

6-7-2000

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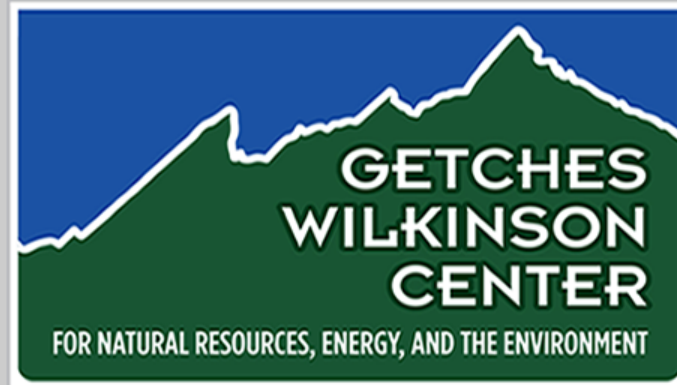
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## Citation Information

DeCoteau, Jerilyn, "The Effects of Development on Indian Water Rights: Obstacles and Disincentives to Development of Indian Water Rights" (2000). *Water and Growth in the West (Summer Conference, June 7-9)*.  
<http://scholar.law.colorado.edu/water-and-growth-in-west/3>



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Jerilyn DeCoteau, *The Effects of Development on Indian Water Rights: Obstacles and Disincentives to Development of Indian Water Rights*, in *WATER AND GROWTH IN THE WEST* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 2000).

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# THE EFFECTS OF DEVELOPMENT ON INDIAN WATER RIGHTS: OBSTACLES AND DISINCENTIVES TO DEVELOPMENT OF INDIAN WATER RIGHTS

by Jerilyn DeCoteau

*Water...symbolizes such values as opportunity, security, and self-determination....Strong communities are able to hold on to their water and put it to work. Communities that lose control over water probably will fail in trying to control much else of importance.*

Helen Ingram: *Water Policies: Continuity and Change*,  
quoted in Bates, Getches, MacDonnell, Wilkinson,  
Searching Out the Headwaters, p. 182 (Island Press 1993)  
(copyrighted 1993 Natural Resources Law Center,  
University of Colorado, School of Law).

## I. Introduction

The United States' assimilationist policy embodied in the General Allotment Act of 1887 resulted in reducing the Indians' land base from 138 million to 52 million acres and transferring the resulting 86 million acres to non-Indian hands in less than 50 years. The devastation wrought upon Indians by this misguided effort to individualize Indian lands cannot be measured. A tragedy of this proportion is thought not to be possible in these more modern, more aware times. The government's trust responsibility for Indian resources and involvement of the Indian people themselves in decisions affecting their resources surely will prevent another such occurrence. But even as we look with eyes wide open, something of similar magnitude is happening with Indian water rights. However, it is happening much more insidiously because, while the United States has discarded its assimilationist policy and replaced it with a policy of self-determination, the effects of past policies continue, and new, seemingly neutral laws overlaid on these effects, effectively continue those discarded policies.

This paper identifies some of the effects on Indian water rights of the development of non-Indian water resources. Examined, in particular, are the effects of historical water policy, the Endangered Species Act, the economic standard for quantifying Practicably Irrigable Acres (PIA) and the Sensitivity Doctrine. Not addressed here are water leasing or

administration of water resources; although the tribes' ability to do these things is also limited as a result of development. The effects of development are easy to identify and can be seen readily in the environment. To discern the effects on tribes requires a closer look.

In law school, I learned about property law concepts called "accession and confusion". Accession and confusion describes a situation in which one's property is added to another's property in a way that confusion of the properties results and untangling the property rights becomes a difficult legal problem. I believe something similar is happening to Indian and non-Indian water rights. When the rights are finally untangled the Indians will generally be the losers. This is true for many reasons. Under western water law, junior users can use water that senior rights holders do not use. Where Indian rights have not been quantified, non-Indian rights have been. Where Indian rights have not been developed, water projects for non-Indians have been built, often with federal dollars and without regard to rights Indians may have to the water used for the federal projects. Where projects included Indian components, those components were scheduled to be built last, often too late to receive necessary funding. Where non-Indian water projects have degraded the environment to a state that threatens extinction of animals or plants, Indians now find themselves in line for water rights behind water rights for endangered species. And the Endangered Species Act puts Indians effectively in line behind the junior users who likely caused the environmental degradation.

For Indians, non-Indian development has resulted in stringent scrutiny of any use any Indian tribe proposes for its reserved water rights, scrutiny that non-Indian water uses have not been subject to. In two words, the development of non-Indian water resources has "inhibited" or "prohibited" development of Indian water rights, as well as other Indian resources. This is true despite the sovereign authority of tribes to develop and regulate their own resources, despite the federal government's trust responsibility to protect tribal resources and promote tribal sovereignty and development, despite a hundred guarantees in treaties, court decisions, settlements, compacts, and secretarial orders that Indian water rights are reserved or that they will be unaffected by other water uses.

At this point in time, even money, if it were to be made available in large enough sums, may be too late to help tribes develop their water rights. Tricks in the law and environmental concerns can effectively prevent tribes from developing their water, or other resources. The problem seems intractable, but a solution must be found. The future of many tribes depends on it. As has been noted: "Development of reservation resources, [is] more than simply a stick in a tribe's bundle of rights, [it] is critical to the fulfillment of

tribal self-determination and the survival of land-based Indian nations as nations.” Sandy Zellmer, “Conserving Ecosystems Through the Secretarial Order on Tribal Lands”, 14 WTR Nat. Resources & Env’t, 162, 164 (Winter 2000) (citations omitted)(Zellmer).

## **II. The Nature of Indian Water Rights**

Most Indian water rights are reserved water rights, and most have not been quantified. Even where quantified, tribes have often been unable to develop their water rights. Even so, everyone has known since 1908 when the United States Supreme Court announced the Winters reserved rights doctrine that most tribes hold substantial and unused reserved water rights with a priority senior to most other users.

In 1908, in the case Winters v. United States, 207 U.S. 564 (1908), the Supreme Court explained that when Indian reservations were established, sufficient water was reserved to fulfill the purposes of the reservation. These rights are called Winters rights or Indian reserved rights. They have a date-of-reservation priority, which makes them earlier than most non-Indian water rights, and they differ from other water rights under a priority system in that they cannot be forfeited or lost through non-use.

Indian reserved rights lay dormant for almost fifty years after the Winters decision, while non-Indian water resources were being developed under federal water projects, without regard to the existence of unquantified and unexercised Indian reserved rights. If there was little concern after 1908, certainly the potential magnitude of Indian reserved rights became apparent in 1963 when, in the case Arizona v. California, 373 U.S. 546 (1963), the Supreme Court approved the practicably irrigable acreage method of quantifying reserved water rights, which would result in large quantities of Indian reserved rights. In that case Arizona sued California over the allocation of the Colorado River and because it was concerned that California would not live within its allocation. The United States joined the suit on behalf of five tribes: the Chemehuevi Tribe, Colorado River Indian Tribes, Cocopah Tribe, Fort Mojave Tribe and Quechan Tribe. After 1963, tribes’ rights could be quantified, but still nothing was done to help the tribes develop their rights and while a few tribes were able to use their water, Indian reserved water rights remained largely unused.

## **III. History of Development of Non-Indian Water in the West**

The period of time since the United States Supreme Court recognized reserved water rights in Winters has been a time of unprecedented non-Indian water development in the West.

The 1902 Reclamation Act set in motion an era of major water development in the west, but in the development frenzy that ensued, Indian water rights were largely ignored. "During the five-term Roosevelt-Truman interregnum, [] several omnibus river-basin bills [] authorized not one, not five, not even ten, but dozens of dams and irrigation projects at a single stroke. Economics mattered little, if at all...." Marc Reisner, Cadillac Desert: The American West and Its Disappearing Water, p. 119 Penquin Books, New York 1993 (Reisner). For example, thirty-six dams were built on the Columbia River and its tributaries in as many years, and 107 dams were included in the Pick-Sloan Project in the Missouri River Basin. Taking the Colorado River alone, numerous dams and reservoirs have been constructed. Some examples are: Flaming Gorge, Navajo, Glen Canyon, Hoover, and Parker. Huge water delivery and transmountain projects developed include the Central Utah Project, the Central Arizona Project, Imperial Irrigation District, and others. Large municipalities have grown up depending on the Colorado River and its infrastructure. By contrast Indian water rights on the Colorado River have been virtually non-existent.

The federal government often used tribes' water and land resources to build federal water projects, but tribes did not and still do not benefit from federal irrigation, flood control or hydroelectric projects in proportion to tribal resources used in these projects. The National Water Commission's 1973 Report made this indictment: "[W]ith few exceptions, the projects were planned and built by the federal government without any attempt to define, let alone protect, prior rights that Indian Tribes might have had in the waters used for projects.... In the history of the United States Government's treatment of Indian Tribes, its failure to protect Indian water rights for the use on the Reservations it set aside for them is one of the sorrier chapters."

The joint Army Corps of Engineers and Bureau Of Reclamation Pick-Sloan Plan in the Missouri River Basin, approved in 1944, provides a wrenching example of total disregard for Indians and their property and resources. Five dams on the Missouri River destroyed over 550 square miles of tribal land in North and South Dakota and dislocated over 900 families. Another 200,000 acres of Sioux land were flooded in South Dakota and 580 families uprooted. It has been described this way:

[Sioux families were] uprooted and forced to move from rich, sheltered bottomlands to empty prairies. Their best homesites, their finest pastures, croplands, and hay meadows, and most of their valuable timber, wildlife, and vegetation were flooded. Relocation of the agency headquarters on the Cheyenne River, Lower Brule, and Crow Creek reservations seriously

disrupted governmental, medical, and educational services and facilities and dismantled the largest Indian communities on the reservations. Removal of churches, community centers, cemeteries and shrines impaired social and religious life on all five reserves. Loss not only of primary fuel, food, and water resources but also of prime grazing land effectively destroyed the Indians' economic base. The thought of having to give up their ancestral land, to which they were so closely wedded, caused severe psychological stress. The result was extreme confusion and hardship for tribal members.

Frank Pommersheim, "The Reservation as a Place: A South Dakota Essay", 34 South Dakota Law Review (1994) p. 261 quoting M. Lawson, Dammed Indians, p. 29 (1982) (Pommersheim). In his book, Command of the Waters, p. 178 (internal citations omitted), Dan McCool said: "The Pick-Sloan program 'replaced the subsistence economy of the Missouri River Indians...with a welfare economy....' And, water related problems persist... 'water systems on the affected reservations do not meet minimal public health standards'."

Vine Deloria, esteemed Sioux author, professor and intellectual, characterized the Pick-Sloan project as "the single most destructive act ever perpetrated on any tribe by the United States." Pommersheim at 261. In the Pick-Sloan Plan, the Indians were not consulted and the Bureau of Indian Affairs did not speak up. In fact the Department of the Interior threw itself behind Plan over the objections of the Mandan, Hidatsa and Arikara Tribes of the Fort Berthold Reservation who pleaded not to have the Garrison Dam Built. Reisner at 188. In the 1948 signing ceremony, a tribal representative broke into tears, when, for \$33 an acre, the tribes gave up 155,000 acres of their most valuable lands. Reisner at 374-75 (picture).

Needless to say, the Missouri River tribes' rights had not been quantified, and the project did not have an Indian component. Today the 28 Tribes that have water rights along the Missouri River Tribes are struggling to quantify their water rights. The Army Corps of Engineers has been working on a Master Water Control Manual for 11 years. The Project Manager for the Manual said: "We are committed to being much more sensitive to the tribes [than in the past]". But tribal leaders are wary and complain that at a recent two-day conference on the Law of the Missouri River, no representative of American Indians spoke. "Indian Water Rights Considered", HONOR Digest, March/April 2000 (HONOR@dgsys.com).

Where Indian projects have been funded, they have received a fraction of the funding for

non-Indian projects. For example, on the Wind River Reservation in Wyoming about \$4.4 million was spent over 80 years on developing irrigated agriculture. Wyoming was quick to call this a “massive expenditure”. Andrew C. Mergen and Sylvia Lui, “A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States”, 68 University of Colorado L. Rev. 753 (internal citations omitted). But that should be compared with the federal government’s infusion of \$72 million in the neighboring Riverton Irrigation Project, which serves a considerably smaller non-Indian population - over 16 times the investment in the Indian project. *Id.* at 753-54.

Where federal irrigation projects have had Indian components, these components have been scheduled for completion last. Many of these Indian projects end up not being built due to lack of funds and increasingly strict federal benefit-cost analyses. Examples are:

1. The Navajo Indian Irrigation Project was authorized in 1962 along with the non-Indian San Juan Chama Project. The San Juan Chama Project was completed ahead of schedule while NIIP only irrigates about one half the original proposed acreage.

2. The Southern Ute and Ute Mountain Ute Indian Tribes negotiated a settlement of their reserved water rights in 1988, Colorado Ute Indian Water Right Settlement Act of 1988, Pub. L. No. 100-585, 102 Stat. 2937 (1988), which provides for the Animas LaPlata Project, which is not yet started.

3. The Ute Indian Tribe agreed in 1965 to defer use of a substantial amount of their reserved water to allow use of that water in the Bonneville Unit of the Central Utah Project (a transmountain diversion from the Colorado River Basin). In return, the Ute Tribe was promised water from three proposed CUP storage units, none of which has been built, 35 years later.

### Interstate Water Compacts

With extensive development, conflicts arose between states. To resolve problems over the rights and duties of States on the same river system, and concerns over development, states entered into Compacts that set the amount each state may take from the river and what they must deliver to downstream states. Indian water rights are not mentioned in these compacts, except to assure that Indian rights are not affected. For example, the Upper and Lower Colorado River Basin Compacts contain explicit language assuring that nothing in the compacts affects Indian Rights. “Nothing in this Compact shall be construed as



affecting the obligations of the United States of America to Indian Tribes” Colorado River Compact, Article VII: Upper Colorado River Basin Compact, Article XIX. Despite this language, all the water in the Colorado River was allocated to the States, with no discussion or apparent consideration of Indian water rights. Since the Colorado River Compact in 1922, there have been over 50 compacts dealing with allocation, pollution, flood control, and regulation of water.

Have these compacts affected Indian water rights? Speaking from personal experience as a water rights lawyer in water settlement talks in New Mexico, a primary concern of the State was delivering water to Texas under the Rio Grande Compact. Because of that concern, the State has a policy of allowing no more storage projects. This creates a huge obstacle for tribes who need storage to be able to exercise their water rights. Identifying a project that does not potentially affect deliveries to Texas and that will provide benefits to non-Indians as well, to make it politically palatable, is a massive and highly uncertain undertaking, the cost of which is borne by the United States and the Tribes.

#### **IV. Endangered Species Act**

Against the backdrop of water development in the west, in which tribes largely did not partake, and which was largely brought to a halt for economic and environmental reasons, Congress passed the Endangered Species Act in 1973, as amended at 16 U.S.C. §§ 1531 et. seq. The ESA places the needs of endangered species and their habitat (which often turns out to be reservations because, unlike other areas of the country, they have been undeveloped), in front of the tribes’ needs to develop their resources. Because of the way the ESA is designed and implemented, it also places junior water users ahead of the tribes’ senior water rights.

Western tribes who are trying to develop their resources are experiencing problems with laws designed to preserve wildlife, and the land and water resources it depends on. For example, the Navajo Nation has been trying to negotiate its claims in the Little Colorado River Basin for ten years. Navajo tribal attorney, Stanley Pollack, has expressed this frustration, “Everywhere we turn, we run into endangered-species problems. Take your pick: We proposed a small dam, but an endangered fish stopped that; we proposed a small irrigation project, but an endangered plant stopped that.” Quoted in, Dan McCool, “Indian reservations: Environmental refuge or homeland?” High Country News, April 10, 2000 p.10. As Professor Dan McCool observed in his recent High Country News article, Indian homelands should not be “converted into ecological preserves for the benefit of those who

have already despoiled their own lands.” *Id.* “We cannot ask Indian people to remain in poverty because the rest of the West is overdeveloped.” *Id.* See also, Adrian N. Hansen, “The Endangered Species Act and Extinction of Reserved Indian Water Rights on the San Juan River”, 37 Ariz. L. Rev. 1305, 1329 (1995) (“The lack of economic activity has left many western Indian reservations poor, but picturesque enclaves of critical habitat.”)

#### **A. The Endangered Species Act’s Disproportionate Effect on Indian Tribes**

In any action with any federal involvement, the ESA imposes an obligation on all federal agencies to protect and conserve imperiled wildlife species and their habitats. 16 U.S.C. §§7(a)(1) and 7(a)(2). Federal agencies must consult on the impacts of any “federal action” on listed species and identify a “baseline” of existing activities that already affect the listed species. 16 U.S.C. §1536 (a)(2). The federal agency is then required to consult with the U.S. Fish and Wildlife Service or National Marine Fisheries Service, which will prepare a biological opinion finding: (a) no-jeopardy to the endangered species or adverse modification of critical habitat; (b) jeopardy, or; (c) reasonable and prudent alternatives. 50 C.F.R. §402.14(h)(3).

The ESA contains no mention of Indian tribes or reservations, except for one reference to subsistence activities in Alaska. Yet the ESA will apply nearly every time a tribe seeks to use its reserved water. That is because virtually any development of Indian water will depend on federal funding or approval. The same is not true for non-Indian water users. The federal involvement will trigger a Section 7 consultation; and a baseline will be established that will not include the tribe’s water, but will include the contamination and degradation caused by past development of junior non-Indian uses. This means that the baseline for Indian projects will include the effects of past federally funded or subsidized non-Indian development. In fully appropriated streams, this is a guarantee that Indians will not be allowed to develop their water resources. Thus, tribes must account for degradation of the ecosystem that resulted in the listing of an endangered species.

Essentially “grand-fathering in” junior uses, the ESA turns the prior appropriation system on its head. One tribal attorney described the impact of the ESA in reference to the Colorado River Tribes: “At worst the Act has stopped tribal water development in its tracks. At best, it has fundamentally reduced the flexibility tribes are purportedly assured under the Reserved Rights Doctrine.” Tod J. Smith, Speech, delivered in Denver in February 6, 1997. CLE International, “Natural Resource & Environmental Law on the Reservation”, February 6-7, 1997 (Smith).

Unexercised, usually senior, Indian water rights are not included in the baseline, even if they have been adjudicated or recognized by an Act of Congress, if they are not a component of an immediate project. Report of the Working Group on the Endangered Species Act and Indian Water Rights: Implementation of Section 7 of the ESA in relation to Indian Water Resources Development, p. 27 (Draft -- August 11, 1999)(Working Group Report). On the other hand, proposed projects that have undergone Section 7 review are included in the baseline. For example, the environmental baseline for the Flaming Gorge Reservoir contains numerous projects, which have not been built and may never be built, but a tribe proposing a new use of water using its senior rights must address their potential impacts because these projects have undergone Section 7 consultation. Similarly, some states, including Colorado, recognize "conditional" future rights, for which a periodic showing of "due diligence" is required. Conditional rights are included in the baseline. There are numerous other examples. See Working Group Report, at 27. The protection provided by a completed Section 7 review, i.e., holding a place in line for water use under the ESA, has caused a "rush to consult" on proposed projects.

Another Section 7 definition works to the detriment of senior Indian reserved water rights. "Cumulative effects" is defined as "those effects of future State or private activities, not involving Federal activities that are reasonably certain to occur within the action area..." §402.02. Future federal projects, including federal projects to develop Indian water supplies, are not included in the definition of "cumulative effects" for the stated reason that they will be subject to the Section 7 consultation requirement at a later date. Working Group Report at 30. It is easy to understand why tribes want the future development of their senior Indian reserved water rights included in the baseline and cumulative impacts analysis for other federal projects on the same stream. Id. Critics note that inclusion in the baseline will not assure approval for their projects. Factoring in tribes' reserved rights cannot reverse the degradation that led to species decline; and, in an already over appropriated stream system, factoring senior Indian water rights into the baseline will not help the tribes develop their resources, but will only prevent others from leap-frogging over tribal rights. Id. at 31. Given those limitations, it is difficult to understand the opposition to including Indian reserved rights in the baseline.

Particularly troublesome to tribes is that when Indian projects are under consultation, the cost of mitigating past non-Indian degradation has come out of federal funding earmarked for the Indian project. This added cost has raised questions about the financial feasibility of the Indian project. Working Group Report, p. 28. Tribes have advocated taxing the old

projects to pay the cost of species recovery to allow new, but belated Indian projects. Id.

The ESA presents a near irreconcilable conflict with the United State's trust responsibility to promote development of tribal resources. Zellmer, p. 382. It is not difficult to understand why tribes might feel that, as the Secretary begins to deal with big users, he takes steps that further inhibit tribal water development. The 1988 Colorado River Ute Water Rights Settlement included the Animas La Plata Project (ALP), provides the thorniest example. For years, the ALP has been delayed and reduced to a fraction of the size of the original project, and it is still not approved. To give credit where it is due, however, Secretary Babbitt responded recently to an environmental group opposing the current scaled-down version, "ALP Lite". He noted that the Ute Tribes have long been denied the benefit of their agreement with their neighbors and the State of Colorado. "I particularly want to emphasize my concern that we honor our obligation to the Ute Tribes by carrying through on commitments that were made in the 1988 settlement. In order to get this matter settled, the Tribes have made significant concessions in response to environmental concerns and it is now time for us to reciprocate." Babbitt to Vawter Parker, February 15, 2000. He then quoted Justice Black's admonition, "Great Nations, like great men, should keep their word." To risk cynicism, one must ask herself, "Where have we heard that lofty language before? Sadly, in the losers circle. F.P.C. v. Tuscarora Nation, 362 U.S. 99, 142 (1960)(dissent). As an update on ALP, Senator Ben Nighthorse Campbell has reintroduced the Ute settlement, although it may be too late in the session to allow passage. Thus, the Colorado Utes will have to wait even longer for this great nation to decide to do the right thing.

## **B. Solutions and Reallocating the Burden of the ESA**

Some efforts are being made to address the disproportionate effects of the ESA on Tribes. The Secretarial Order 3206 on American Indian Tribal Rights, Federal-Trust Responsibilities, and the Endangered Species Act (June 5, 1997) (Secretarial Order) is the result of a bilateral effort between the tribes and federal officials, initiated by the Secretary - a positive sign. The Order is a start, but basically, it is a reiteration of existing federal law and policy; the Order requires the U.S. Fish and Wildlife and other federal agencies to recognize, implement and fulfill their trust responsibility to Indian tribes. Still, as Charles Wilkinson notes in his recent article, "The Order is no dramatic breakthrough.... But in a complicated world, progress is often made in "measured, collaborative approaches to particular problems." Charles Wilkinson, "The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order", 72 Wash L. Rev. 1063, 1088 (1997).

The Secretary took the next measured step when he directed a working group to evaluate the Section 7 consultation process with respect to its impact on Indian tribes. The result is “The Draft Report of the Working Group on the Endangered Species Act and Indian Water Rights: Implementation of Section 7 of the ESA in relation to Indian Water Resource Development”, August 11, 1999. Revisions to the report are not generally available. Among the Working Group’s many recommendations is to include in the baseline: Indian water rights that have been adjudicated, those confirmed in a water rights settlement act, and those quantified by an act of Congress. Obviously controversial, this recommendation does not have the support of the entire Working Group.

Outside the Working Group, others ways have been suggested to mitigate the impact of the ESA on Indian tribes, such as allowing tribes to market water they cannot use because of the ESA. This would allow some economic benefit, but there is little incentive for downstream users to pay for what they know the ESA will continue to give them for free. Professor David Getches has proposed a surcharge against those water users who benefit from the water tribes might have developed but for the restrictions imposed by the ESA. This would reallocate some of the burden. David Getches, Management and Marketing of Indian Water: From Conflict to Pragmatism, 58 University of Colorado L. Rev. 515 (1988). Tod Smith, attorney for the Ute Indian Tribe, who worked with the Federal Working Group, has proposed that the reservation and its entire reserved water right be included in the baseline as an “existing federal project”, established by the federal government as a homeland for Indian people. Smith, supra.

The ESA may be the most visible problem for tribal water development, but the current test for determining Practicably Irrigable Acres may well prevent the pre-requisite quantification of any tribe’s Winter’s rights.

## **V. Proving the Unprovable Practicably Irrigable Acreage (PIA)**

### **A. Benefiting the National Economy**

The current test for proving PIA is based on an economic standard that requires water projects to show benefits to the overall economy. Under this test, tribes must prove their proposed PIA projects will benefit the national economy such that a transfer of water resources to the new Indian use is justified. As many have come to realize and comment, this is an impossible standard. This standard is a direct result of development for the benefit of non-Indians during

a time in which economics did not matter. Furthermore, this economic standard was developed at a time when federal policy was shifting away from water development projects and, in fact, was designed to prevent further water development projects. Not surprisingly, no proposed federal water development project has been approved under these standards.

So how did this standard come to apply to Indian reserved water rights? Arizona v. California, 373 U.S. 546 (1963), set the standard for quantifying a tribe's reserved water rights - PIA, and employed an "economic feasibility" analysis that measured the benefits and costs of the Indians' irrigation projects. This economic feasibility test was more sophisticated than any used for most Bureau of Reclamation projects, where "economics mattered little, if at all" Reisner, *supra* p. 119, but it lacked the complexity and perversity of the "economic feasibility" test that has evolved as it coursed its way through the cases: State of New Mexico ex rel. Reynolds v. Lewis, nos. 20294, 22600 (Chaves County 1956) (N.M. Dist. Ct. July 11, 1989), *aff'd* 861 P.2d 235 (N.M. Ct. App. 1993) (Mescalero); In re General Stream Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d (Wyo. 1988), *aff'd without opinion by an equally divided court*, 492 U.S. 406 (1989) (Big Horn); State of New Mexico v. Aamodt, Civ. No. 6639 M (D.N.M. 1986) (Aamodt) (decision of the federal district court pending).

In Arizona v. California, proving practicably irrigable acreage was a simple matter of measuring the cost of irrigation against the benefits to the Tribes. If the benefits were equal to or outweighed the costs, the court found PIA and reserved water rights sufficient to irrigate the PIA. After that, things started to get complicated. Attorneys for the State in the Big Horn cases described the PIA quantification standard as an "excruciating evidentiary exercise....", Brief for the Petitioner, Wyoming v. United States of America, Shoshone Tribe and Northern Arapaho Tribe of the Wind River Indian Reservation, et al., 109 S.Ct. 2994 (1989) cited in "Casenotes: Quantification of Federal Reserved Indian Water Rights--'Practicably Irrigable Acreage' Under Fire: The Search for a Better Legal Standard. In re *The General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988), *aff'd* mem. sub nom. *Wyoming v. United States*, 109 S. Ct 2994 (1989)", XXV Land and Water Law Review, 417, 425 (1990).

Now, a complex formula is applied that accounts for everything from "discount rate" to "opportunity costs" i.e., the economic cost of shifting resources from one use or user to another. The currently favored formula is found in the Principles and Guidelines adopted by the Water Resources Council in 1983 to be used by four federal agencies in determining whether to go forward with a proposed water project. U. S. Water Resources Council, Economic and Environmental Principles and Guidelines for Water and Related Land

Resources Implementation Studies, (1983) (established pursuant to the Water Resources Planning Act of 1965, Pub. L. 89-80 (codified as amended at 42 U.S.C. §1962 a-2 and 4-1). Nothing requires applying the Principles and Guidelines to the adjudication of Indian reserved water rights. But see, Martha C. Franks, “The Uses of the Practicably Irrigable Acreage Standard in the Quantification of Reserved Water Rights”, 31 Nat. Resources J. 549 (1991)(Franks). Nevertheless, in the two most recent cases to address PIA, Mescalero and Aamodt, the state court and the special master in the federal court, respectively, have clearly relied on the economic analysis found in the P& G’s for their economic analysis of PIA. The result has been as expected - no PIA was found.

In the Aamodt case, a general stream adjudication, involving the rights of four New Mexico Pueblos, Special Master Byrd’s report to the court recommended that the “Economic analysis must not be “prepared from any particular perspective.” Special Master’s Draft Report Re Reservation Water Rights Claims of the Pueblo of Nambe, p. 27, Finding 88, dated June 29, 1999, State of New Mexico v. Aamodt, Civ. No. 6636 (D.N.M. 1966) (Special Master’s Draft Report). He disagreed with the Tribe’s attorney and the United States that the question in doing the economic analysis was whether the Tribe would be better off with or without the project. Id. at 47 Finding 20. Not understanding how one could conduct an economic analysis without determining whether the project would economically benefit the owner of the project, one Department of Justice attorney was led in frustration to comment in his objections to the Special Master’s Report that “Even a purely objective deity would have a perspective”. Aamodt, United States’ Objections to Special Master’s Report Re Reservation Water Rights Claims of the Pueblo of Nambe, p. 27.

Proving PIA has become a battle of the economists, who do not agree on the costs and benefits that go into an economic analysis. Some argue only direct costs and benefits to the tribe go in. Others argue that costs to third parties must be accounted for, including costs to junior water users. -Some argue that a discount rate must include an inflation factor, others argue against the inclusion of an inflation factor where future generations are to be accounted for. Both sides claim their numbers are based on sound principles of economic analysis. Furthermore, economics gets entangled with legal theory, and despite economists’ protestations to the contrary, economics is value laden. This may sound very esoteric, but manipulation of the discount rate, costs and benefits, and certainly the “perspective” from which the economic analysis is done, can change a benefit-cost ratio enough to render a project feasible or infeasible. See generally, Report of the Special Master, General Adjudication of All Rights to Use of Water in the Big Horn River System, No. 4993 (Wyo. Dist. Ct. Dec. 15, 1982); Burness, Cummings, Gorman, and Lansford, “Practicably Irrigable Acreage and Economic Feasibility: The Role of Time, Ethics and Discounting”, 3 Nat.

Resources J. 289 (1983); Franks, supra.

Martha Franks, former New Mexico Assistant Attorney General, who tried the Mescalero case for the State, and who has studied PIA carefully, noted that “it is extremely difficult to show economic feasibility under these guidelines”, Franks at 562, and that no federal project planned in accordance with the economic feasibility standards in the Principles and Guidelines has been approved, id., i.e., none has been shown to have a positive benefit to cost ratio. She said that “The PIA standard forces the tribes to prove economic feasibility for a kind of enterprise that, judging from the evidence of both federal and private willingness to invest money, is simply no longer economically feasible in the West.” Franks, at 578 .

It seems clear that courts have strayed far from the benefit-cost analysis used in Arizona v. California. The application of the economic test found in the 1983 P&G’s to determine PIA is plainly the result of the developmental frenzy of the preceding 50 years and the realization that things had gone too far, in both the economic and environmental senses. Recalling that the P&G’s are concerned with a reallocation of resources, and are designed to insure that the national economy will benefit from any reallocation, it seems fore-ordained that in where Indian rights are being quantified by a proposed irrigation project, the P&G’s guarantee that existing uses, which did not have to meet any comparable economic feasibility test, will be protected.

It is worthy of note that in 1999, the Committee to Assess the U.S. Army Corps of Engineers recommended the 1983 P&G’s be thoroughly reviewed and modernized to move away from the focus on benefits to the national economy, largely because other values, such as the environment, cannot be evaluated in those terms. “[T]he P&G’s are woefully out-of-date in providing guidance to the Corps for environmental protection and restoration projects”. National Research Council, New Directions in Water Resources Planning for the U.S. Army Corps of Engineers, National Academy Press, Washington, D.C. 1999. The same is clearly true for water intended to fulfill the purposes of reservations, which were intended to be homelands for Indian people. Winters.

## **B. The Sensitivity Doctrine**

The “sensitivity doctrine” means simply that, before quantifying Indian reserved water rights, courts should consider the impact on other water users, whether junior or senior. This doctrine is without sound legal basis, and without moral justification; yet it has not been discredited and should not be taken lightly.



Justice Powell created the sensitivity doctrine in his dissent in United States v. Mexico, 438 U.S. 696, 718 (1978), when he characterized the majority opinion: “I agree with the Court that the implied reservation doctrine should be applied with sensitivity to those who have obtained water rights under state law and to Congress’ general policy of deference to state water law.”

The sensitivity doctrine came into Indian reserved water rights lexicon in the Big Horn case. See In Re Rights to Use Water in Big Horn River, 753, P.2d 76, 101, 111-12 (Wyo. 1988), and became illegally perched over Indian water rights jurisprudence in an unlikely, but effective way when the Supreme Court reviewed the PIA standard in the Big Horn case. Justice O’Connor wrote an opinion that was to be announced in June of 1989, that would have changed the way Indian reserved water rights are quantified by, among other things, requiring proof that future PIA projects would actually be built, and by lending legitimacy to the sensitivity doctrine. The Wyoming decree had included future irrigation projects whose engineering and economic feasibility had been demonstrated. But O’Connor rejected that approach. In her opinion she said greater “pragmatism” is required out of “[s]ensitivity to the impact on State and private appropriators of scarce water under state law.” Wyoming v. United States, Opinion, 2d draft, at 15, 17, No. 88-309, at 17 ( June 12, 1989). O’Connor’s opinion was never released because she recused herself at the last moment citing a conflict of interests. Her family’s ranch was named in a water rights suit brought by a tribe involving the Gila River in Arizona, which touched on a portion of the ranch. The opinion became available when the papers of the late Justice Thurgood Marshall were released.

In their article, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 66 Univ. of Colorado L. Rev., 683, 751, (Summer 1997), Andrew Mergan and Sylvia F. Liu, attorneys in the United States Department of Justice, take the sensitivity doctrine seriously, as it should be. They point out that the Court’s “sensitivity” to non-Indian water rights ignores the law that created both Indian and non-Indian water rights, shows a willingness to sacrifice rights the government owns out of sensitivity to other water users, and appears to be matched by a suspicion that Indians may be getting more than they deserve. They call the sensitivity doctrine “an illegitimate thumb on the scales.” *Id.* Sylvia Liu has concluded that the sensitivity doctrine is inconsistent with the federal government’s fiduciary duty to uphold tribal sovereignty. Sylvia F. Liu, “Comment, American Indian Reserved Water Rights: The Federal Obligation to Protect Tribal Water Resources and Tribal Autonomy”, 25 *Env’tl L.* 425 (1995).

While the sensitivity doctrine is not technically part of Indian reserved water rights analysis, sensitivity creeps in insidiously in ways that cannot be discounted. One federal judge presiding over a general stream adjudication was overheard saying at a cocktail party, “I will

not take one gallon of water away from current non-Indian users.” In some cases, “sensitivity”, euphemistically speaking, seems to make judges forget regular old water law. In the Aamodt litigation, the Special Master recommended a finding that if the Tribe could find a way to use water currently leaving the system, that water would have to be allocated first to more senior users than the Tribe, and any additional storage the Tribe created to enable use of some of the water discharged from the system would likewise have to be made available to more senior users. Special Master’s Draft Report at p. 41, Finding 90. The Special Master ignored the basic principle in water law that a junior user can have a more reliable water supply than a senior user if he can use or store water the senior user does not use. He also ignored the fact that once their water right is quantified, tribes can change their use of water. Arizona v. California. He found that the Pueblo of Nambe could not change the use of its quantified right for its historically irrigated acreage (HIA); if Nambe did not use its HIA water on its HIA lands, then it must be left in the stream to serve the next most senior non-Indian water users. Id. at 51, Conclusion 44.

Some believe, not too naively, that some “states are not working toward measuring water use, increasing efficiency of water use or even enforcing existing laws, but instead going to great lengths to ensure the status quo in water use.” Jack McDonald, “Fourth Annual Water Conference: Meeting Future Columbia Basin Water Demands – Consumptive and Non-Consumptive Needs”, 10 NRLI News 11 Summer/Fall 1999 (Natural Resources Law Institute, Northwestern School of Law). Ironically, as some are starting to realize, quantification or even settlement of water rights does not usually change the status quo because tribes are not usually able to put their water to use. These uncomfortable realizations have come over me too during my years of involvement with treaty rights, water rights, land claims, and with nearly every Indian law issue in which I have been involved. Even worse, I see more than a glimmer of truth in the statement: “[T]he field of Indian law exists to commodify and transfer Native American assets, not to protect them or otherwise keep them incommensurable with market exchanges, as was promised by so many treaties, statutes, and other agreements.” Jo Carillo, ed., Readings in American Indian Law, p. 209 (Temple University Press, Philadelphia 1998). In the area of Indian reserved water rights, we have skipped right over the quantification, commodification and transfer of the Indians’ reserved water; those with junior rights are already using the Indians’ water. And, under the notions of sensitivity and preserving the status quo, that may prove the hardest to undo.

## V. Conclusion

There are more elaborate procedures, and greater restrictions on Indians’ ability to quantify and use their water rights than non-Indians have ever been or ever will be subjected to. PIA

analysis has greatly hampered tribes' ability to quantify their reserved rights for agriculture. In New Mexico, the economic analysis employed by the courts has effectively prevented proof of the existence of PIA. The ESA has turned the priority system on its head and made the first last, by requiring the tribes to account for, and even mitigate the damages done to the environment by junior users. Negotiated settlements have been as glacial and contentious as general stream adjudications, and once reached, as slow to be implemented. The history of water development in this country, the relationship of the tribes to the United States, and the ESA have come together in a way that inhibits and even prevents Indians from developing their water resources. It is because the Indians, the first inhabitants of this land, have been systematically excluded, and now that they want to be included so that tribal societies can survive and exist at a standard acceptable in the non-Indian world, all forces seem to be converging against them. If Indians get what non-Indians have, it may take the last fish, or kill the last tree, or destroy the home of an endangered plant. And no one, not even the Indians, wants that to happen. However, Indians should not have to shoulder the whole burden of the effects of non-Indian development.

In closing, I want to relate a story I read that was told in reference to the ESA, but that I find applicable in general to the development of water in the west relative to Indians. It goes like this:

A story was told of a motley gathering at a frontier roadhouse. At mealtime, the boarder tenants, a rough crowd of frontiersmen, congregated around the table. The cook brought out a large platter piled high with porkchops and the boarders, one by one, indulged voraciously in the bounty. At the end of the table was a solitary Indian. When the platter got to his end of the table he reached out for what was now the last rather small and shriveled porkchop. As he reached out his fork a man at the other end of the table shouted: "Hey, look at that damn Indian. He is going to eat the very last porkchop."

P. Deloria, *Directory of the American Indian Law Center*, reprinted in Jamie K. Ellison, "Tribal Sovereignty and the Endangered Species Act", 6 *Willamette J. Int'l L. & Dispute Resolution*, 131, 150 n. 111 (1998).