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Perspectives on Water and Energy in the American West and in Indian Country

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PERSPECTIVES ON WATER AND ENERGY IN THE AMERICAN WEST AND IN INDIAN COUNTRY

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Just a few years ago, an event took place that can teach us important things about our society in the western United States. It occurred in Milagro, a remote mountain town in northern New Mexico. An Hispanic named Joe Mondragón cut a small ditch and tapped into the creek that runs through the center of Milagro. He was doing nothing more than irrigating his tiny beanfield. Yet the town first fell ominously silent. Then most of the memorable citizenry of Milagro—rednecks, Hispanics, and environmentalists alike—literally took up arms. The State Police, the State Water Master, and even the Governor were caught up in the furor. Events moved inexorably toward a violent rendezvous that is as classically western as any historical event I know.

All of this took place simply because Joe Mondragón, by watering his little beanfield, had disrupted the rigid hierarchy of water rights erected by western water law.

There are other such examples. Recently, outside of Albuquerque, New Mexico, a small group of environmental activists, including a man named George Hayduke, began a defiant crusade by cutting down billboards with a chain saw. The espionage of the Monkey Wrench Gang, as they called themselves, quickly expanded. They drove a Caterpillar tractor into Lake Powell. They incapacitated the heavy equipment of an entire highway construction crew by slicing fuel lines and dumping sand in crankcases. Finally, the Monkey Wrench Gang turned to dynamite. Among many other things, they blew up a railroad bridge along with the coal cars that were crossing it.

But the ultimate goal of the Monkey Wrench Gang was water policy—the massive impoundments on the Colorado River. Before achieving that goal, the gang was found out. They had to go underground and take aliases. But I understand that recently word was received from George Hayduke. He was asked what job he had obtained under his assumed name. He replied that he was the nightwatchman at the Glen Canyon Dam.

Technically, Milagro is a fictitious place and Joe Mondragón is a fictitious character from John Nichols' book, *The Milagro Beanfield War*.[1] George Hayduke is a character in Edward Abbey's novel, *The Monkey*

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1. J. NICHOLS, THE MILAGRO BEANFIELD WAR (1974). *See also* J. NICHOLS, THE MAGIC JOURNEY (1978).

Wrench Gang.[2] These writers have joined with John McPhee,[3] Wallace Stegner,[4] Norman MacLean[5] and others in building a body of modern literature that reflects the American West as it truly exists today, with all of its bracing ambiguities, inconsistencies, and undercurrents of violence. They have broken with the traditional writing of the West, which all too often has been little more than a replication in words of the pictorial art of Remington and Russell.

But, because these modern authors write of the West as it really is, they must write of water. The deep-cut emotions over water in the American West are no fiction. *The Milagro Beanfield War*—depicting a community in a death struggle over the appropriation of water—is as good a starting place as there is for the study of water law, or indeed, agricultural law, in the American West.

To turn to some events that are plainly not fiction. The federal government in the 1930's decided to build Parker Dam to impound waters of the Colorado River. Because the State of Arizona feared a loss of water to California and because one support of the dam was on Arizona soil, the Governor of Arizona sent out troops against the construction crews retained by the United States of America.[6]

The City of Los Angeles transports part of its water supply through an aqueduct that carries water 225 miles from the Owens Valley, which is located on the other side of the Sierra Nevada. Owens Valley residents dynamited the aqueduct more than once in the 1920's.[7] Today their frustration is vented in only slightly different ways. Just a few months ago, a Molotov cocktail was tossed into the Long Pine office of the Los Angeles Department of Water and Power.[8]

The MX missile system is proposed for the placid high plains country of eastern Nevada and western Utah. The idea is to build some 4,600 concrete missile shelters for 200 missiles. Then the missiles would be moved around among the shelters to create a kind of shell game so that the Russians cannot figure out where our missiles are located.[9]

Some local ranchers are bitterly opposed to the MX project and are talking very tough.[10] Their opposition goes beyond the arms race and beyond the 30,000 workers, the 4,600 concrete missile shelters, and the 8,500

2. E. ABBEY, THE MONKEY WRENCH GANG (1975). *See also* E. ABBEY, DESERT SOLITAIRE (1970).

3. J. MCPHEE, COMING INTO THE COUNTRY (1976); J. MCPHEE, ENCOUNTERS WITH THE ARCHDRUID (1972).

4. *See, e.g.*, W. STEGNER, THE SOUND OF MOUNTAIN WATERS (1969).

5. N. MACLEAN, A RIVER RUNS THROUGH IT (1976).

6. Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 40 (1966).

7. R. NADEAV, THE WATER SEEKERS (1950).

8. Stegner, *Water and Power*, HARPER'S, March, 1981, at 61.

9. *See generally* U.S. DEP'T OF THE AIR FORCE, ENVIRONMENTAL IMPACT ANALYSIS PROCESS: DEPLOYMENT AREA SELECTION AND LAND WITHDRAWAL/ACQUISITION DEIS (1980).

10. Abbey, *Before the Boom: A Last Look at the Towns and Trails in the Shadow of MX*, ROLLING STONE, March 19, 1981, at 22.

miles of new roads that will be necessary to serve them. No, water is an ultimate issue. The concrete for the shelters will require as much as 130,000 acre feet of water—or 42 billion gallons—and in arid Utah and Nevada that is easily enough to fight about.

All of this, of course, has a geographical premise. It was John Wesley Powell who first warned us, over a century ago, that different rules apply west of the hundredth meridian—that mark of longitude that runs through the middle of North and South Dakota, and then down through Nebraska, Kansas, Oklahoma, and Texas.[11] Of course, Powell was not being literal: his point was that the hundredth meridian roughly corresponds to a key north-south rainfall line. In most of the country west of that line, annual precipitation is less than twenty inches per year. West of South Dakota the land is generally arid and agriculture cannot profitably occur under natural conditions. Water must be applied artificially to the ground.

Thus, the central position of water in the American West. In the East farms are built upon land. In the West they are built upon water. Over seventy percent of all water in the West is used for irrigation for agriculture. In some states, the figure approaches ninety percent.[12] Thus, at its essence, water policy in the West is agricultural policy, and vice versa.

Agriculture's hold on western water is being loosened by modern developments unrelated to farming. The big cities have burgeoning needs for water. Oil shale mining and coal slurrying are both water-intensive. Production of energy by nuclear and coal-fired power plants is water-intensive. All of this comes to bear on the farmers who now own the water. The price is usually right and, without water rights, the farms cannot continue. This, of course, becomes a threat to open space for, as the agricultural value disappears when the water right is bought out, the former farmland becomes a candidate for population sprawl.

The water shortage, we have come to learn, has still other ramifications. We have at long last perceived that fish—like oil shale retorts and power plants—are water-intensive, too.[13] And, perhaps surprisingly, so are jaguars.

When the early European explorers visited the Gulf of California in the sixteenth, seventeenth and eighteenth centuries, they marvelled at the resounding crash created as the wall of water that was the Colorado River hit the Gulf. One of our greatest preservationists, Aldo Leopold, visited there much later, in the 1920's. Here, from his famous book, *The Sand County*

11. J. POWELL, REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES, EXEC. DOC. NO. 73, 45th Cong., 2d Sess. (1878). *See generally* W. STEGNER, BEYOND THE HUNDREDTH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST (1953).

12. *See, e.g.*, U.S. DEP'T OF INTERIOR, WESTWIDE STUDY REPORT ON CRITICAL WATER PROBLEMS FACING THE ELEVEN WESTERN STATES 46 (1975).

13. On the recent development of state statutes providing for minimum stream flows to protect wildlife, *see* Tarlock, *Appropriation for Instream Flow Maintenance: A Progress Report on "New" Public Western Water Rights*, 1978 UTAH L. REV. 211.

Almanac, is his report of the delta of the Colorado River, located in the State of Sonora, Mexico, just below the border:

> All this wealth of fowl and fish was not for our delectation alone. Often we came upon a bobcat, flattened to some half-immersed driftwood log, paw poised for mullet. Families of raccoons waded the shallows, munching water beetles. Coyotes watched us from inland knolls, waiting to resume their breakfast of mesquite beans, varied, I suppose, by an occasional crippled shore bird, duck, or quail. At every shallow ford were tracks of burro deer. We always examined these deer trails, hoping to find signs of the despot of the Delta, the great jaguar, *el tigre*.
>
> We saw neither hide nor hair of him, but his personality pervaded the wilderness; no living beast forgot his potential presence, for the price of unwariness was death. No deer rounded a bush, or stopped to nibble pods under a mesquite tree, without a premonitory sniff for *el tigre*. No campfire died without talk of him. No dog curled up for the night, save at his master's feet; he needed no telling that the king of cats still ruled the night; that those massive paws could fell an ox, those jaws shear off bones like a guillotine.
>
> By this time the Delta has probably been made safe for cows, and forever dull for adventuring hunters. Freedom from fear has arrived, but a glory has departed from the green lagoons.[14]

* * *

Leopold was right. Since then, the Colorado River has been tamed and stored. Almost incredibly, after just one-half a century of construction, the Secretary of Interior stocks water from the Colorado River much as a grocer stocks cans on a shelf. The Glen Canyon Dam, so coveted by George Hayduke, alone holds the equivalent of two years of annual runoff from the entire river.[15] There is no longer a Colorado Delta, no green lagoons or *el tigre* to rule them. Indeed, there is no longer a Colorado River at all in Mexico. It is entirely dry.[16] Even in southern Arizona, just above the border, the Colorado River is the size of—and can barely be distinguished from—a medium-sized irrigation canal.

All of these forces and pressures are magnified and intensified in Indian country. First, water and energy development must be negotiated with the presence of additional governments, the tribes. Second, Indians hold extensive reserved water rights that are anomalies in the prior appropriation system. I doubt that federal non-Indian reserved rights, with the exception of rights for National Wildlife Refuges, will create significant dislocations in local water-based economies.[17] That is plainly not true of Indian reserved

14. A. LEOPOLD, A SAND COUNTY ALMANAC WITH ESSAYS ON CONSERVATION FROM ROUND RIVER 151-52 (1966).

15. Sibley, *The Desert Empire*, HARPER'S, Oct. 16, 1977, at 49.

16. Canby, *Our Most Precious Resource: Water*, NATIONAL GEOGRAPHIC, Aug. 1980, at 144, 180-81.

17. *See generally* FEDERAL WATER RIGHTS OF THE NATIONAL PARK SERVICE, FISH AND WILDLIFE SERVICE, BUREAU OF RECLAMATION AND THE BUREAU OF LAND MANAGEMENT, 86 Interior Dec. 553 (1979).

rights. Five Colorado River tribes, small in terms of population, are entitled to almost one million acre feet per year from a river that produces just fourteen million acre feet per year.[18] And the rights of the Navajo tribe—far and away the largest tribe in terms of both people and land—have not yet been determined.[19] Plainly, scores of other tribes from the northern Great Plains to the Pacific Coast are entitled to vast quantities of water.

The courts, Congress, the National Water Commission, and many others have squarely recognized that it is only fair that Indians should now receive their just entitlement of water. There is no question that during the early 20th century—from the Missouri River Basin to the Pyramid Lake Reservation in Nevada to the Yakima reservation in Washington—Congress and the Bureau of Reclamation consciously chose to subsidize heavily non-Indian water development at the expense of treaty-based Indian reserved water rights.[20]

Indian country also creates special complexities for a third reason: the land ownership pattern. This is just a partial listing of the kinds of land ownership within reservations:

1. Tribal land.
2. Individual Indian trust, or allotted, land. The pervasive legal ramifications of the allotment policy, begun in the 1880's, can hardly be overstated.[21]
3. Individual Indian fee land.

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18. Arizona v. California, 373 U.S. 546, 595-96 (1963), *decree entered*, 376 U.S. 340, 344-45 (1964).

19. *See, e.g.*, Back & Taylor, *Navajo Water Rights: Pulling the Plug on the Colorado River?*, 20 NAT. RESOURCES J. 71 (1980).

20. *See, e.g.*, Hundley, *The Dark and Bloody Ground of Indian Water Rights: Confusion Elevated to Principle*, 9 W. HIST. J. 455 (1978). The famous conclusion of the National Water Commission tersely set out federal policy:

> Following *Winters*, more than 50 years elapsed before the Supreme Court again discussed significant aspects of Indian water rights. During most of this 50-year period, the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the *Winters* doctrine. 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 on the Reservations it set aside for them is one of the sorrier chapters. . .

NAT'L WATER COMM'N, WATER POLICIES FOR THE FUTURE 474-75 (1973).

21. Total Indian land holdings were reduced from 138 million acres in 1887, when the General Allotment Act was passed, to 48 million acres in 1934, when the enactment of the Indian Reorganization Act brought an end to the allotment program. D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 87 (F. Prucha ed. 1973). Allotment has limited tribal territorial jurisdiction. *E.g.*, DeCoteau v. District County Court, 420 U.S. 425 (1975). One can fairly wonder whether tribal jurisdiction over non-Indians in criminal cases would have been denied, as it was in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), were the Court not faced with the fact that large numbers of non-Indians own land in Indian country, usually as a result of the allotment process. The important question of water rights of allottees is treated in this issue. *See* Getches, *Water Rights on Indian Allotments*, 26 S.D.L. REV. 405 (1981).

4. Federal public land.
5. State land, including in some cases the beds of navigable watercourses.
6. Non-Indian fee land.
7. Non-Indian fee land in which the owner owns the surface estate and the United States owns the minerals beneath the surface. There are sixty million acres of land in such divided ownership in the West, much of it in the northern Great Plains.[22]

Fourth, quite recently geologists have found that some minerals—including coal, molybdenum, and uranium—are heavily concentrated on Indian reservations.[23] Thus, Indian mineral holdings have a special economic importance.

There are other concerns peculiar to Indian country. In addition to what might be called purely environmental issues, there are Indian cultural and religious attitudes toward the land and water. Finally, there is racism. There is no point in any of us pretending that such hostilities are not very much a part of water and energy policy in Indian country. Combined, these several factors make water and energy development more delicate and complex on Indian reservations than in any other place in the country.

In most areas of the West—perhaps most particularly in the upper Great Plains—leaders are searching for solutions. There is, very properly, a backdrop of desperation: it is in everyone's interest to avoid an Indian water war. Leaders of all of the parties are well aware, I think, of the debilitating effects of the Indian fish war of the Pacific Northwest and the Great Lakes.[24] Recognizing this, many of the principal figures are proceeding with a fair amount of wisdom and good faith and, perhaps ultimately most important, with increasing amounts of cooperation and trust, arms-length though they may be.

The major papers that follow will deal with the hard specifics. I would like to make just a few general remarks pertinent to the subject matter of this symposium.

First, we must bring to an end the waste of water. We simply must

22. *See generally* Brimmer, *The Rancher's Subservient Surface Estate*, 5 LAND & WATER L. REV. 29 (1970).

23. *See generally* COMPTROLLER GENERAL'S REPORT TO THE SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, MANAGEMENT OF INDIAN NATURAL RESOURCES, 94th Cong., 2d Sess. pt. 2 (Comm. Print 1976); BUREAU OF COMPETITION, STAFF REPORT TO THE FEDERAL TRADE COMM'N, MINERAL LEASING ON INDIAN LANDS (Oct. 1975).

24. Quoting from Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123, 1126 (9th Cir. 1978), the Supreme Court made this observation about the conduct of Washington state officials:

> The state's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases, the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice.

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 696 n.36 (1979) (citations omitted).

develop a conservation ethic for water quantity, as we have already begun to do for air, trees, animals, wilderness, and even, ironically, water quality. I see no avoiding the fact, given the preeminent use of western water for agriculture, that the burden must be laid largely at the feet of the farmers, particularly those who have benefitted so much from the big reclamation projects.

I believe that we have made too much of vested property rights to water. In my judgment, the law is now—although it needs to be further clarified—that there is no vested right in wasted water.[25] Putting water to waste is not a beneficial use. It does not, in the language used by the Colorado Supreme Court, amount to "maximum utilization" of water.[26] This means that a permit from the state, or even an amount of water designated in a court decree, can be diminished in quantity if waste is occurring by today's reasonable standards. Western legislatures can legislate against existing waste and state water masters can order waste to be abated; that is regulation, not a taking. Courts can also order the abatement of waste, even if waste happens to be built into old decrees. Thus, more judges can and

25. Great numbers of western farmers have water rights based on outmoded methods of irrigation that are grossly wasteful when compared with more modern technology. Earthen ditches, which lose water to leakage and to the roots of phreatophytes (literally, "water loving plants"), are still common. These conveyance losses can be largely eliminated by lining irrigation ditches with plastic or concrete, or by substituting pipes. In addition to conveyance loss, water is often applied directly to the field by flood irrigation. Furrow irrigation and trickle irrigation both reduce waste substantially, though the latter method may not be economically feasible in some regions. On many operations, sprinklers are feasible and can reduce by 90% percolation losses associated with flood irrigation. *See generally* B. WITHERS & S. VIPOND, IRRIGATION: DESIGN AND PRACTICE 35-58 (2d ed. 1980); R. LINSLEY & J. FRANZINI, WATER RESOURCES ENGINEERING 398-420 (1972); NAT'L WATER COMM'N, *supra* note 20, at 299-302.

Historically, the prior appropriation doctrine has been premised on the notion that a diversion of water, if put to a beneficial use, established a vested property right. Thus some courts have found that existing appropriations could not be altered by subsequent conservation legislation, even if the appropriations used more water than was reasonably necessary, without resulting in a compensable taking. *See, e.g.*, Enterprise Irrig. Dist. v. Willis, 135 Neb. 827, 284 N.W. 326 (1939). Wasteful practices have also been insulated from judicial and legislative review by the doctrine that the quantity of water necessary to irrigate a given number of acres is measured by irrigation practices customarily used in the locality, even if customary local practices are wasteful and more efficient irrigation practices are feasible. *See, e.g.*, Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist., 3 Cal. 2d 489, 45 P.2d 972 (1935); Barrows v. Fox, 98 Cal. 63, 32 P. 811 (1893).

Modern cases have moved to eliminate waste on a number of fronts. Wasted water, even if recognized in an earlier adjudication, has been found not to be a beneficial use. *See, e.g.*, Budd v. Bishop, 543 P.2d 368, 373 (Wyo. 1975); *In re* Water Rights of Escalante Valley Drainage Area, 10 Utah 2d 77, 348 P.2d 679, 681-82 (1960). The New Mexico courts have concluded that the amount of water wasted is lost through the forfeiture statutes. *See, e.g.*, State v. McLean, 62 N.M. 264, —, 308 P.2d 983, 988-89 (1957). In Idaho, the supreme court has ruled that water rights must be measured from the point of diversion, not the place of use, thus effectively exluding from a water right any water wasted through carriage loss. Glenn Dale Ranches Inc. v. Shaub, 94 Idaho 585, —, 494 P.2d 1029, 1032 (1972). The Wyoming Supreme Court has denied the transfer of wasted water. Basin Electric Power Coop. v. State Bd. of Control, 578 P.2d 557, 569-70 (Wyo. 1978). Whatever specific theories may be employed, courts should proceed on the conceptual basis that an appropriation of water based in part on wasteful practices can be decreased over time as new technologies become reasonably feasible. *See generally* Note, *Water Waste—Ascertainment and Abatement*, 1973 UTAH L. REV. 449.

26. *See, e.g.*, A-B Cattle Co. v. United States, 196 Colo. 539, —, 589 P.2d 57, 60-61 (1978).

should say, very simply, "no one wastes water in my court." And that applies to non-Indians and Indians, alike.

Second, all parties should seek to bring to an end the era of litigation in Indian law. During the decade of the 1970's, the Supreme Court rendered 32 Indian law opinions,[27] an extraordinary number far exceeding fields such as antitrust law, consumer law, and environmental law. We must proceed into an era of negotiation. Tribes, energy companies, and, importantly, credit institutions must negotiate. Tribes, states, and counties must add to the increasingly impressive list of intergovernmental agreements that have been negotiated over taxation, police protection, hunting and fishing, water, and other subjects.[28] The proposed Tribal-State Compact Act should be seriously considered.[29] It may be time for the tribes themselves to seek the legislative or judicial overturning of *Kennerly v. District Court of Montana*.[30] I seriously question whether today the tribes need the protection that *Kennerly* afforded them in 1971.

When they get to the negotiating table, the various sides must seek an understanding of the other parties' concerns. They must search for the other side's legitimate interests, as good negotiators always do.

The tribes must respect the legitimate interests of energy corporations.

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27. Washington v Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979); Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979); United States v. John, 437 U.S. 634 (1978); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); United States v. Wheeler, 435 U.S. 313 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165 (1977); United States v. Antelope, 430 U.S. 641 (1977); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977); Bryan v. Itasca County, 426 U.S. 373 (1976); Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800 (1976); Fisher v. District Court, 424 U.S. 382 (1976); DeCoteau v. District County Court, 420 U.S. 425 (1975); Antoine v. Washington, 420 U.S. 194 (1975); United States v. Mazurie, 419 U.S. 544 (1975); Morton v. Mancari, 417 U.S. 535 (1974); Morton v. Ruiz, 415 U.S. 99 (1973); Washington Game Dep't. v. Puyallup Tribe, 414 U.S. 44 (1973). Mattz v. Arnett, 412 U.S. 481 (1973); United States v. Mason, 412 U.S. 391 (1973); Keeble v. United States, 412 U.S. 205 (1973); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); United States v. Jim, 409 U.S. 80 (1972); Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972); United States v. Southern Ute Tribe or Band, 402 U.S. 159 (1971); Kennerly v. District Court, 400 U.S. 423 (1971); Tooahnippah v. Hickel, 397 U.S. 598 (1970).

28. The foundation-supported Commission on State-Tribal Relations has been created to study and promote cooperation between state and tribal governments. The Commission, which has a permanent staff and which is comprised of state legislators and tribal council members, has on file copies of existing intergovernmental agreements on a variety of subjects; transcripts of field hearings held by the commission; and research papers on legal and economic issues. Copies of these documents and further information can be obtained from the two Commission offices at these addresses: National Conference of State Legislatures, 1125 Seventeenth Street, Suite 1500, Denver, Colorado, 80202; and American Indian Law Center, P.O. Box 4456, Cornell Post Office, Albuquerque, New Mexico, 87196.

29. *See, e.g.*, S. 1181, 96th Cong., 1st Sess. (1979); *Jurisdiction on Indian Reservation: Hearings on S. 1181, S. 1722, and S. 2832 Before the Senate Select Comm. on Indian Affairs*, 96th Cong., 2d Sess. (1980).

30. 400 U.S. 423 (1971). In holding that tribes cannot voluntarily transfer judicial jurisdiction to the states except pursuant to Public Law 280 or other express legislation authorizing such transfers, *Kennerly* jeopardizes many tribal-state jurisdictional compromises since tribes may often concede jurisdiction to the states in one or more disputed areas in order to establish tribal jurisdiction in other controverted areas.

Obviously, the companies must return a reasonable profit or they cannot do business. Beyond that, the companies need to be assured of a reasonable degree of certainty so that corporate projections can be made. In some, though by no means all, cases, this may mean a waiver of basic tribal sovereign rights, such as immunity from law suits and the right to tax.[31] Tribes have always stood on principle and properly so—too many sovereign rights have been lost through inadvertence and bad faith. But, in some instances at least, tribes must seriously consider waiving some sovereign powers if such a waiver is appropriate to meet the legitimate interests of the corporate party on the other side of the table. To me, it is a deeply encouraging sign that today many Indian tribes, like other governments, are powerful enough to be willing to waive some of their powers.

The position of the ranchers and farmers, large and small, with water rights under state law must also be respected by the tribes. Yes, those non-Indians made a mistake of law in thinking that their state water rights were inviolate. But they did not make a bad-faith mistake—almost none of them had heard of the *Winters* Doctrine when they began their operations. Their spreads are often dependent on their water rights. Their livelihoods and families are at stake, and such concerns obviously touch the deepest chords. Arguably, these considerations are extralegal, but that is too narrow a view. Negotiations often cannot properly proceed unless the tribes move beyond the printed words of court decisions and recognize in a pragmatic way the predicament in which non-Indian water users find themselves.

The farmers and energy corporations must also respect the legitimate interests of the tribes. First and foremost, the tribes must be dealt with as governments, not Elk's Clubs or minions of the United States.[32] This is an emotional, bed-rock issue that is far beyond the telling here. But I can say unequivocally that the governmental status of tribes must be recognized and deeply respected. If that is not done, corporate negotiators will find that the deal is off.

And are Indian tribes governments under the law today? In *Worcester*

31. *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW ch. 6A4c (1981 ed.) (waiver of tribal sovereign immunity) and ch. 7D (tribal taxation).

32. Both federal and state courts have contributed to the atmosphere of lawlessness, *see* note 24, *supra*, by expressly denying the well-established governmental status of tribes, *see* note 34, *infra*. *See, e.g.*, United States v. Mazurie, 487 F.2d 14, 19 (10th Cir. 1973), *reversed*, 419 U.S. 544, 556 (1975) (characterizing the Wind River Tribe as a "private, voluntary organization, which is obviously not a governmental agency. . . ."); Brough v. Appawora, — Utah —, —, 553 P.2d 934, 935 (1976), *vacated and remanded*, 431 U.S. 901 (1977) ("The Ute nation, of the long-ago treaty, no longer exists. . . ."); Bad Horse v. Bad Horse, 163 Mont. 445, 517 P.2d 893, 897, *cert. denied*, 419 U.S. 847 (1974) ("Only by throwing off the strictures of Indian sovereignty can state courts enter the arena and meet the problems of the modern Indian. If Congress and the federal appellate courts have a better solution, let them come forward."); Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 89 Wash. 2d 276, —, 571 P.2d 1373, 1376 (1977), *vacated and remanded*, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (Federal district court decision basing Indian fishing rights on governmental status of tribes not valid because "the decision was based upon a treaty made not with a foreign nation, but with inhabitants of this Nation who were ancestors of the Indian claimants in this action.").

v. Georgia,[33] one of Chief Justice John Marshall's greatest opinions, the sovereign, governmental status of tribes was squarely recognized. Does the essence of *Worcester* remain good law today? A reading of the cases plainly shows that it does.[34] Indeed, I suggest that *Worcester v. Georgia* is literally one the most enduring of all Supreme Court opinions. From a review of *Shepard's* citations,[35] one can see that of all of the United States Supreme Court cases handed down between 1789 and the end of the Civil War in 1865—of all the cases handed down during the first three-quarters of a century of the Court's existence—only three of those cases were cited more often by modern courts during the 1970's than *Worcester v. Georgia*. They were *Marbury v. Madison*,[36] *McCulloch v. Maryland*,[37] and *United States v. Perez*.[38] Thus today's courts have turned to *Worcester* even more often than to venerable decisions such as *Trustee of Dartmouth College v. Woodward*,[39] *Gibbons v. Ogden*,[40] and *Martin v. Hunter's Lessee*.[41]

The point has been made in another way by Judge Monroe G. McKay of the Tenth Circuit Court of Appeals. His eloquent conclusion, handed down just a few months ago, is this:

> The State questions the existence of any inherent tribal powers in this case. It argues that the Tribe could not have exclusive rights in any traditional territory because, in effect, there is no traditional territory: "the Mescaleros were being swept from their lands by a tide of white settlers." Brief for Appellants at 37. If we were to accept the State's argument, we would be enshrining the rather perverse notion that traditional rights are not to be protected in precisely those instances when protection is essential, *i.e.*, when a dominant group has succeeded in temporarily frustrating exercise of those rights. We prefer a view more compatible with the theory of this nation's founding: rights

33. 31 U.S. (6 Pet.) 515 (1832).

34. The Court has properly noted, after placing reliance on *Worcester*, that "this is not to say that the Indian sovereignty doctrine. . .has remained static during the 141 years since *Worcester* was decided." McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171 (1973). *Cf.* Montana v. United States, 101 S. Ct. 1245 (1981) (no tribal jurisdiction, on facts of case, to regulate non-Indian hunting and fishing on non-tribal land within reservation boundaries); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (tribes do not possess retained sovereignty over non-Indians in criminal matters). In the difficult cases testing the furthest reaches of tribal governmental powers, especially where non-Indians are involved, tribal jurisdiction has not always been upheld. *Id.* The Court in the modern era, however, has cited *Worcester* in virtually every major case involving tribal powers and has remained absolutely unwavering in its adherence to the central premise of *Worcester*—that tribes are governments with a broad range of inherent powers. *See, e.g.*, Montana v. United States, 101 S. Ct. 1245 (1981); White Mountain Apache Tribe v. Bracker, 100 S. Ct. 2578 (1980); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); United States v. Wheeler, 435 U.S. 313 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Fisher v. District Court, 424 U.S. 382 (1976); Morton v. Mancari, 417 U.S. 535 (1974); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).

35. *See* SHEPARD'S UNITED STATES CITATIONS—CASES, CASE EDITION SUPPLEMENT 1971-76 & CASE EDITION SUPPLEMENT 1976-1980.

36. 5 U.S. (1 Cranch) 137 (1803).

37. 17 U.S. (4 Wheat.) 316 (1819).

38. 22 U.S. (9 Wheat.) 579 (1824).

39. 17 U.S. (4 Wheat.) 518 (1819).

40. 22 U.S. (9 Wheat.) 1 (1824).

41. 14 U.S. (1 Wheat.) 304 (1816).

do not cease to exist because a government fails to secure them. *See* The Declaration of Independence (1776).[42]

Finally, as I suggested earlier, negotiations over Indian water rights and energy involve more than acre feet, diversion works, and mineral royalties, significant though those concerns may be. The issues go even beyond the values held by good environmentalists who treasure the bright spackled beauty of an open meadow or by those fly-fishers who seek out the solitude of a remote churning mountain stream. There are religious dimensions to water and energy policy, as well. To many Indians, water is an integral part of their spiritual world. A young but profoundly traditional Northern Cheyenne woman from Montana has explained that her people view life as a great wheel, with all of the spokes being dependent upon one another. The spokes—land, air, animals, water, and human beings—are all equally important. There is no hierarchy. Water, however, has a special importance because all of the spokes depend on it. It is a spiritual wrong to use too much water because that would affect all of life. Frank Tenorio, Governor of the San Felipe Pueblo, has made a similar point:

> There has been a lot said about the sacredness of our land which is our body; and the values of our culture which is our soul; but water is the blood of our tribes, and if its life-giving flow is stopped, or it is polluted, all else will die and the many thousands of years of our communal existence will come to an end.[43]

Thus, whether the issue is water or land, corporations must respect the diverse responsibilities that Indian leaders have: responsibilities to the economic needs that their people have today and, also, responsibilities to the land and water that they know should be kept there forever. There will never be a balance sheet that can reflect these greater concerns.

These are some of the many factors that create the cast and the tone of the kind of respect that the various parties must have for each other's legitimate interests. Without that mutual respect, there can be no era of negotiation and we cannot avert an Indian energy or water war.

But those wars must be averted, for none of the parties plans to go away. The corporations will proceed in their present form or be reshaped by mergers or acquisitions that do not affect the substance of their missions.

And the tribes—who have been wracked by allotment and termination but who have survived with dignity and vigor—will continue also. Anyone seriously misjudges the long flow of history and the tenacity of American Indians if they believe that Indians are somehow going to fade from this society. It is their land, their minerals, their water, their traditions and reli-

42. Mescalero Apache Tribe v. New Mexico, 630 F.2d 724, 730 (10th Cir. 1980), *judgment vacated and remanded*, 101 S. Ct. 1752 (1981).

43. UNITED EFFORT TRUST, *A Dwindling Water Supply and the Indian Struggle to Retain Aboriginal and Winters Doctrine Water Rights*, 4 AM. INDIAN J. 35 (Dec. 1978).

gion, and their children and grandchildren yet unborn. They have had those things, tangible and intangible, and have built their lives around them, for more years past than can be measured. I suggest that those things will persevere for more years from now than can be measured.

So the parties are not going to disappear and neither are their common problems. We need to move away from the violence, anarchy, and racism that have attended resource issues in the American West for too long. What we need to do now is to proceed with a sense of cooperation, good faith, and optimism—not toward the courtroom but toward the bargaining table.