* and *Colorado Doctrines*.[7] These *Doctrines* provided that the federal government owned all the resources of the public domain. According to the Reclamation Bureau, when the federal government relinquished control over the land, it still retained control over the surplus water.

Shurts examines how the Reclamation Bureau, rather than the BIA or the tribes, pressured the Justice Department to determine Indian water rights. Federal water policy depended on securing water claims in the arid West to sustain

6. Ann E. Amundson, *Recent Judicial Decisions Involving Indian Reserved Water Rights, Western Water Policy*, INDIAN WATER 1985, COLLECTED ESSAYS 4 (Christine L. Miklas & Steven J. Shupe, eds. 1986).

7. *See generally*, NORRIS HUNDLEY, WATER AND THE WEST: THE COLORADO RIVER COMPACT & THE POLITICS OF WATER IN THE AMERICAN WEST (1975).

national irrigation projects created under the federal Reclamation Act of 1902.[8] The Reclamation Bureau depended not only upon amorphous Indian Reserved Water Rights to accomplish its goals but also on the inability of states to regulate interstate streams. The Secretary of Interior was left to direct the Department of Justice to enforce the sometimes conflicting interests of the Indian Reserved Water Rights and the Reclamation Bureau's desire for federal control over water in the West.

The Shurts book examines how the BIA sought to protect Indians by pursuing conflicting water rights doctrines—the view of the states, *prior appropriation*, and the view of the *Winters* Court, *Indian reserved water rights.* The doctrines fundamentally conflict with each other. Prior appropriation, determined by state governments, depends on when and how a particular water appropriator uses the water. On the other hand, *Winters* rights, administered by the federal government, existed without regard to specific historical patterns of use. *Winters* rights were judicially fashioned to protect oppressed minorities and to fulfill the treaty based purposes of the reservation lands. The *Winters* decision did not specify a method of determining Indian water rights. *Winters* rights remain un-quantified. Federal courts created the *Winters* Doctrine whereas state courts and legislators originated *prior appropriation.*[9] The BIA faced inevitable confusion in attempting to rely on both doctrines.

Shurts explains how the BIA aggressively sought to lease as much Indian land as possible to non-Indian farmers so that it could put water to beneficial use and preserve potential Indian water claims. The book shows how the BIA had conflicts with other Interior Department agencies and competed with the Reclamation Bureau for projects, funding and even legal representation.

The author does an admirable job of recreating the thoughts and analyzing the mind-sets of the litigants and judges at the turn of the century. He analyzes the leading cases of the day that Carl Rasch, the United States Attorney who litigated on behalf of the Indians in the *Winters* case, cited in support of his argument for the tribe in *Winters*. Shurts explains the historical background and context of the other federal Indian law policies, namely, the allotment era and the attempt to assimilate Indians from the reservations into individual landholders and farmers. To understand the *Winters* Doctrine, it is first necessary to understand Indian allotment policy.

The book has three great strengths. First, Shurts shows how the allotment policy was used to break up the tribal land mass and transfer tribal lands and resources to non-Indians. Shurts also suggests that the success of the allotment process minimized the non-Indian criticism of the *Winters* decision. However, he also explains the amorphous nature of the *Winters* Doctrine, and argues that the

8. Act of June 17, 1902, c. 1093, § 4, 32 Stat. 389; May 10, 1956, c. 256, 70 Stat. 151 (current version 43 U.S.C. § 419 (1986).

9. Professor McCool writes that the Prior Appropriation and Winters doctrines "are completely contradictory doctrines, and recognition of one constitutes a denial of the other." DANIEL MCCOOL, COMMAND OF THE WATERS: IRON TRIANGLES, FEDERAL WATER DEVELOPMENT, AND INDIAN WATER 119 (1987).

very ambiguity of the doctrine provided the federal government leverage in negotiating with non-Indians for water rights claims. Statutory rights are more easily enforced than judge-made common law like the *Winters* Doctrine.

Second, Shurts shows how politics shaped federal Indian policy and formed water rights policies in the arid West. Shurts' use of original sources to portray the broad historical context of Indian and Western water rights is striking and successful.

Third, Shurts shows how the *Winters* Doctrine, despite its initial obscurity, was used in the decades following its announcement in 1908. He provides a specific case study of the Uintah Reservation in Utah. There, the United States filed a declaratory judgment and injunctive action in federal district court to enjoin non-Indian users from appropriating tribal water. Eventually, the court entered a permanent injunction pursuant to a negotiated settlement. The *Winters* Doctrine played an important role in reaching that result.

The book notes how the United States asserted both Utah state law claims and federal reserved water rights claims under *Winters*, and refused to compromise the *Winters* Doctrine. Shurts does note, however, how the federal government did compromise certain water rights, such as those for grazing, to reach the settlement in the *Uintah* case.

Shurts explains why the United States litigated the *Winters* case and other Indian water rights cases, and why many non-Indian land owners favored the *Winters* decision (the ancillary promise of federal funds, economic development, and the possibility for enhanced water availability). Shurts notes many of the realities policy makers and legislators in Congress faced at the time. Most *fin de siécle* non-Indian land owners were more interested in the Bureau of Reclamation funding for irrigation projects than the possibility that Indians would take water from them.

The *Winters* decision was initially obscure. Yet, the *Winters* Doctrine has been a major historical force in Indian and water policy. Shurts shows how the three branches of the federal government used the doctrine to promote seemingly inconsistent policy goals to settlement of the West by non-Indians and compliance with treaty rights of Indian tribes. Professor Daniel McCool has written:

"This impressive legacy of litigation has yet to resolve many of the controversies surrounding the *Winters* Doctrine. This is a testament to the difficulty of implementing a vague, court-mandated policy, especially one that contradicts a long standing policy with a statutory basis and strong political support." [10]

Shurts' book provides the best historical treatment to date of the complexities and competing policy choices Indians, settlers, judges and legislators faced at the turn of the twentieth century. Shurts' discussion of the origins and evolution of the *Winters* Doctrine provides important background and context for the decision of current day disputes regarding Indian reserved water rights. Beginning in the early 1980s, the *Winters* Doctrine played a key part in some negotiated settle-

10. *Id.* at 247.

ments of Indian water rights (although many of the decades-long negotiations are still in progress and have met with mixed results).[11]

One of the more interesting points that Shurts explains in his book is how the Reserved Water Rights Doctrine developed almost by accident as a secondary legal argument. The doctrine was not the main argument that the Department of Justice used in the *Winters* case. The argument that eventually became the *Winters* Doctrine was reluctantly accepted by the Office of the United States Attorney for the District of Montana and later by the United States Court of Appeals for the Ninth Circuit.

At the beginning of the book, John Shurts acknowledges Professor Don Pisani of the University of Oklahoma History Department.[12] Professor Pisani provided Shurts with much of the primary material for the book. One of the strengths of the book is Shurts reliance on the works of Professor Pisani.

Although difficult reading at times, the Shurts' book does an excellent job of bringing personality and practicality to the shaping of Indian reserved water rights. I enthusiastically recommend INDIAN RESERVED WATER RIGHTS.

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11. A substantial body of literature exists over the last decade and a half exploring the transfer of western water between Indians and non-Indians. *See e.g.* Michael C. Blumm, et al., *Judicial Termination of Treaty Water Rights: The Snake River Case*, 36 IDAHO L. REV. 449 (2000); Taiawagi Helton, *Comment, Indian Reserved Water Rights in the Dual-System State of Oklahoma*, 33 TULSA L.J. 979 (1998); JON C. HARE, INDIAN WATER RIGHTS: AN ANALYSIS OF CURRENT & PENDING WATER RIGHTS SETTLEMENTS (1996); Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers*, 30 TULSA L.J. 61 (1994); INDIAN WATER RIGHTS IN THE NEW WEST (Thomas R. McGuire, et. al., 1993); Susan D. Brienza, *Wet Water vs. Paper Rights: Indian & Non-Indian Negotiated Settlements and Their Effects*, 11 STAN. ENVTL. L.J. 151 (1992); Joseph R. Membreno, *Indian Reserved Water Rights, Federalism & the Trust Responsibility*, 27 LAND & WATER L. REV. 1 (1992); John E. Thorson, *Proceedings of the Symposium on Settlement of Water Rights Claims*, 22 ENVIRONMENTAL LAW 1009 (1992); Peter W. Sly & Cheryl A. Maier, *Indian Water Settlements & EPA*, 5 NAT. RESOURCES & ENV'T 23 (1991); Reid Peyton Chambers & John Echohawk, *Implementing the Winters Doctrine of Reserved Water Rights: Producing Indian Water & Economic Development Without Injuring Non-Indian Users?* 27 GONZ. L. REV. 447 (1991/92); Barbara S. Monahan, *Note, Florida's Seminole Indian Land Claims Agreement: Vehicle for an Innovative Water Rights Compact*, 15 AM. INDIAN L. REV. 341 (1991); Jim Shore & Jerry C. Straus, *The Seminole Water Rights Compact & the Seminole Indian Land Claims Settlement Act of 1987*, 6 J. LAND USE & ENVTL L. 1 (1990); Susan Williams, *Indian Winters Water Rights Administration: Averting New War*, 11 PUB. LAND L. REV. 53 (1990); Steven J. Shupe, *Indian Tribes in the Water Marketing Arena*, 15 AM. INDIAN L. REV. 185 (1990); 29 NAT. RESOURCES J. (1989) (Symposium Issue: New Challenges in Western Water Law); GARY WEATHERFORD, MARY WALLACE, LEE HAROLD STOREY, LEASING INDIAN WATER (1988); Lee Harold Storey, Comment, *Leasing Indian Water Off the Reservation: A Use Consistent With the Reservation's Purpose*, 76 CAL. L. REV. 179 (1988); John A. Folk-Williams, *The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights*, 28 NAT. RESOURCES J. 63 (1988); David M. Getches, *Management & Marketing of Indian Water: From Conflict to Pragmatism*, 58 U. COLO. L. REV. 515 (1988); PETER W. SLY, RESERVED WATERS RIGHTS SETTLEMENT MANUAL (1988); Steven J. Shupe, *Water in Indian Country: From Paper Rights to a Managed Resource*, 57 U. COLO. L. REV. 561 (1986); *Drafting Agreements*, 3 NAT. RESOURCES & ENV'T 3 (1988); and Karen M Shapiro, *An Argument for the Marketability of Indian Reserved Water Rights: Tapping the Untapped Reservoir*, 23 IDAHO L. REV. 277 (1986-87).

12. JOHN SHURTS, INDIAN RESERVED WATER RIGHTS xi (2000).

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