# INDIAN WATER RIGHTS: THE BUREAUCRATIC RESPONSE

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## INTRODUCTION: THE WINTERS DOCTRINE

The legal development of Indian water rights can be traced through a complicated 73 year history of court cases beginning with Winters v. U. S.[1] In that landmark case the U. S. Supreme Court established the doctrine of federal reserved water rights, also known as the Winters Doctrine. The court ruled that the U. S. government had "impliedly" reserved water rights for the Indians when they created the Ft. Belknap Reservation. They reasoned that although water rights were not specifically mentioned in the treaty that established the reservation, it would be unreasonable to assume that the Indians or the federal government intended to alienate the water from the land. Thus the government, in fulfillment of its fiduciary duty as trustee of Indian property, had reserved sufficient water for the Indians to fulfill the purposes for which the reservation was created.

There have been numerous water rights cases in the years since the Winters decision, most of which have expanded the scope of federal reserved water rights. In U. S. v. Powers (1939) the Supreme Court applied Winters Doctrine rights to allotted lands.[2] In that same year the 9th Circuit Court of Appeals ruled that Winters Doctrine rights were applicable to all reservations, not just those established through treaty, as was the case in Winters v. U. S.[3] The Doctrine was further expanded to include future requirements of Indians in two important circuit court decisions.[4]

In 1963 the Supreme Court attempted to clarify the mounting body of case law that dealt with Indian water rights. In Arizona v. California the Court held that the priority date for establishing Indian reserved water rights is the date the reservation was created, and does not require actual use of the water; in other words, the right is not lost because the Indians are not using the water. More recently, the High Court has extended federal reserved rights to groundwater in the case of Cappaert v. U. S.[5] In a state such as Arizona, where 60% of the water supply comes from groundwater, the Cappaert decision assumes an important role in future water resources development.[6]

To accurately assess the ramifications of the Winters Doctrine it is necessary to understand two basic facts. First, this doctrine is based on case law or judge-made law, not statutory law. In the absence of specific Congressional action, the courts have had to interpret the general intent of Congress' Indian policy, and apply it to water rights controversies. As a result, the decision-making process is fragmented into specific cases without the benefit of an explicitly stated long-range Congressional policy. However, Congress has lent its implied approval of the expansion of the Winters Doctrine by refusing to pass legislation which would repudiate or curtail federal reserved water rights. Over fifty bills have been introduced into the Congress that would specify the extent of federal reserved rights. Nearly all of these bills were attempts to curtail federal rights and emphasized state control over water allocation. All of these bills have failed.[7]

A second important point concerns the inherent conflict between the doctrine of federal reserved rights, and the Prior Appropriation Doctrine recognized by most western states. The latter doctrine is based upon "beneficial use"--to establish a priority, the water must be in use, and the right is lost through non-use. Also, the senior appropriator always has a superior right over subsequent appropriators. In contrast to Prior Appropriation is the doctrine of federal reserved rights, which establishes a priority merely by establishing a federal reservation of land with a potential for future water use. Thus the state doctrine is oriented towards actual past usage while the federal doctrine is future oriented and is not dependent upon use.

The fragmented development of water rights case law, the inaction of Congress, and the conflict between state water law and federal reserved rights have exacerbated the difficulties associated with the implementation of Indian water rights. The remainder of the paper will discuss these difficulties of implementation, and how federal agencies have dealt with them.

## THE BUREAUCRATIC RESPONSE

### The Department of Justice:

Through a series of Supreme Court decisions the federal government has been declared the "guardian" or trustee of Indian people and their property.[8] The responsibility of litigating Indian water rights for the Indians has fallen on the Department of Justice which fulfills this role by suing on behalf of various Indian tribes. The Department is required by law to file all claims in which the U. S. is a party.[9] There have been many cases where the Department of Justice has competently, and at times zealously, fought for Indian rights to water. Nearly all of the most important Indian water rights cases have been brought to court, not by the tribes themselves, but by the Department acting as trustee.

While the Department of Justice has undoubtedly accomplished much in this area, its effectiveness is limited by its multiple loyalties; the Department also represents other federal interests which are in conflict with Indian claims to water. An example of this is the Department's responsibility to represent the United States in hearings before the Indian Claims Commission.[10] This conflict-of-interest forces the Justice Department to protect the interests of the federal government when Indian claims appear to be to the detriment of that government.[11]

One of the best examples of the Justice Department's failure to vigorously protect Indian interests was in the case of Arizona v. California, where twelve tribes from the Lower Basin of the Colorado River claimed that the government was inadequately protecting their interests. They based their claim on the fact that the initial United States petition of November, 1953, made a strong claim for Indian water rights as being "prior and superior to the use of water claimed by the parties of this cause in the Colorado River..."[12] This language so angered representatives from Arizona that the U. S. Attorney General withdrew the petition without consulting tribal attorneys, and removed the language claiming a prior and superior right for Indian reservations. The tribes protested but the Special Master in charge of the case dismissed the motion.[13] Again in 1961 the Navajo Tribe filed a motion to intervene, claiming inadequate representation, and again the motion was denied.[14]

Another example of alleged inadequate representation concerns the claims of the Five Central Arizona Tribes to CAP water. They are requesting water from that project to compensate for past failures of the federal government to actively litigate on behalf of their water interests. An important factor in these cases is groundwater depletion, and its subsequent effects on both wells and surface water sources. For example, the Papago Tribe is suing the State of Arizona, the City of Tucson, nearby mines, and local non-Indian irrigators in an effort to win new sources of water to compensate for traditional sources. The tribe points out that these traditional sources were lost without any effort by the Justice Department to protect them.[15]

It is clear that the tribes have been disappointed in their "guardians" at the Department of Justice. As a result, they have increasingly relied on their own private counsel to litigate their water rights cases. For example the Papago Tribe has hired the Native American Rights Fund, as well as private attorneys, to press their claims for more water. Federal funding for outside water rights attorneys has been available over the past few years, and this will undoubtedly aid the tribes in the future in their drive to become less dependent on the Department of Justice.

### The Bureau of Reclamation:

There is an important distinction to be made between what is sometimes called "wet" water and "paper" water. Thus far this paper has discussed the latter, which refers to water rights as expressed by the courts. But you cannot drink water rights, hence the former term refers to usable water; in other words water that can de deliver-

ed to where it is needed. It is at this point in the process that the Bureau of Reclamation becomes an important factor in Indian water rights. The Bureau's original mission was to "reclaim" the desert in 17 western states. After an initial era of flourishing activity, prime irrigation projects began to grow scarce, the best sites already developed. The Bureau gradually shifted to other activities and became the Water and Power Resources Service. While the Bureau had built many giant projects over the years that primarily benefit non-Indian irrigators, they have constructed very few projects that exclusively serve Indian reservations.[16] As a result, Indian tribes have had a difficult time converting their water rights into usable, deliverable water.

The Indian tribes have never been perceived as a part of the Bureau of Reclamation's clientele. Indian reservations, with their reliance on federal reserved rights, are in direct conflict with non-Indians who establish water rights under the prior appropriation doctrine and comprize the bulk of the Bureau of Reclamation's constituency. Congress has appropriated millions of dollars for Bureau projects based on state recognized water rights. For Congress to proceed now with authorization and appropriation of Indian projects would require the re-allocation of water, which would deprive previously built non-Indian projects of water.[17] Of course it is highly unlikely that Congress would do this. Thus, as the number of non-Indian projects increase, the less likely it is that Congress will fund Indian projects that compete for the same water. As a result there is a conspicuous gap between court-mandated rights (paper water), and actual water usage.

The Bureau of Indian Affairs:

The Bureau of Indian Affairs (BIA) was created in 1824 to aid the federal government in accomplishing two contradictory goals; to subdue the Indian (by force if necessary), and to protect the Indian. These conflicting duties have never ceased to trouble the BIA in the ensuing 150 years. Part of their trust responsibility is the protection of real property, under which water rights is subsumed.

Although the BIA considers itself a trustee for Indian water rights, there are several factors which limit its ability to function effectively in that capacity. The BIA is in the Department of Interior along with the Bureau of Reclamation and several other agencies whose needs often conflict with the needs of the Indian tribes. Many important decisions, such as Departmental budgeting, overall policy, and western natural resource development, are in the hands of the Secretary of Interior, who must balance all of the conflicting demands in a politically acceptable manner. The BIA is often forced to compromise or abondon its goals when they conflict with powerful agencies like the Bureau of Reclamation.[18]

Another factor working against the BIA is the fact that it is not primarily a water development agency. While the BIA can lend support to tribes litigating for rights in court, it does not have the expertise, personnel, and experience to create large irrigation projects and push them through Congress. The BIA is sometimes placed in the awkward position of relying on the Bureau of Reclamation for technical assistance. This creates some unusual problems. For example, the two agencies have very different definitions of "irrigable acreage," which is an important variable in water allocation decisions. The Bureau of Reclamation considers the amount of "economically available" water an important aspect of potentially irrigable acreage, but the BIA prefers to emphasize other variables that are primarily concerned with agricultural factors. In a project that is sponsored by the BIA, but engineered by the Bureau of Reclamation, the Secretary of Interior must often decide which definition to use, which often determines whether the project will be built.

A final factor that the BIA must overcome is the hostility that some tribal members feel for the agency. Many Native Americans still remember the BIA's involvement in the enormously unpopular programs of the past such as allotment and termination. Also, there is a feeling among some tribal members that any form of reliance on the BIA impedes the movement toward self-determination, and results in continued dependence on the federal govenment. Even the best intentions of the BIA may be viewed with suspicion.

## CONCLUSION

In the past, Indian tribes often lacked the organization and political resources necessary to effectively influence water allocation decisions. The tribes relied upon the federal government to protect Indian resources as a part of the government's trustee responsibility. But in recent years tribes have developed into a politically viable force. With increasing sophistication they have demonstrated their ability to compete in the policy-making process. Although Indians are not numerically strong (140,628 live on reservations in Arizona), reservation lands hold approximately a third of the nation's recoverable low sulfer coal, half of the country's uranium deposits,[18] and last but not least, substantial claims to water resources (at present they control about 30% of the water in Arizona[19]). There are several potential developments that could result from the increased political power of the tribes which would impact upon the three agencies that deal with Indian water rights. Each agency will be discussed below.

The Department of Justice. Indian tribes will undoubtedly continue to hire their own attorneys, but this does not necessarily relegate the Justice Department to a position of secondary importance. Increased tribal activism in the courtroom may serve as an incentive to the Justice Department and ultimately open up many new channels of litigation. Also, by remaining involved in Indian water rights litigation, the Justice Department can maintain at least some influence over tribal decisions in this area.

Another important factor is the result of recent court decisions which allow for concurrent federal and state court jurisdiction in basin-wide water rights controversies.[20] Since state courts have traditionally been hostile to Indian rights--and therefore federal rights--the federal government, acting through the Department of Justice, will undoubtedly want to maintain an active part in Indian water rights decisions which could ultimately have an impact on federal reserved rights on other forms of federal reservations such as national forests and parks, and military installations.

The Bureau of Reclamation. In the future, Indian tribes may become an important constituency of the Bureau of Reclamation. If Indian water rights become sufficiently legitimized through either congressional legislation or continued court action, the possibility of large Indian irrigation projects might become more attractive to Bureau planners looking for new potential project sites.

One stumbling block to Bureau of Reclamation participation in all-Indian projects in the past has been the Bureau's methods of cost-benefit analysis. All projects must produce a positive cost-benefit ratio to be considered acceptable. But this criteria often works against the possibility of a reservation project. First, reservations were usually carved out of the least desirable land and thus require a greater capital investment to make them productive. Second, many of the benefits that would accrue from an on-reservation project--increased tribal independence and other cultural and social variables--cannot be measured by traditional concepts of cost-benefit analysis.

However, future projects may be intended as a compensatory mechanism (to right past injustices) rather than economic profitability. With appropriate congressional authorization, this could free the Bureau of Reclamation from the requirement for a positive cost-benefit ratio. The Ak Chin Settlement Act is, in many respects, an example of this type of project.

The Bureau of Indian Affairs. It is difficult to predict the ultimate impact the self-determination policy will have on the Bureau of Indian Affairs. The agency will probably continue to fund studies that the tribes can use in water rights litigation, but beyond that the BIA may be hesitant to try to "control" important water allocation decisions by the tribes, even if they conflict with other priorities in the BIA's parent Department, Interior. Much of the BIA's future work will be to help the tribes implement their decisions after the tribes have made up their own minds concerning tribal priorities. This could create a positive healthy working relationship between Indian peoples and its federal "guardian," the BIA.

In sum, the present situation--and the potential for future developments--in Indian water rights is probably best explained by the following statement from the 1977 Report from the Arizona Academy; "All other water conflicts and disputes pale into insignificance compared to the potential effects Indian demands could have."[21]

## ENDNOTES

1. 107 U. S. (1908).

2. 305 U. S. 527 (1939).

3. United States v. Walker River Irrigation District, 104 F. 2d. 334, (9th Cir., 1939).

4. Conrad Investment Company v. U. S., 161 F. 832, (9th Cir., 1908), and United States v. Aktanum Irrigation District, 236 F. 2d. 321 (9th Cir., 1956).

5. 426 U. S. 128 (1976).

6. Colorado River Basin Water Problems: How To Reduce Their Impact, Report to the Congress by the General Accounting Office, CED-79-11, May 4, 1979, p. 65.

7. Eva Hanna Morreale, "Federal-State Conflicts Over Western Water - A Decade of Clarifying Legislation." Rutgers Law Review 20 (1966), p. 423.

8. See, inter alia, Cherokee Nation v. Georgia, 5 Pet. 1 (1931)., United States v. Payne, 264 U. S. 446 (1924)., U. S. v. Kagama, 118 U. S. 375 (1886).

9. 28 U. S. C. 516 (1970).

10. 25 U. S. C. 70 (1970).

11. See generally, Ronald T. L. Young, "Interagency Conflicts of Interests: The Peril To Indian Water Rights," Law And Social Order, 1972, pp. 313-28.

12. Petition of Intervention, No. 10 original, filed Nov. 2, 1953, Para. XXVII, at 23, Arizona v. California, 344 U. S. 919 (1953).

13. Motion for leave, filed June 27, 1956 in Arizona v. California (U. S. Supreme Court No. 10) 344 U. S. 919 (1963).

14. Motion on behalf of Navajo Tribe of Indians of the Navajo Reservation for leave to intervene. Filed Sept. 25, 1961 in Arizona v. California (U. S. Supreme Court, No. 8) 344 U. S. 919 (1963).

15. Report to the Congress, see note 6, pp. 86-88.

16. The exception is the Navajo Indian Irrigation Project, which was built as part of a compromise to allow a non-Indian project--the San Juan-Chama--to establish a water right free of Indian claims to that projects water sources. The C.A.P. will also serve Indian reservations, but it was built primarily for non-Indian water users.

17. Interviews with various agency personnel at the Bureau of Reclamation (Water And Power Resources Service) regional headquarters, Phoenix, Arizona.

18. Interview at the Bureau of Indian Affairs Area Office, Phoenix, Arizona.

19. David Schaller, "An Energy Policy for Indian Lands: Problems of Issue and Perception," in New Dimensions to Energy Policy, ed. by Robert Lawrence, (Lexington, Mass.: D. C. Heath and Company), p. 57.

20. U. S. v. District Court in and for Eagle County, 401 U. S. 520 (1971). Colorado River Water Conservation District v. U. S., 424 U. S. 800 (1976), Akin v. U. S. 424 U. S. 800 (1976).

21. Arizona Water: The Management of Scarcity, prepared by the University of Arizona for the 31st Arizona Town Hall, Oct. 9 - 12, 1977.