ENVIRONMENTAL LAW

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ARTICLES

Environmental justice recognizes that low-income, minority communities are disproportionately affected by air pollution, and that this problem should be addressed through environmental law and policy. While it is easy to identify general relationships between poverty, demographic patterns, and air pollution, it is far more difficult to demonstrate that companies build industrial facilities at particular sites based on the racial or ethnic composition of the neighboring community, or even that a minority community would be subject to disproportionate health and welfare impacts from a particular facility. It is even more difficult to prohibit the construction of industrial facilities based on a disproportionate impact on low income, minority communities. This Article reviews the reported cases considering the discrimination-based claims of the environmental justice movement, in the context of permitting and environmental reviews for industrial facilities. It concludes that this approach has not been successful in limiting their construction and operation. Finally, the Article suggests that land use planning restrictions on industrial development based on air pollution loading would provide a more direct and viable means of protecting low income, minority communities.

The federal government owns many thousands of conservation easements on private lands. Thus far, private landowners have challenged few of these federal easements in litigation. In the Columbia River Gorge National Scenic Area, the United States Forest Service has acquired more than two dozen conservation easements to

The year 1976 marked a sea change in federal policy regarding the treatment of American Indian tribes and their water rights. In that year, the Supreme Court of the United States was called upon to determine the scope of the McCarran Amendment, a rider on a federal appropriations bill that waived the sovereign immunity of the United States in state court general stream adjudications "where it appears that the United States is the owner or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise." The Supreme Court, in what has been called a "clear example of judicial legislation," interpreted that language to grant state court jurisdiction for the determination of Indian reserved water rights. In so doing, the Court abandoned the "deeply rooted" federal policy of "leaving Indians free from state jurisdiction and control," and has subjected the tribes to "hostile [state court] forums in which [the tribes] must be prepared to compromise their [water right] claims."

The purpose of this Article is to examine the legislative history of the McCarran Amendment, the available Congressional Record, the Senate Report, as well as the Hearing Minutes, in an effort to ascertain whether it was Congress's intent to include Indian reserved water rights within the scope of the McCarran Amendment.

The legislative history indicates that "the McCarran Amendment was meant to be interpreted narrowly, not broadly." It demonstrates that the Senators' actual concern had not to do with federal reserved water rights but instead that the United States, acting in a proprietary rather than sovereign capacity, had been acquiring an ever-increasing number of state law water rights but was refusing to enter state court proceedings to either adjudicate or administer those rights. As the presense of the federal government increased in the river basins of the West, the proponents of the McCarran Amendment became increasinly alarmed that federal claims of sovereign immunity would effectively preclude state courts from enforcing state water law, thereby causing "the years of building the water laws of the Western States . . . [to] be seriously jeopardized."

Far from a general waiver, the legislative history reveals that the sponsors of the McCarran Amendment intended to address only this narrow but politically explosive problem where the United States was claiming a "privilege of immunity that the original owner wouldn't have." Indian reserved water rights, which are reserved by the federal government in its sovereign capacity for the benefit of Indian tribes that have sovereign immunity independent of the United States, do not appear to have been considered or intended to be included by Congress as the McCarran Amendment was passed into law.

wildcatter or tribal leader hesitant about the rules of the game and how to anticipate their application.