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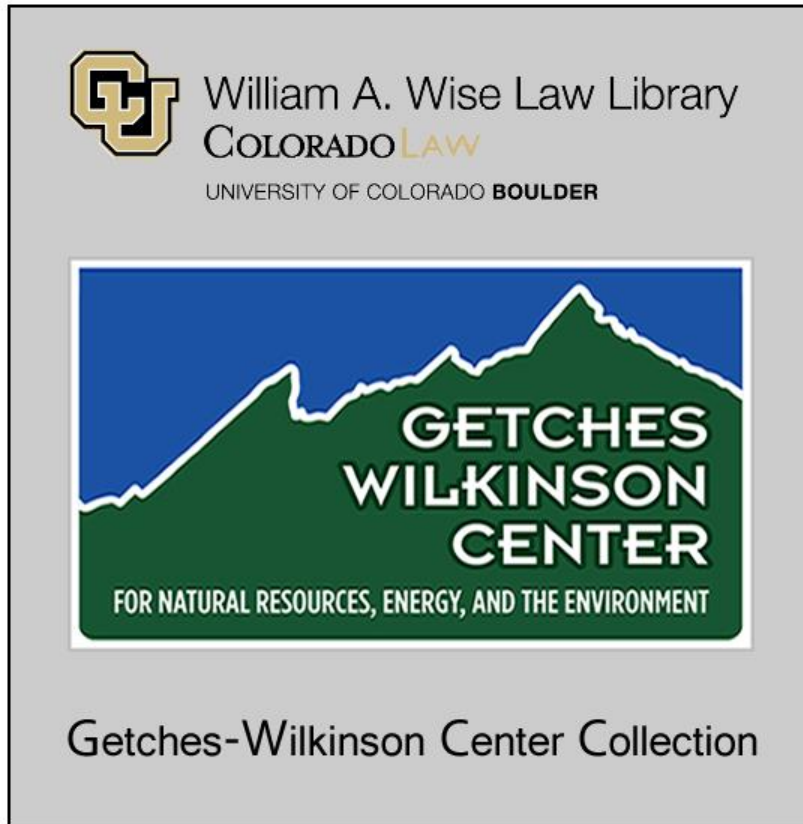
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**NEW DEMANDS FOR TRIBAL RIGHTS TO
FEDERAL WATER AND POWER**

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DAMS: WATER AND POWER IN THE WEST

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NEW DEMANDS FOR TRIBAL RIGHTS TO
FEDERAL WATER AND POWER

by Jeanne S. Whiteing

I. Introduction

Under the Winters Doctrine, Indian Tribes possess significant rights and claims to water resources in the West, often with the earliest priority date on the stream system. Winters v. United States, 207 U.S. 564 (1908). Until fairly recently, however, tribal claims to water remained unquantified for the most part and therefore undeveloped. Between the 1908 Winters decision, and the 1963 decision in Arizona v. California, 373 U.S. 546, few decisions addressed Indian water rights, and even less attention was paid to Indian water rights in the development of the West.

Even before the formal articulation of the Winters Doctrine in 1908, it was the intent of Congress to encourage and subsidize the development of irrigated agriculture and other water development outside of Indian reservations beginning with the passage of the Desert Land Act in 1877 and the Reclamation Act of 1902. Much of the West was developed under these fostering and encouraging federal policies, and with the help of substantial federal subsidies. Other federal policies such as that embodied in the 1920 Federal Power Act and in various authorities prior to that, encouraged the development of water resources for power purposes. For the most part, this development was pursued without regard for, or consideration of, Indian water rights and other Indian rights.

With the encouragement, or at least the cooperation, of the Secretary of the Interior -- the very office entrusted with protection of all Indian rights -- many large irrigation projects were constructed on streams that

flowed through or bordered Indian Reservations, sometimes above and more often below the Reservations. With 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 the projects ... In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use of the Reservation it set aside for them is one of the sorrier chapters.

...

United States National Water Comm'n, Water Policies for the Future -- Final Report to the President and to the Congress of the United States, 474-75 (1973).

Only in the last two decades has there been a concerted push to quantify Indian rights through litigation and/or settlement. Therefore, only recently has there been enough certainty about tribal water rights for tribes to consider any significant development. In any case, tribes have lacked the capacity without subsidies similar to those provided to non-Indians, to develop their water resources. This has changed only with the advent of Congressionally approved water rights settlements that have provided both encouragement and funds for tribal water development.

Just as tribes are finally in a position to give serious consideration to the development of tribal water resources, however, changes in federal policies, driven in part by the "changing western landscape," as well as changes in the political climate, may make such development of tribal water resources difficult, if not impossible. Concerns for the environment and the ecosystem, and "new" values relating to development in general, as well as federal budgetary constraints, have drastically altered the atmosphere and the potential for tribal development.

At the same time that tribal water development has come to the fore, the clash of non-Indian development and tribal rights, in particular tribal fishing rights, is being played out as part of the "changing western landscape." For example, the Elwha River Ecosystem and Fisheries Restoration Act, Public Law 102-495 (1992), authorizes the Secretary of the Interior to acquire and remove the Elwha and Glines Canyon Projects on the Elwha River for the full restoration of the Elwha River ecosystem and native anadromous fisheries. The Act implements a settlement negotiated between the dam owners, resource agencies, local governments, environmental groups, and the Lower Elwha Klallam Tribe, who have treaty fishing rights that have been impacted by the dams.

On the Missouri River, the Mni Sose Intertribal Water Rights Coalition, a coalition of 26 tribes in the Missouri River Basin, maintain that the policies of the federal government that led to the construction of the massive dams on the upper Missouri River for flood control purposes, intentionally suppressed development of Indian water rights by committing the water to other uses, and that these same policies have intentionally destroyed the culture and economy of the Indian people, including tribal subsistence economies, lifeways and sacred areas. Five of the Missouri River mainstem dams in North and South Dakota destroyed more than 550 square miles of Indian land and displaced more than 99 reservation families. The Fort Peck Dam in Montana displaced 350 families on the Fort Peck Reservation. Now the tribes are seeking to ensure that tribal rights, including the protection of sacred sites, cultural objects and the remains of ancestors, are considered in the operation of the projects. The tribes also seek to obtain some benefit from the projects, and have successfully obtained allocations of power from the projects to benefit tribal members beginning in the year 2001.

Indian tribes seek to address a variety of interests and issues involving dams "in the New West": 1) they seek to develop tribal water resources in light of the establishment of their rights to specific quantities of water through litigation and negotiation; 2) they seek to restrict or limit the impact of existing projects on other rights such as fishing rights and cultural rights; and 3) they seek to obtain benefits from existing projects that have significantly impacted Indian reservations and reservation life, including enforcement of long ago promises of the federal government.

II. Development of Tribal Water Resources

A. Quantification of Indian Water Rights Through Litigation

1. The first major quantification of Indian water rights occurred in Arizona v. California, 373 U.S. 546 (1963). Over the next two decades general stream adjudications were initiated in nearly every state in the West under the 1952 McCarran Amendment, 66 Stat. 560, 43 U.S.C. § 666. The primary litigation during this period was over the appropriate forum -- state or federal -- to adjudicate Indian water rights. See Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976); Arizona v. San Carlos Apache Tribe, 464 U.S. 545 (1983). Since that time, only one major adjudication has been completed. In re Rights to Use Water in the Big Horn River System, 753 P.2d 76, affirmed sub. nom. Wyoming v. United States, 492 U.S. 406 (1989).

2. Although the two tribal parties in the Big Horn case, the Arapaho and Shoshone Tribes, were awarded approximately 500,000 acre feet of water in the litigation, they have no recognized storage rights, and have not been able to coordinate releases from upstream

reservoirs to achieve adequate flows for fishery purposes.

B. Quantification of Indian Water Rights Through Settlements

1. Since 1983, there have been approximately fourteen negotiated settlements of Indian water rights. A list of these settlements is attached.

2. Most of these settlements contain provisions concerning storage rights in existing projects, the construction of new projects or a change in operation of existing projects to benefit the tribal rights. For example:

a. Fort Hall Indian Water Rights Settlement, P.L. 101-602 (1990), provides that in times of shortage, the Tribes will augment their flows with federal storage rights. Storage space is made available in the existing federal Blackfoot Reservoir, Grays Lake, and other reservoirs on the Snake River system. Other storage rights are also made available.

b. Northern Cheyenne Indian Reserved Water Rights Settlement, P.L. 102-374 (1992), provides that in addition to surface flow rights, the Tribe will receive 20,000 acre-feet of water from an enlarged and repaired Tongue River Reservoir, a dam owned by the State of Montana. The Tribe also received an allocation of 30,000 acre feet of water from the Yellowtail Dam.

c. Colorado Ute Indian Water Rights Settlement, P.L. 100-585 (1988), provides for the

construction of the Animas-La Plata Project and completion of certain facilities on the Dolores Project. The Animas-La Plata Project would provide additional storage and water supply for future needs of the Tribes.

- d. Pyramid Lake Water Rights Settlement, P.L. 101-618 (1990), provides for a change in the operating criteria of the Newlands Project to provide for reservoir releases for fishery purposes and other purposes.

- e. Ute Indian Water Rights Settlement (Uintah and Ouray Reservation), P.L. 102-575 (1992), provides funds for reservoir repair and clean-up of storage facilities associated with the existing Indian Irrigation Project. In addition, in return for the Tribe's past contribution of water to the Bonneville Unit of the CUP, the 1992 Settlement Act requires the United States to pay the Tribe 26 percent of the annual Bonneville M&I capital repayment obligation of 50 years which is attributable to 35,500 af annually of tribal water that should have been supplied to the Tribe from the CUP. The settlement also allows the Tribe to utilize the "unused capacity" of existing diversion facilities to transport Tribal water from the Uintah Basin to the Bonneville Unit.

- f. Many of the Indian water rights settlements in Arizona, of which there are five, include as a part of the settlements, water from the Central Arizona Project, in some cases through complicated transfers or exchanges. Certain

of these settlements also provide for new storage arrangements for tribal water. In 1983, the Secretary of the Interior specifically allocated a block of CAP water for settlement of Indian water rights.

3. The majority of Indian water rights settlements also include the ability to market water with varying restrictions. In many cases, the ability to take advantage of these provisions depends on access to storage. Water marketing requires a stable water supply and ability to release water when needed by the lessee.
- C. Federal funding for Indian irrigation projects is almost non-existent, and the Bureau of Indian Affairs has pushed tribes to contract these projects through the Indian Self-Determination and Education Assistance Act, P.L. 93-638 (1975), 25 U.S.C. § 450 et seq. As tribes contract these projects, they take on the responsibility of the storage facilities that are a part of these projects.
 - D. As tribes develop the necessary infrastructure and financing for economic development projects, hydroelectric generation is being considered by a number of tribes.

III. Impacts From Existing Projects

- A. All over the West, Indian reservations, like other communities, have been impacted by the construction of dams. Changes in the operating criteria of these dams or, in the case of the Lower Elwha Klallam Tribe, complete removal of a dam, are being sought by tribes.

B. Changes or modification of operating criteria have been significant components of negotiated Indian water rights settlements. Such changes benefit tribal fisheries, cultural interests and other significant tribal interests.

1. The Mni Sose Coalition Tribes have sought to change the operating criteria of the mainstem Missouri River dams which is set forth in the Master Control Manual of the Army Corps of Engineers. The primary purpose of the effort is to get the Army Corps of Engineers to recognize the existence and scope of Indian water rights in its operation of the mainstem dams. There are 28 tribes in the Missouri River Basin, each of which has reserved water rights. Some of these water rights are quantified, and some are not.

2. The Ten Tribes Partnership which is made up of Tribes with decreed rights to the Colorado River or tributaries are similarly monitoring the development of regulations by the Bureau of Reclamation for the operation of the Colorado River. The most closely watched provisions relate to the conditions for water marketing on the River.

The Ten Tribes also have significant interests in, and concerns about, changes in the operation of the River for purposes of endangered fish and other endangered species, and what impacts such changes may have on existing water rights.

C. Many dams licensed by FERC particularly in the Northwest are located on or near Indian reservations. As part of the relicensing of existing facilities by FERC, tribes

will have a significant role in the development of conditions of licenses if the dam is located on federal land. 16 U.S.C. § 797 (e). In all cases, affected tribes are required to be consulted. 18 C.F.R. § 4.38 (a) (2) and §16.8 (a) (2).

- D The subject of the impacts of federal dams on fisheries in the Snake River is the subject of another presentation at this conference by Don B. Miller from the Native American Rights Fund.

IV. Tribal Demands for Power

- A. Much of the tribal land taken for construction of dams and reservoirs on the Missouri River were taken with the pledge that the Tribes would gain access to low-cost hydroelectric power and irrigation projects. The Tribes have successfully negotiated an allocation of direct power from the Western Area Power Administration, the marketing agency for Missouri River Basin power. This allocation was made pursuant to the Energy Policy Act of 1992. Tribes are considered preference customers for the power under section 9 (c) of the Reclamation Project Act of 1939. Contracts are for 20 year periods beginning 2001. The power allocated is for individual tribal consumers.

- B. As part of water settlements, many tribes have sought a portion of the power revenues from the generation of power associates with water projects located on Indian reservations or that impact tribal water rights. To date, I am unaware of any settlements that have included such provisions.

V. Conclusion

Dams in the West are inextricably related to Indian water rights and other tribal rights. On one hand, tribes look to such projects to protect tribal rights. On the other hand, such projects are seen as destroying tribal rights. Both views are probably correct. Indian tribes, like other communities, have varied issues and concerns that will continue to play out against the changing policies relating to dams in the West.

Indian Water Settlement Legislation

| Tribe | Public Law Number and Statutes at Large Cite |
|---|--|
| 1. Ak-Chin Indian Community of Arizona | P.L. No. 95-328 92 Stat. 409 (1978; amended by P.L. No. 98-530. 98 Stat. 2698 (1984) |
| 2. Tohono O'odham Nation of Arizona | P.L. No. 97-293. 96 Stat. 1261 (1982) |
| 3. Assiniboine & Sioux Tribes of the Ft. Peck Reservation in Montana | Senate Bill No. 467, Chapter 735, Laws of Montana 1985 |
| 4. Salt River Pima-Maricopa Indian Community of Arizona | P.L. No. 100-512, 102 Stat. 2549 (1988) |
| 5. Southern Ute & Ute Mountain Tribes of Colorado | P.L. No. 100-585, 102 Stat. 2973 (1988) |
| 6. La Jolla, Rincon, San Pasqual, Pauma & Pala Bands of Mission Indians of California | P.L. No. 100-675, 102 Stat. 4000 (1988) |
| 7. Pyramid Lake Paiute and Fallon Paiute Shoshone Tribes of Nevada | P.L. No. 101-618. 104 Stat. 3284 (1990) |
| 8. Shoshone-Bannock Tribes of the Fort Hall Reservation in Idaho | P.L. No. 101-62. 104 Stat. 3059 (1990) |
| 9. Fort McDowell Indian Community of Arizona | P.L. No. 101-628, 104 Stat. 4469 (1990) |
| 10. Jicarilla Apache Tribe of New Mexico | P.L. No. 102-441, 106 Stat. 2237 (Oct. 23, 1992) |
| 11. Northern Cheyenne Tribe of Montana | P.L. No. 102-374, 106 Stat. 1186 (Sept. 30, 1992) |
| 12. San Carlos Apache Tribe of Arizona | Title XXXVII of P.L. No. 102-575, 106 Stat. 4600 (Oct 30, 1992) |
| 13. Ute Tribe of the Uintah and Ouray Reservation in Utah | Title V of P.L. No. 102-575, 106 Stat. 4600 (Oct. 30, 1992) |

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