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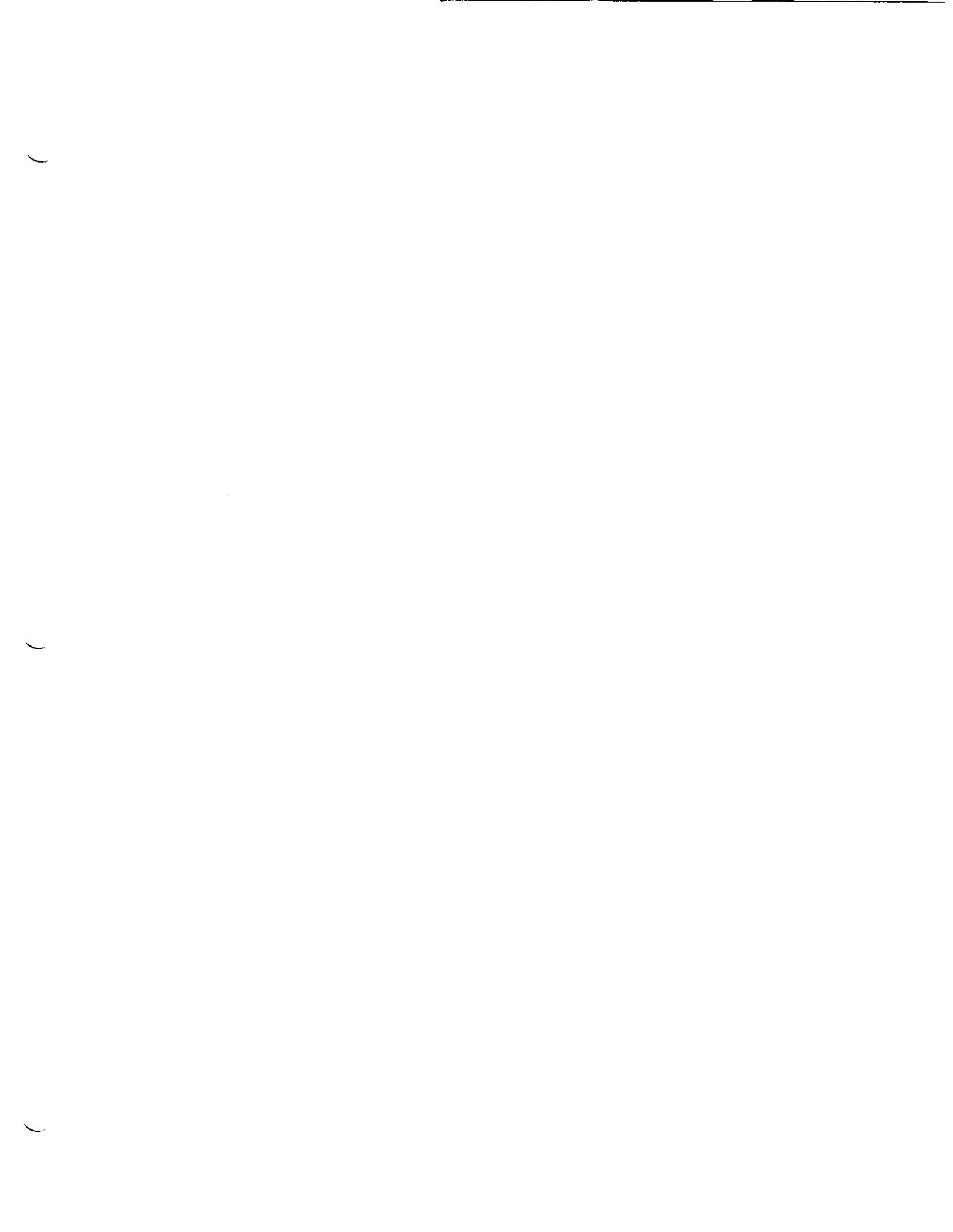
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INDIAN WATER RIGHTS IN THE SUPREME COURT:
A REVIEW AND PREVIEW

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A presentation for the Conference on
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I. A BRIEF REVIEW

A. The Old Landmarks: Indian Rights Triumphant

1. Winters v. United States (1908)

A very extreme ruling: Assigning all the waters of the River to the Indians/ Notwithstanding white settlers were the first to divert water/ And according Indians priority apparently because of unceded aboriginal sovereignty over waters, not on basis of new reservation of water by the United States for their benefit. But decision ambiguous as to how to measure Reservation needs/ And unclear whether intent of federal government or of Tribe is controlling.

2. United States v. Powers (1939)

The clear holding is that Winters rights are transferrable to non-Indian purchasers of Reservation land which remains within Reservation. The decision is ambiguous as to: Whether transfer is automatic/ Extent of right transferred/ And conditions, if any, on preservation of transferred right.

3. Arizona v. California (1963)

Held: Winters rights are impliedly reserved for all Indian Reservations, whether established by treaty, Act of Congress or executive action/ Winters rights embrace navigable as well as non-navigable waters/ The intent of the United States (of Congress or the Executive), not the doctrine of equitable

apportionment, controls quantity appropriated for the Reservation/ Quantity of water reserved is amount necessary to satisfy future, as well as present, needs/ And, where agricultural development was contemplated, quantification should be based on irrigable acreage within the Reservation.

B. The Decisions of the 1970s: Mixed Signals

1. The Colorado Cases: Eagle County and Division No. 5 (1971); Colorado River (Akin) (1976)

Holding, first, that the McCarran Amendment subjects to State court adjudication not merely water rights of the United States acquired under State law, but also federal reserved rights; and, then, by inexorable progression, that Indian reserved rights were also subject to State adjudication. Ambiguities in the last decision, however, left room for argument and jurisdictional skirmishes continued.

2. Cappaert v. United States (1976)

Ringling re-affirmation of the federal reserved water doctrine, in general, treating Winters rights for the benefit of Indians as an example. Express repudiation of equitable apportionment or other "balancing" test/ Extension of doctrine to groundwater. Perhaps significant caveat that what is reserved is "amount of water necessary to fulfill the purpose of the reservation, no more."

3. United States v. New Mexico (1978)

Grudging but unequivocal recognition of the federal reserved water doctrine as an exception to the rule of deferral to State control of water allocation. Accordingly, reserved rights should be found only where obviously necessary to fulfill Reservation purposes and only in quantities required to satisfy the original and primary purposes. How this principle, fashioned in the context of National Forest water claims, will apply to Indian Reservations is not entirely clear.

4. Washington v. Fishing Vessel Ass'n (1979)

On the whole, a ruling generous to Indian claims, recognizing off-Reservation fishing rights of the Tribes of the Pacific Northwest and quantifying their aggregate share as up to 50 per cent. But the Court issued a warning, since invoked in water cases, to the effect that the Indians should not, at the expense of white competitors, be conceded a share that would earn them more than "a moderate living."

C. The 1983 Trilogy: Indians Should Not Rock the Boat

1. Arizona v. California (March '83)

A closely divided Court rejects Indian claims to more water for lands already considered two decades before and requires further proof of water claims for other lands. Reluctance to disturb the status quo at the expense of competing non-Indian users is the basic message. But there is also "the specter" (as the Dissent labels it) that in future cases the Court may retrench on the irrigable acreage standard, in light of New Mexico and Fishing Vessel.

2. Nevada v. United States (June '83)

Now a unanimous Court rejects an obviously meritorious Indian water claim which federal officials failed to assert several decades ago. Here, more starkly than in the previous case, doing belated justice to the Indians would have required divesting "thousands of small farmers" of water "rights," now in use pursuant to "promises made to their forebears two and three generations ago" and long since "solemnized in a judicial decree." Those words, by Justice Brennan, tell us the Court is extremely reluctant to upset the status quo of some duration in order to vindicate Indian water claims. Another aspect of the case is the forceful reaffirmation of the Heckman rule that the United States may bind non-party Indians, regardless whether conflicting federal interests may affect the adequacy of that representation.

3. Arizona v. San Carlos Apache Tribe (July '83)

The Akin rule is now re-affirmed in circumstances that leave no apparent defense against a State that is ready and willing to adjudicate Indian water rights in the State courts at any pace not wholly lacking perceptible movement. Again, conflicts of interest on the federal side are said to erect no impediment. And the Court holds that the right of the Tribes to institute their own litigation in federal court to vindicate federal rights can be defeated in the case of water rights, with the Tribes relegated to the role of intervenors in State court proceedings.

II. A RASH PREVIEW

A. The Winters doctrine will survive.

Short of legislative action, there is no reason to doubt that the basic Winters doctrine will survive -- albeit on a restricted diet and in modest garb. Every Member of the Court has authored or joined in very recent statements re-affirming that Indian water rights are a matter of federal law and that such rights, to the extent necessary to fulfill the reservation purposes, were impliedly reserved by the United States when the reservation was established. Those general propositions are secure.

B. The Winters rule for Indians will continue to meld in as merely one indistinguishable aspect of the federal reserved water doctrine.

Ever since the 1963 decision in Arizona v. California, the Court has characterized Winters as holding that the United States impliedly reserves water for the Indians when it "establishes" an Indian Reservation, ignoring the language strongly suggesting that it was the Tribe that held back or "reserved" its pre-existing water rights when it ceded some of the aboriginal tribal lands. Whether this has or has not been a deliberate lapse probably does not matter. Most likely, in a case where it matters, the Court will adhere to the proposition that Winters rights only derive and date from federal action. The least of the consequences would be rejection of an immemorial priority date for Indian water appurtenant to aboriginal lands -- rarely a matter of practical importance. Other possible results are outlined in a moment. See paras. C and D.

- C. Quantification standards or procedures will be adjusted so as to avoid adjudicating to the Indians all the available waters to the detriment of actual beneficial use by non-Indian neighbors.

The result in Winters is not likely to be repeated. The devices invoked for holding down Indian water claims where they might otherwise exhaust the available waters and require non-Indians to relinquish existing uses predictably will include some or all of the following:

1. According finality to old judgments or contracts which favor non-Indians and understate the tribal entitlement;
2. Allowing State courts, in future, to quantify Indian water rights, subject only to U.S. Supreme Court discretionary review in cases of manifest error;
3. Applying a modified New Mexico test to quantify Reservation entitlement, limited to the amount necessary to satisfy the primary purposes of the Reservation, as contemplated at the time of its creation;
4. Restricting change of use to those contemplated at the date the Reservation was established and the water was reserved;
5. Invoking the Fishing Vessel "moderate living" standard as a ceiling to Indian water claims;

6. Limiting transferability of water rights, at least for off-Reservation use by non-Indians;
7. Imposing a rule of loss of right through non-use if there is no actual beneficial use on the Reservation within some reasonable time; and, finally,
8. Qualifying the doctrine of implied reservation by presuming that the United States would not have intended to reserve all available waters for an Indian Reservation where the consequence of so doing was to condemn to perpetually useless desert neighboring federal lands -- especially those acquired from the Indians with a view to sale to homesteaders.

D. Practical and equitable considerations increasingly will affect quantification of Indian water rights.

As just observed, the Court is unlikely in future to concede to the Indians, at the expense of their white neighbors now using water, a monopoly of the available water, even if strict application of the rule of Winters and the irrigable acreage standard of Arizona v. California would produce such a result, and, to avoid it, one or more of the devices listed may be invoked. Several of these approaches reflect practical or equitable considerations. Presumably, the Court will not recant its

repeated statements to the effect that the federal reserved waters doctrine is not governed by equitable apportionment criteria. But, short of that, it seems probable the Court increasingly will be influenced, even overtly, by equitable factors like laches, reliance, relative need, and economy versus waste. And this can cut either way, as Justice Brennan suggested in his concurring opinion in the Nevada case. In sum, the kind of considerations identified as relevant in Colorado v. New Mexico may well be noticed also in Indian water rights cases.

E. Tension between binding representation of Indian water rights claims by the United States and the prerogative of tribal self-representation will continue unresolved until Congress intervenes.

The Court has recently affirmed in very strong language the quasi-sovereign status of Indian Tribes, enjoying governmental powers and immunities, incidentally including the prerogative of self-representation in asserting tribal water rights. At the same time, however, the Court appears to have dismissed all arguments based on allegedly disabling conflicts of interest in the United States representation of Indian water claims -- viewing such conflicts as unavoidable and tolerable under the scheme of federal responsibility for Indian rights enacted by Congress.

Because of cost considerations and because the McCarran Amendment only waives the sovereign immunity of the United States, not of the Tribes, in State court water adjudications, the federal government will continue to be primarily concerned with vindicating Indian water rights. Despite increasingly frequent allegations of inadequate representation, there is no reason to suppose the Court will retreat. But the Congress ultimately may be persuaded to establish some kind of Indian Counsel, separate from both the Department of the Interior and the Department of Justice.

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