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I. SUMMARY

The marketing of water by Indian tribes in the western United States has become a divisive issue both on and off the reservations. Legal ambiguities leave the issues clouded, as do many social and economic questions associated with the transfer of tribal waters to non-Indian use. The focus of attention is currently in Congress where several Indian water settlement bills propose to allow the off-reservation leasing of tribal waters.

II. ATTITUDES AND POSITIONS

A. Many entities and individuals favor the marketing of Indian water to off-reservation users.

1. A number of Indian tribes perceive the leasing of their water to off-reservation users as a short term means of raising capital for long term economic development.

2. Many off-reservation water users with growing demands support Indian water leasing as a means to bring certainty into their future supplies and as a useful vehicle for arriving at water rights settlements with tribes.

3. Federal entities see Indian water marketing as a way for tribes to raise capital to augment the money available from a tight federal budget.

B. Other entities and individuals strongly oppose Indian water marketing.

1. Many Indian people fear that leasing water to off-reservation users will ultimately lead to the loss of their water rights. Others feel that the very concept of treating water as a commodity for sale is wrong.

2. A number of western state governments and non-Indian water users are adamantly opposed to off-reservation marketing. They fear that they may end up having to pay for water in those areas where tribes have legal claims to water resources, but where off-reservation users have historically been the ones using the supplies. Worse yet, they fear that off-reservation water marketing would enable the tribes to reallocate water from historic users to new users that are willing to pay the tribes' price.

III. THE PRESSURES TO MARKET WATER

A. Indian tribes are legally entitled to large water rights superior in priority to most non-Indian users in the West. [Winters v. United States, 207 U.S. 564 (1908)]

B. In many instances, the paper entitlement to water has not been translated into actual supplies on the reservations. During the major water development era in the West set in motion by the Reclamation Act of 1902, Indian water rights were essentially ignored. According to the prestigious National Water Commission: "With few exceptions, the [Reclamation] projects were planned and built by the federal government without any attempt to define, let alone protect, the 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 on the Reservations it set aside for them is one of the sorrier chapters. [U.S. National Water Commission, WATER POLICIES FOR THE FUTURE - Final Report to the President and Congress of the United States, at p.474 (1973)]

C. In the current era, where easy federal funding of major water projects has dried up, tribes have difficulty in developing new on-reservation irrigation activities and other water-intensive projects for stimulating economic growth.

D. The most feasible alternative for obtaining on-reservation benefits from Indian water rights, therefore, may often involve the marketing of water to off-reservation users.

IV. THE LEGAL FRAMEWORK

A. A series of enactments dating back to 1790, called the Indian Nonintercourse Acts, invalidate the transfer of land by Indian nations and tribes unless Congress has authorized the transaction. [25 U.S.C. Section 177] These acts were designed to prevent private individuals, states, and local entities from purchasing land from Indian tribes independent of federal policy and control.

B. Many current commentators interpret "land" in the Nonintercourse Acts as including water, thereby prohibiting the sale of water by Indian tribes absent congressional consent.

C. A 1955 federal statute delegates to the Secretary of the Interior the authority to approve leases of Indian land, thus fulfilling the congressional consent requirement of the Nonintercourse Acts. [25 U.S.C. Section 415] Leases of reservation lands to non-Indians under this authority have included the use of tribal waters to serve the purposes of the lease (e.g. the Tribes of the Colorado River Indian Reservation lease tens of thousands of acres to non-Indian irrigators who are entitled to several acre-feet of tribal water per acre of leased land).

D. By interpreting "land" in the 1955 act to include water, the Secretary has also approved the leasing of tribal water

to non-Indians for on-reservation use (e.g. the Navajo and Hopi tribes lease several thousand acre-feet annually to the Peabody Coal Company for a slurry pipeline originating in their joint use area).

E. Tribes that desire to lease water off-reservation have generally gone to Congress to attempt to receive authorization. These attempts are summarized below in Section V.

V. PAST AND CURRENT EXAMPLES

A. The Tohono O'odham Nation (formerly called the Papago Tribe in southern Arizona) is the only tribe to have received explicit congressional authorization to market its water entitlements. Under the Southern Arizona Water Rights Settlement Act of 1982, the Tohono O'odham may "sell, exchange, or temporarily dispose" of its water rights subject to Secretarial approval of specific contractual arrangements. Net proceeds from any such sale "shall be used for social or economic programs or for tribal administrative purposes which benefit" the tribe. [P.L. 97-293, Section 306(c)(2)]

1. The Tohono O'odham have not undertaken any water marketing pursuant to this provision.

2. On March 28, 1988, the Tucson City Council offered to purchase 8,000 acre-feet/yr from the Tohono O'odham on a 99-year lease basis. The leased water would be delivered from the Central Arizona Project as part of a settlement agreement for additional water that a district of the Tohono O'odham Nation is currently negotiating.

B. In 1985, the Tribes of the Fort Peck Indian Reservation and the State of Montana signed a compact settling their water disputes and allowing the tribes to market a portion of their entitlement. [Fort Peck/Montana Compact. The compact is embodied in S.B. 467 as ratified by the Montana legislature in 1985.]

1. Under the compact provisions, tribal water marketing is subject to certain state laws, and the state itself may elect to be a partner in the marketing arrangement.

2. Because the compact was reached as part of a judicial settlement agreement to which the United States was a party, some people believe that congressional approval of the off-reservation marketing provisions is not needed. Others disagree. Attempts to get a bill introduced into Congress to explicitly authorize the off-reservation leasing portion of the compact have been unsuccessful to date.

3. No marketing has been attempted by the Fort Peck Tribes, although they are currently undertaking an assessment of water leasing for their long term planning purposes.

C. The San Luis Rey Indian Water Rights Settlement Act was introduced into Congress in 1987 with broad tribal opportunities to market water to off-reservation users in the San Diego area. [S.795] Under the proposal, the Indian Water Authority was enpowered to "use, lease, sell, exchange, control, and manage" any of its water resources, including 22,700 acre-feet/yr delivered to it from the federal Central Valley Project, on or off the reservations. This provision for water marketing was deleted, however, during committee hearings during the latter part of the year.

D. Marketing provisions in the Colorado Ute Indian Water Settlement Act of 1987 are also proving controversial. [H.R. 2642 and S.1415] Explicit provisions defining procedures for off-reservation leasing were replaced in early 1988 committee hearings by language that simply states that the Nonintercourse Acts do not apply to the subject waters. If enacted, the bill in its current state would leave many questions unanswered regarding the scope and legality of off-reservation water leasing.

E. In early 1988, the Salt River Pima-Maricopa Indian Community Settlement Act [H.R.4102 and S.2153] was

introduced to settle Indian and non-Indian disputes in the Phoenix area. Among other provisions, the settlement calls for the purchase of 13,300 acre-feet/yr of the tribe's water entitlement by Phoenix on a 99-year lease. The purchased water is associated with the tribe's Central Arizona Project entitlement rather than with its Winters rights in the local watershed. The bill is currently undergoing review in committee.

F. In April 1988, an act [H.R.4453 and S.2322] was introduced to help settle disputes over limited water supplies in the Yakima Valley of central Washington. In addition to many other provisions, the act provides for the leasing of water entitlements of the Yakima Indian Nation to local off-reservation irrigators.

VI. CONCLUSION

The disputes over Indian water marketing are growing more intense each month as additional tribes attempt to assert their authority to lease water--and as many non-Indian water interests grow increasingly nervous about the implications of these attempts. A key issue appears to be the character of the water that is proposed for off-reservation leasing by the tribes. In general, more controversy surrounds the marketing of Indian water entitlements based on Winters reserved rights than on the leasing of non-Winters water (e.g. waters imported to a tribe from projects as part of a settlement agreement).

Whereas opponents of off-reservation leasing may reluctantly acquiesce to a specific instance of marketing of imported waters, they object vehemently to Winters rights leasing proposals that could spill over as precedent to other areas of the West. Not surprisingly, the most vocal opponents to off-reservation leasing of Winters rights are water users with headgates downriver of large Indian reservations with undiverted water rights.

No quick answers will arise to settle this ongoing controversy over the off-reservation leasing of Indian water. The focus of attention and efforts in this matter will likly remain in congessional committees through the remainder of this year. One point appears clear--Congress will not choose to pass generic legislation defining the scope of allowable off-reservation leasing. Rather, it will continue to handle the issue on a case-by-case basis in specific bills.