6-6-1990

Sources of Water IV: Tribal Water Rights

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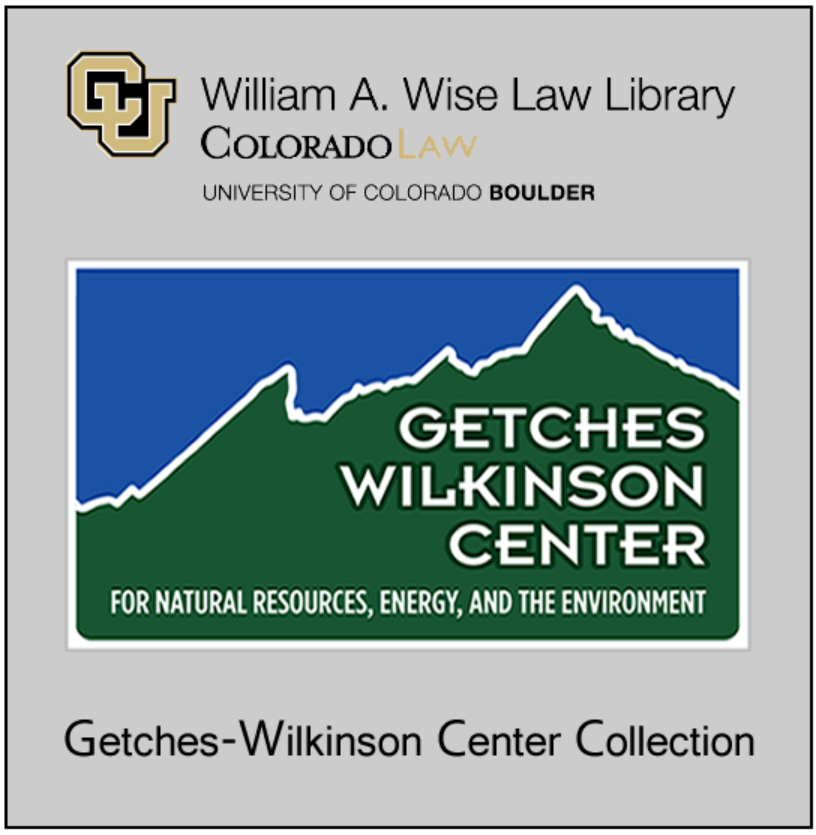

John E. Echohawk, *Sources of Water IV: Tribal Water Rights*, *in* MOVING THE WEST'S WATER TO NEW USES: WINNERS AND LOSERS (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1990).

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Moving the West's Water to New Uses:
Winners and Losers

Natural Resources Law Center
University of Colorado School of Law
June 6-8, 1990

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I. Introduction.

A. Summary.

Western Indian tribes have substantial claims to reserved water rights with early priority dates for agricultural lands which are largely undeveloped. These claims are being asserted in a large number of cases in western courts, but recently several claims have been resolved through negotiated settlements and many others are in negotiations. A controversial element in each settlement has been whether Congress would give the requisite federal approval to market Indian reserved water rights for off-reservation uses. Therefore, the use of tribal water rights off-reservation on a transfer basis to meet changing demands for water and the need to reallocate a portion of the existing uses to new uses will most likely occur on a case-by-case basis as Indian water rights settlements are negotiated and approved by Congress.

B. General References.

AILTP/American Indian Resources Institute, "Indian Water 1985" (1986).

AILTP/American Indian Resources Institute, "Indian Water 1989" (1989).

II. The Nature of Indian Reserved Water Rights.

A. Like other Indian rights, Indian reserved water rights have been the subject of increased litigation over the last 25 years as federal Indian policy has changed from termination of tribes to Indian self-determination.

B. The landmark case in Indian water rights was decided by the United States Supreme Court in 1908 (Winters v. United States, 207 U.S. 564).

1. Under the Winters doctrine, Indian tribes have the right to use sufficient water for present and future needs that fulfill the purposes for which their reservations were established.

2. Indian reserved water rights have superior priority dates over non-Indian uses begun after the reservations were established, but actual beneficial use is not required in order to maintain the rights.

C. The existence of Indian reserved water rights under the Winters doctrine was reaffirmed by the United States Supreme Court in 1963 (Arizona v. California, 373 U.S. 546) when the Court allocated approximately 1 million acre-feet of water annually to five Indian reservations along the lower Colorado River for present and future uses.

1. The standard for quantification of Indian reserved water rights approved by the Court in this case to satisfy present and future Indian agricultural needs was the amount of water necessary to irrigate all of the practically irrigable acreage (PIA) on the reservation.

2. The PIA standard survived a state challenge in the United States Supreme Court in 1989 (Wyoming v. U.S., 106 L.Ed. 2d 342) by a 4-4 vote with Justice O'Conner withdrawing from participation. The tie vote had the affect of upholding a Wyoming Supreme Court decision employing the PIA standard to award the Shoshone and Arapaho Tribes of the Wind River Reservation approximately 500,000 acre-feet of water for present and future agricultural purposes.

III. The Current Status of Indian Water Rights Claims.

A. At the present time, there are approximately 50 cases in the courts of the western United States involving the adjudication of Indian reserved water rights. A large portion of the water in the west is at stake in these cases - over 45 million acre-feet of water according to a Western States Water Council survey in 1984.

1. The purpose of these cases is to define or quantify the amount of water that tribes are entitled to under their reserved water rights.

2. Although tribal claims based on the PIA standard predominate, some claims are also being made for non-agricultural water uses that also fulfill the purposes for which the reservations were created.

3. These cases are typically huge and complex, pitting the states and thousands of private water claimants under state law against the tribes and the federal government as trustee for the tribes.

B. Progress in these cases was delayed for a number of years while a threshold jurisdictional issue common to most cases was ultimately decided by the United States Supreme Court in 1983 (Arizona v. San Carlos Apache Tribe, 463 U.S. 545). The Court held an act of the Congress in 1952 impliedly authorized the adjudication of Indian water rights in state courts.

1. Although federal courts also have jurisdiction to hear these cases, the Court held that normally these cases should proceed in state court.

2. The Court also emphasized, however, that state courts are bound to respect federal law which defines tribal reserved water rights.

C. Recent federal policy has favored negotiations as the preferred method of resolving Indian water rights claims and several Indian water rights settlements have been achieved:

1. Ak-Chin Indian Community of Arizona - P.L. No. 95-328, 42 Stat. 409 (1978); amended by P.L. No. 98-530, 98 Stat. 2698 (1984).

2. Papago Tribe of Arizona - P.L. No. 97-293, Title III, 96 Stat. 1274 (1982).

3. Assiniboine and Sioux Tribes of the Fort Peck Reservation in Montana - S.B. 467, 49th Leg. 1985 Montana Laws, ch. 735.

4. Salt River Pima-Maricopa Indian Community of Arizona - P.L. No. 100-512, 102 Stat. 2549 (1988).

5. Southern Ute and Ute Mountain Ute of Colorado - P.L. No. 100-585, 102 Stat. 2973 (1988).

6. La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians of California - P.L. No. 100-675, 102 Stat. 4000 (1988).

D. There are currently 14 sets of settlement negotiations underway and another six sets of negotiations possible in the near future according to Interior Department figures.

IV. The Transferability of Tribal Water Rights to Meet Changing Demands and Uses Off-Reservation.

A. Only a small percentage of the PIA that tribes are claiming water for is actually being irrigated at the present time. Historically, tribes were left out of the major water project era. U.S. National Commission, Water Policies for the Future - Final Report to the President and Congress of the United States at 474 (1973).

B. An option that exists is for tribes to forego use of their reserved water rights for agricultural projects and lease the water to meet changing demands and uses off of the reservation.

C. Controversy exists as to whether tribes can market their water to non-Indians off the reservation under existing law. The Indian Nonintercourse Acts, 25 U.S.C. 177, which invalidate Indian land transactions made without Congressional consent, seem to require Congressional approval and tribes have sought it.

D. Congressional approval of marketing Indian reserved water rights was controversial in the three Indian water settlements enacted by Congress in 1988.

1. In the Salt River Pima-Maricopa settlement, only the Tribe's Central Arizona Project

water and not its reserved water rights were authorized to be leased.

2. In the San Luis Rey settlement involving the five Mission Bands, imported supplemental water was allowed to be exchanged.

3. In the most controversial settlement of all, the Colorado Ute waived the Indian Nonintercourse Acts and transformed the Indian reserved water right into a state water right when used off the reservation.

a. As reflected in the committee reports, there were disputes about whether reserved water rights could be leased at all and whether there was a difference between federal reserved water rights and Indian reserved water rights.

b. Disagreement apparently exists whether such a state right will revert back to a reserved right once it is no longer marketed off of the reservation.

c. In response to concerns expressed by other tribes, Congress made it clear that it did not intend to set a precedent in the water marketing area in a provision which said that nothing should be "construed as altering or affecting the determination of any questions relating to the reserved water rights belonging to other Indian tribes."

E. Whether Congress should enact a general statute waiving the Nonintercourse Acts for Indian water marketing, thus allowing tribes to lease their reserved water rights off-reservation without express Congressional approval, was discussed at Congressional oversight hearings on Indian reserved water rights in 1989. Hearings on Indian Water Policy Before the Senate Select Committee on Indian Affairs, 101st Cong., 1st Sess. (1989).

F. Given the opposition to generic Indian water rights marketing legislation by those who fear being adversely affected, Indian tribes have not pressed for such legislation and are exploring whether individual tribal settlements dealing with the transferability issue can be negotiated fairly.

V. Conclusion.

A. The use of tribal water rights off-reservation on a transfer basis to meet changing demands for water in the west and the need to reallocate a portion of the existing uses to new uses will most likely occur on a case-by-case basis as Indian water rights settlements are negotiated and approved by Congress.