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Jeanne S. Whiteing

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Marketing of Indian Reserved Water Rights

Jeanne S. Whiteing
Whiteing, Thompson & White

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The subject of marketing of Indian water rights has been getting a lot of attention lately for several reasons.

First, as economic development on Indian reservations becomes an ever more critical concern, Indian tribes have started to look at taking advantage of one of their last remaining untapped resources. Since agriculture undertaken by the Tribes is unlikely to be a profitable venture, tribes are beginning to look at other ways to utilize their valuable water resources.

Second, three Indian water rights settlements were enacted into law by the last Congress. These settlements directly raised questions relating to the marketability of Indian water, and each dealt with in various ways. As Indian water rights become quantified or new settlements are reached, the issue of marketing is likely to be raised again and again.

In many respects, the issue is still theoretical. There is not a large water market, if a market at all, for most reservations. And thus, there has been no major pressure to have the legal issue resolved definitively. Nevertheless, there now are some tribes who may be in a position to seriously consider water sales.

I. Background - The nature of Indian water rights.
A. In 1908 the U.S. Supreme Court held that when an Indian reservation is set aside the Indians have the implied right to sufficient water to fulfill the purposes of the reservation. *Winters v. United States*, 207 U.S. 564 (1908). The priority date of the water right was established as the date the reservation was set aside. The rights are not lost by non-use and remain outside state law appropriation systems. *Id.*

B. The fundamental purpose of most reservations is to provide a permanent homeland for the Indians; thus water was reserved for both present and future uses necessary to maintain a homeland. *Arizona v. California*, 373 U.S. 546 (1963).

C. The measure of Indian reserved water rights for agricultural purposes was defined in *Arizona v. California*, supra as the amount of water needed to irrigate all "practically irrigable acreage" on the reservation. Water has also been reserved for other purposes, including domestic and stockwatering uses, fishing and hunting.

D. Reserved water rights may be used for any purpose even though they are quantified based on the purpose for which they were originally reserved. *Arizona v. California*, 439 U.S. 419, 422 (1979).
E. When Indian land is leased, the water rights associated with the land may also be leased. 

*Skeem v. United States*, 273 F.93 (9th Cir. 1921); 25 U.S.C. §415(a). Section 415(a) is generally seen as authorizing the leasing or transfer of water within a reservation. Legal and policy ambiguities exist concerning authority to market Indian water outside the reservation.

II. Pros and Cons of Marketing of Indian Water Outside the Reservation.

A. Pros.

1. Tribes perceive water marketing as a way to use valuable water resources as a means of raising capital for economic development.

2. Other water users favor marketing of Indian water as a means of assuring access to Indian water and thereby stabilizing future supplies.

3. Transfers of water ensure the efficient use of a scarce resource.

4. Indian water rights are no different than state water rights which are fully transferable under most state laws.
5. Transfers are consistent with the idea that Tribes should receive the full economic return from their resources.

B. Cons

1. Leasing of Indian water will eventually lead to the loss of Indian water rights.

2. Marketing will adversely impact present water users by requiring them to pay for what they now utilize without payment.

3. Marketing will adversely impact present users by potentially allocating the water to other uses.

4. Marketing would interfere with existing interstate compacts and allocations.

III. Potential Legal Barriers to Marketing of Indian Water Rights.

A. 25 U.S.C. §177 prevents transfers of Indian land without Congressional approval. Many argue that this statute prevents the sale of Indian water rights off the reservation without specific Congressional authorization. However, it is unclear whether the prohibition against transfers of land includes transfers of water.
B. Congress may have already authorized tribal corporations chartered under the Indian Reorganization Act, 25 U.S.C. §477, to transfer water rights.

C. Because Indian water rights exist only as a result of land ownership, some argue that off reservation use is inconsistent with the nature of Winters rights.

D. The Wyoming Supreme Court's recent decision in In re the Adjudication All Rights to Use Water in the Big Horn River System and All Other Sources, 750 P.2d 681 (Wyo. 1988), left undisturbed the lower district court's ruling that "the Court can restrict any use of said water to within the boundaries of the reservation." The district court's decree states that "the use [and sale of the Tribe's water rights] is confined to the reservation." In its Cross-Petition for Certiorari, the Arapaho and Shoshone Tribes sought Supreme Court review of this issue and other issues. As of May 25, 1989, the Supreme Court had not acted on the Tribe's Cross-Petition.

E. According to Department of the Interior policy issued in December, 1988, Interior indicated that with proper authorization, Indian water rights could be transferred off the reservation. However, Interior will suggest specific water transfers only if "such transactions would be involved in any Indian water rights settlement or solution of other water rights controversies..."
VI. Congressional Authorizations

A. There are several recent water rights settlements enacted into law in 1988. Each treats water marketing differently.

1. San Luis Rey Indian Water Rights Settlement Act, P.L. 100-675, 102 Stat. 4000 (Nov. 17, 1988). As enacted, the settlement does not provide water marketing provisions. It does provide for development of supplemental water for the Bands from works authorized under the Act or through contracts with the MWD. The original bill had broad water marketing provisions.

2. Salt River Pima - Maricopa Indian Community Settlement Act, P.L. 100-512, 102 Stat. 2549 (Oct. 20, 1988). The Act specifically provides for a 98 year lease of water by the Community and the Secretary of up to 13,000 acre feet of CAP water to which the Community is entitled to surrounding cities and towns. Except for this lease, the Act provides that "no water received by the Community pursuant to the Agreement may be sold, leased, transferred or in any way used off the Community's reservation."

Settlement also provides that when either the Southern Ute or Ute Mountain Ute Tribes elects to transfer water off the reservation, the Tribe's water right "shall be changed to a Colorado State water right" during the use off the reservation.

B. Other Settlements

1. Southern Arizona Water Rights Settlement Act of 1982, P.L. 97-293, 96 Stat. 1280. The Act provides that the Tohono O'odham Tribe may "sell, exchange, or temporarily dispose" of its water rights but the Tribe may not "permanently alienate any water right." The proceeds of such transfers are to be used "for social and economic programs or for tribal administrative purposes which benefit" the Tribe.

2. Fort Peck-Montana Water Rights Compact, 1985. The Compact contains provisions authorizing the marketing of water off the reservation, but such transfers must conform with state law, and the State may elect to be a joint venture partner.

Conclusion

Debates are likely to continue over whether Indian water rights are transferable off the reservation. Case by case authorizations are likely to continue primarily in the context of water settlements. Senator Inouye has indicated interest in
introducing a general Indian water rights marketing authorization bill. It is possible that this will come in the next Congress.