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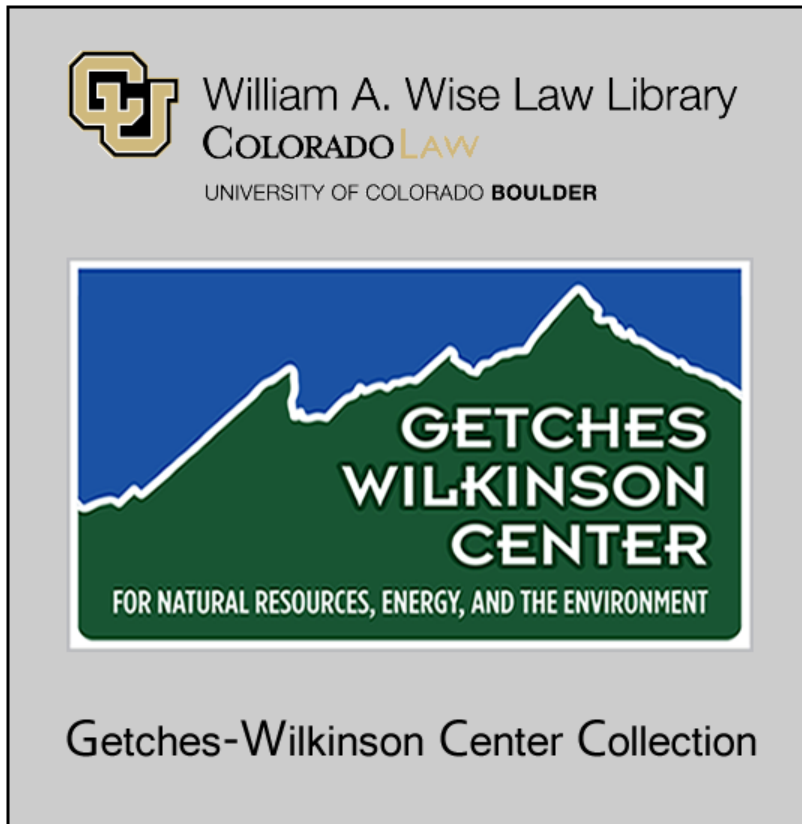
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PUTTING INDIAN RESERVATION WATER RIGHTS TO USE

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WESTERN WATER LAW IN TRANSITION

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PUTTING INDIAN RESERVATION WATER RIGHTS TO USE

I. THE PROBLEM

A. Introduction: water law and Indian water rights as literature. Hundley, *The Dark and Bloody Ground of Indian Water Rights: Confusion Elevated to Principle*, 9 *West. Hist. Q.* 455 (1978); Back and Taylor, *Navajo Water Rights: Pulling the Plug on the Colorado River?*, 20 *Nat. Resources J.* 71 (1980); Indian Reserved Water Rights: *The Winters of Our Discontent*, 88 *Yale L.J.* 1689 (1979); Veeder, *Water Rights: Life or Death for the American Indian*, 5 *Indian Historian* 4 (1972).

B. Life in Indian country bears almost no resemblance to this literary world. Except for northwestern Indian fisheries, see *United States v. Adair*, 723 F.2d 1394, 1412-14 (9th Cir. 1983), cert. denied, 104 S.Ct. 3536 (1984), Indian water rights are largely unused. The reasons this is so are:

1. Lack of capital to develop.
2. Lack of technical knowledge.
3. Lack of statutory authority to lease or sell.
4. Lack of inducements for others to lease or purchase.

C. The latter point is based on the fact that water rights are rights of use, so junior owners may use whatever senior owners are not. See *United States v. Ahtanum Irr. Dist.*, 236 F.2d 335, 340 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957). This fact makes Indian water rights a unique exception to the historical pattern of inducing or compelling Indians to sell their resources.

D. A familiar and significant feature of Indian water

rights is uncertainty over amounts to which Indians are entitled. See *Arizona v. California*, 373 U.S. 546, 600-01 (1963), modified, 460 U.S. 605 (1983); Felix S. Cohen's *Handbook of Federal Indian Law* 585-96 (1982 ed.). Most Indian water rights are unquantified as well as undeveloped. This allows broad disagreement over entitlements. See *Report of the Special Master, General Adjudication to All Rights to Use of Water in the Big Horn River System and All Other Sources, State of Wyoming, 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*, 23 *Nat. Resources J.* 289 (1983).

E. There has been much legal warfare over Indian water rights in recent years, mostly over efforts to require quantification in state courts. See *Arizona v. San Carlos Apache Tribe*, 103 S.Ct. 3201 (1983). There has been some actual quantification. E.g., *Big Horn River Adjudication*, *supra*. But these cases have had almost no effect on actual water uses.

II. WHAT SHOULD BE DONE?

A. Tribes and their federal trustee need to find development capital and find wise ways to use it. They should also promote quantification of Indian rights and seek statutory authority to lease Indian water rights.

B. The earliest efforts to quantify Indian rights were made by the federal government to protect its reclamation projects. The results were egregious failures to protect Indian resources. See, e.g., *Escondido Mutual Water Co. v. FERC*, 692 F.2d 1223,

1225-27 (9th Cir. 1982), aff'd in part, rev'd in part sub nom. Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians, 104 S.Ct. 2105 (1984); United States v. Truckee-Carson Irr. Dist., 649 F.2d 1286, 1289-95 (9th Cir. 1981), aff'd in part, rev'd in part sub nom. Nevada v. United States, 103 S.Ct. 2906 (1983); Note, 24 Nat. Resources J. 1067 (1984); Ahtanum, supra; United States v. Walker River Irr. Dist., 104 F.2d 334 (9th Cir. 1939).

C. These cases created an understandable distrust of quantification among Indian people. When the McCarran Amendment (43 U.S.C. 666) was interpreted to allow states to require quantification in state courts, see Colorado Water Cons. Dist. v. United States, 424 U.S. 800 (1976), tribal leaders feared the worst. But long continued water uses by junior owners pose a greater threat to Indian water rights. On balance, quantification is in the best interest of tribes. Quantified rights are also more useful to efforts to raise development capital and facilitate leasing.

D. Except for the recent Papago statute, see 96 Stat. 1274 (1982), no federal statute expressly allows Indian water rights to be leased or sold. See 25 U.S.C. sec. 177 (tribal land inalienable without explicit authority in federal law). The courts have recognized valid uses of Indian water rights by lessees of Indian lands and purchasers of Indian minerals. See Skeem v. United States, 273 F. 93 (9th Cir. 1921); 25 U.S.C. secs. 390, 394; United States v. Anderson, No. 3643, slip op. at 17-19 (E.D. Wash. Aug. 23, 1982), aff'd, 736 F.2d 1358 (9th Cir. 1984). In the case of Indian allotments, the courts have

recognized valid conveyances of Indian water rights to non-Indian successors. *Colville Conf. Tribes v. Walton*, 647 F.2d 42 (9th Cir.), cert. denied, 454 U.S. 1092 (1981). See *United States v. Powers*, 305 U.S. 527 (1939). A few decisions state that Indian water rights may be shifted to other uses and to other Indian lands. *Anderson*, supra, slip op. at 11-12; *Walton*, supra, 647 F.2d at 48 and authorities cited therein; *Big Horn Adjudication*, supra, No. 4993 slip op. at 20,65 (Wyo. Dist. Ct. May 10, 1983). But these decisions leave a number of questions, and in any case they do not authorize lease or sale of Indian water rights for use on non-Indian lands.

E. Indian tribes and the United States should seek a comprehensive statute authorizing tribes to lease their water rights for periods long enough to allow a lessee to amortize investments. The statute should also address problems of junior users and perhaps of interstate transfers.

F. Raising capital to develop Indian water rights poses a host of issues only some of which can be adequately discussed today.

1. The first major source of capital for Indian reservation development was sales of the tribes' own land. See L. Schmeckebier, *The Office of Indian Affairs* 237-42 (1927). Congress also built reservation water projects with federal appropriations and obtained water supplies from private developers in exchange for easements for water access and ditches on tribal land.

2. Most of the early projects failed because they were

tied to the ill-fated allotment scheme. See Cohen, *supra*, at 127-38, 612-28.

3. The other traditional method to develop Indian resources was by sale or lease, reducing the Indian interest to a cash consideration. This method has rarely done much to create a sound economic base for reservation communities. It is of limited use for water development because of the lack a statute authorizing water leasing.

4. Because of this history, any scheme to develop Indian water rights should carefully consider what sort of development would best succeed in the reservation setting. Development at maximum speed will often not be the best alternative for a tribal community.

5. Some Indian people oppose development of their lands, and their views are entitled to respect. But there has been a tendency to magnify their views. The failure of past development schemes has allowed opponents to occupy center stage by default.

6. For many years, the federal government has been the principal source of development capital for reservations. But this is obviously a static or declining source. Indians have sometimes shared in reclamation projects, but these are stalled. The next panel this afternoon will enlighten us on the prospects.

7. Tribes can now raise funds through taxation. See *Kerr-McGee Corp. v. Navajo Tribe*, 53 USLW 4451 (Apr. 16, 1985). There are serious practical limitations on this source, but it will help some tribes in the bond markets.

8. In private capital markets, Indians encounter

several unique obstacles. Lenders are wary of the complexities of Indian country litigation. Tribal courts may have exclusive jurisdiction, tribal borrowers may be immune from suit, tribal trust assets are immune from execution. See Cohen, *supra*, at 317, 323-28, 349-52, 357-59. Legal uncertainties promise complicated litigation. There are solutions to these problems, but they are not widely known in the banking world.

9. Tribes may also borrow as governments, now aided by the Indian Tribal Governmental Tax Status Act of 1982, 96 Stat. 2607. But jurisdictional obstacles to tribal borrowing will be even more formidable in the bond markets.

10. Outright borrowing requires tribal borrowers to bear the full duty of managing developments projects. Outsiders must be hired in many cases, and mistakes are made. This is an added factor for lender caution.

11. The most promising avenue for tribes to tap private capital markets in joint venturing or its corporate equivalents. Many tribes are well situated for this form of enterprise, and it reduces a number of the problems that complicate other forms of development. Joint venturing in mineral development schemes (including those requiring water) was facilitated by passage of the Indian Mineral Development Act of 1982, 25 U.S.C. secs. 2101-2108. Unfortunately, regulations to implement this act have been delayed, restricting its usefulness.

CONCLUSION

Indian tribes and their federal trustee need to take action to put Indian reservation water rights to use. In addition to

the problems of raising capital, tribes should pursue quantification of their rights and should seek a statute authorizing them to lease their water rights for periods long enough to allow investors to amortize investments. Although the federal government is less likely to supply development capital, a number of developments offer tribes important new opportunities in private capital markets.

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