The Case for a Legislative Solution to Indian Water Claims

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"The Case For A Legislative Solution To Indian Water Claims"

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The Federal Impact
On State Water Rights

A short course sponsored by the
Natural Resources Law Center
University of Colorado School of Law
June 11-13, 1984
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Who Is Responsible For It? Who Should Pay?

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JAMES M. BUSH

"THE CASE FOR A LEGISLATIVE SOLUTION TO INDIAN WATER CLAIMS"

NATURAL RESOURCES LAW CENTER
UNIVERSITY OF COLORADO
BOULDER, COLORADO
JUNE 12, 1984

I want to thank Dean Levin, Co-Chairmen Jim Corbridge and Larry MacDonnell for inviting me to participate in this conference. I consider it an honor, and I hope my remarks will be considered constructive and of some interest to you.

I am sure that some views I have regarding this subject will be controversial, but an academic setting is supposed to be the appropriate place for such an exchange.

Thomas Jefferson is supposed to have said: "It is the trade of lawyers to question everything -- yield nothing and talk for hours". I don't expect to question everything -- I believe I can yield a bit and I certainly don't plan to talk for even one hour!

Not too many years ago, the terms "Winters Doctrine" and "reserved water rights" meant nothing to most people -- this
INCLUDED PUBLIC OFFICIALS AT MOST LEVELS, VARIOUS LEADERS IN THE PRIVATE SECTOR AND PROBABLY A GOOD MANY LAWYERS, LAW STUDENTS AND EVEN SOME LAW PROFESSORS.

THAT HAS CHANGED. THE OIL CRISIS OF A FEW YEARS BACK MADE US ALL PAINFULLY AWARE OF THE SCARCITY AND EVEN THE FINITE NATURE OF SOME OF OUR NATURAL RESOURCES. THAT IS INDEED TRUE OF WATER.

IT IS NOW BECOMING RATHER COMMON TO PICK UP A NEWS MAGAZINE OR THE SUNDAY SECTION OF A NEWSPAPER AND FIND A MAJOR ARTICLE ABOUT POTENTIAL WATER SHORTAGES. THIS NEW INTEREST EXTENDS TO INDIAN WATER CLAIMS. THE "WINTERS DOCTRINE" AND "RESERVED RIGHTS" ARE NO LONGER TERMS THAT MIGHT SUGGEST THE TITLE OF A NEW STATE DEPARTMENT DOCUMENTARY OR SPECIAL SEATS AT A HOMECOMING FOOTBALL GAME.

THOSE WHO HAVE NOT "JUST DISCOVERED" THE PROBLEM -- BUT HAVE DEALT WITH IT IN SOME DETAIL -- I BELIEVE SHOULD BE PLEASED WITH THIS NEW EXPOSURE AND BE HOPEFUL THE SUBJECT RECEIVES EVEN MORE ATTENTION BY THE GENERAL PUBLIC, BY BUSINESS AND BY GOVERNMENT OFFICIALS AT ALL LEVELS.

TOO OFTEN WE FAIL TO ACT UNTIL THERE IS A CRISIS.
THE MORE PEOPLE IN THIS COUNTRY THAT COMMENCE TO COMPREHEND THE MAGNITUDE OF THIS PROBLEM -- THE SOONER A SOLUTION MAY EMERGE.

DESpite the media attention, many Americans still believe this is only a western problem -- and this because most Indian lands lie in the west and, additionally, because much of the west is -- in fact -- an arid region.

I MOST EMPHATICALLY SUGGEST -- IT IS NOT JUST A PROBLEM FOR THE WEST. IT IS A PROBLEM -- WHICH IF NOT SOLVED IN A TIMELY, SENSIBLE AND EQUITABLE MANNER -- WILL HAVE SERIOUS ADVERSE CONSEQUENCES FOR THE ENTIRE NATION.

In this regard, I would remind you that 90% of our non-fuel minerals come from public lands -- primarily in the west. This same region contains the bulk of the nation's low sulfur coal, oil shale and uranium -- and one of the greatest "on shore" potentials for new oil and gas production lies in the overthrust belt extending through Alaska and the western United States from the Canadian border to Mexico. In addition, a very significant part of the nation's supply of food, fibre and timber originates in the west.

The national defense and future economic stability of this country are inextricably tied to the continued development and supply of these resources.
THAT DEVELOPMENT AND SUPPLY IS EQUALLY DEPENDENT UPON THE MOST PRECIOUS RESOURCE OF ALL -- WATER.

TODAY, THE CLOSE TO SIXTY LAWSUITS PENDING WITH RESPECT TO INDIAN WATER CLAIMS IMPACT ON ALMOST EVERY MAJOR RIVER SYSTEM AND SOURCE IN THE WEST. THEY HAVE CREATED GREAT UNCERTAINTY AMONG ALL WATER-USERS -- AGRICULTURAL, MUNICIPAL AND INDUSTRIAL. FUTURE PLANNING, FINANCING AND DEVELOPMENT WILL BE DELAYED -- AND EVENTUALLY STOPPED -- UNLESS THESE DISPUTES ARE RESOLVED. LEAD TIMES WILL BE STRETCHED, COSTS WILL ESCALATE AND SHORTAGES WILL BE EXPERIENCED.

SOLUTIONS

HOW DO WE RESOLVE THIS PROBLEM THAT IS GENERATING MORE AND MORE FRICTION AND WILL GET WORSE AS WATER GETS MORE SCARCE.

THREE AVENUES ARE AVAILABLE:

LITIGATION, NEGOTIATION OR LEGISLATION. MY PRIMARY ASSIGNMENT TODAY IS TO DISCUSS THE LAST -- LEGISLATION.

IN ORDER TO CONSIDER THAT ALTERNATIVE IN THE PROPER PERSPECTIVE, I BELIEVE IT IS NECESSARY AT THE OUTSET TO GIVE SOME CONSIDERATION TO THE BASIC PROBLEM -- AS WELL AS THE OTHER TWO ALTERNATIVES. I WILL DO THAT, BUT TRY NOT TO BE OVERLY REPETITIVE OF MATERIAL COVERED BY OTHER SPEAKERS.
THE BASIC PROBLEM -- How Did It Arise? --
Who Is Responsible For It? Who Should Pay?

Mr. Justice Rehnquist of the U.S. Supreme Court observed in *California v. U.S.*, 438 U.S. 645, that the history of modern irrigation commenced in the West on July 23, 1847 when a band of Mormon pioneers built a small dam across City Creek near the site of the present Mormon Temple in Salt Lake City and directed enough water to saturate 5 acres of very dry land.

During the next 50 years irrigation expanded, more farmers, miners and other settlers moved West. The U.S. Cavalry was there to protect them. U.S. Marshalls brought law and order. Railroads were given free land to provide transportation. The migration was encouraged by Congressional enactments such as:

- The Homestead Act of 1862
- The Mining Law of 1866 and 1872
- The Desert Land Act of 1877 and later
- The Reclamation Act of 1902.

All of these early acts recognized in one way or another that water rights should be controlled by local law.

During the 1860's most of the Indian reservations were created -- either by treaty or executive order. In the creation of these reservations, neither Congress nor the Executive Branch made any express reservation of water rights.
In 1908, the United States Supreme Court resorted to the familiar concept of a "legal fiction" to prevent an injustice. It found in Winters v. U.S., 207 U.S. 564, that Congress had impliedly reserved an amount of water to fulfill the purpose for which the reservation was created.

Some tribal advocates claim that states or private interests are not innocent parties and should bear the burden or cost of resolving disputes over Indian water claims. This belies the historical and legal development of the Winters Doctrine.

First, many if not most of the state-created water rights that would be displaced by the establishment of Winters water rights arose prior to that 1908 decision.

State constitutions and territorial enabling acts typically had vested western states and territories with power to dispose of all waters within their boundaries.

The Desert Land Act had severed the waters from public lands in the West to enable states to provide for the means by which rights to the use of water could be acquired.

So, at the time Winters was decided, persons who had acquired rights to the use of water under state or territorial
LAW HAD GOOD REASON TO BELIEVE THAT THEY HAD INDEED ACQUIRED VALID WATER RIGHTS.

Second, Justice McKenna's opinion in Winters can hardly be considered a definitive statement of the federal reserved water rights doctrine. It said nothing about the quantity of the water and little about the nature of the right. Therefore, those who acquired water rights under state and territorial law subsequent to Winters -- particularly those whose rights might be impacted by Indian reservations created by executive order and not created by treaty -- had little reason to be concerned about the case.

It is important to remember that while Winters dealt with a reservation created by treaty, the great majority of Indian reservations -- virtually all in Arizona, for example -- were created by executive order. It was not until 1963 in Arizona v. California, 373 U.S. 546, that the Supreme Court concluded that Winters rights attached to executive order reservations.

The historical background in the late 1800's cast considerable doubt upon the valid existence of executive order reservations and the nature of Indians' rights with respect to such reservations. See U.S. v. Southern Pacific Transp. Co., 9th Cir. 543 F.2d 676 (1976).
By 1871, the U.S. House of Representatives had become sufficiently concerned about its own lack of participation in Indian policy, that it was responsible for legislation that banned any further use of the treaty power in dealing with the Indians. The legislation, 25 U.S.C. § 71, which removed the treaty power said absolutely nothing about creating Indian reservations by executive order.

Since the purpose behind the enactment was to provide for greater overall congressional participation, it would seem most unusual for anyone to think the President, without participation by either the Senate or the House, could create an Indian reservation all by himself.

Doubt about this authority persisted until 1915, when the Supreme Court decided that such authority existed by virtue of Congress's long-time deference to it. U.S. v. Midwest Oil Co., 236 U.S. 459.

The decision is hard to justify, and soon after it, in 1919, Congress responded with legislation (43 U.S.C. § 150) which prohibited the creation of new executive order reservations.

Even after the Midwest Oil, there was good reason to question whether Winters water rights attached to such reservations.
In 1949, the U.S. Supreme Court held that executive order reservations -- unlike reservations created by treaty or statute -- did not create compensable property interests protected by the U.S. Constitution. *Hynes v. Grimes Parking Co.*, 337 U.S. 86.

If Congress can unilaterally abolish executive order reservations without payment of compensation, it is difficult to understand how a vested Winters right could be created when the underlying reservation -- which is the basis for the right -- does not itself create a vested property right.

If this is difficult to explain, it is probably why Justice Black did not attempt it in *Arizona v. California*, supra. He simply concluded in a one line sentence -- without discussion -- that Winters rights indeed do attach to executive order reservations.

A summary of the current status of executive order tribes may be found in *U.S. v. Southern Pacific Transp. Co.*, supra, at page 687. 1

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1"Thus, the status of executive order reservations can be summarized as follows: the Indians have the exclusive right to possession but title to the lands remains with the United States. Congress has plenary authority to control use, grant adverse interests or extinguish the Indian title. In these respects, executive order reservations do not differ from treaty or statutory reservations. The one difference is that so long as Congress has not recognized compensable interests in the Indians, executive order reservations may be terminated by Congress or the Executive without payment of compensation."
Post Winters

It has been 76 years since Winters -- during which time Congress has failed to clarify what the Supreme Court fictionalized that Congress impliedly intended to do.

During the same period, the Executive Branch -- through Republicans and Democrats alike -- has failed to come to grips with the difficult task of dealing with Indian water rights.

With one or two exceptions, the entire matter has been left to the courts -- and during this 76 year period, the doctrine has been directly applied by the U.S. Supreme Court in only 4 cases:

   The first case, Powers in 1939, added little of a definitive nature to the Winters Doctrine. Like Winters, it involved a reservation created by Treaty.

   The issue was whether reserved rights of the Crow Tribe could be transferred to non-Indians who had acquired allotted Indian lands. The Court did not expressly rule on that issue for procedural reasons. The significant thing was that Court specifically resorted to language of the Treaty (as it had in Winters) saying the Treaty contemplated:
“SETTLEMENT BY INDIVIDUAL INDIANS UPON DESIGNATED TRACTS WHERE THEY COULD MAKE HOMES WITH EXCLUSIVE RIGHT OF CULTIVATION FOR THEIR SUPPORT.”


As mentioned earlier, this was the first time the doctrine was applied to reservations created by executive order.

The other major expansion of the doctrine arising out of this case -- and the only one to be made by the Court up to that time or since -- pertained to the formula for determining the quantity of water to be given to five tribes along the Colorado River.

The Court rejected the doctrine of Equitable-Apportionment which had been used to resolve water disputes between states, and in the interest of achieving "finality" as to the amount of the Indian water right, it made a monstrous mistake. It adopted a formula called the "irrigable acres" test.

The so-called "irrigable acres" test would provide a tribe with an amount of water to irrigate all of the land that is practicably irrigable. The result was to provide the five tribes with approximately 1 million acre feet of water out of the main stream of the Colorado River.

The total acreage comprising the five reservations amounted to 335,000 acres -- or less than one-fourth of one percent of
The 155 million acres comprising the seven states in the Colorado River watershed.

The total population of the five tribes in 1960 was 3,340 compared to the 21 million then living in the seven states.

Another example will further indicate the inequitable apportionment of Colorado River water that has resulted:

A. Ft. Mohave Tribe
   One of the tribes (Ft. Mohave) was comprised of 450 people with only one family living on the reservation. The tribe received 122,640 acre feet.

B. City of Tucson
   Contrast this with the City of Tucson with a population of close to one-half million that will receive a total of 155,000 acre feet of Colorado River water under the Central Arizona Project. Tucson is a community where water demand exceeds supply by a 4 to 1 ratio. The 1980 per capita use in Tucson was a very conservative 140 gallons per person. This still resulted in a groundwater overdraft of 225,000 acre feet.

To give you another perspective as to how the incredible "irrigable acres" test would affect Arizona:
ARIZONA'S TOTAL ANNUAL RENEWABLE SUPPLY OF ALL WATER IS 2.8 MILLION ACRE FEET.

ARIZONA'S TOTAL ANNUAL OVERDRAFT OF GROUNDWATER IS 2.5 MILLION ACRE FEET.

89.7 PERCENT OF TOTAL WATER USE GOES FOR AGRICULTURE ON JUST 1.1 MILLION ACRES OF LAND.

There are over 20 million acres of Indian land in Arizona -- 20 TIMES MORE THAN ALL THE LAND NOW BEING IRRIGATED.

If only 20% is irrigable (tribes claim much more -- some 100%) then to satisfy "Winters" rights -- it would take FIVE TIMES AS MUCH WATER AS IS DEPENDABLY AVAILABLE TO THE ENTIRE STATE -- INCLUDING ARIZONA'S ALLOCATION OF WATER UNDER THE CENTRAL ARIZONA PROJECT.

Clearly, a result that would be not only physically BUT POLITICALLY IMPOSSIBLE.


Some commentators and Indians have claimed that this case -- decided thirteen years after Arizona v. California extended the Winters Doctrine to groundwater. In fact, the Court
DID NOT HAVE TO MAKE THAT DECISION, BECAUSE IT WAS CONCEDED THAT THERE WAS A HYDROLOGIC CONNECTION BETWEEN THE POOL AND MR. CAPPAERT'S WELLS. THE COURT SAID:

"No cases of this Court have applied the doctrine of implied reservation of water rights to ground water. Nevada argues that the implied reservation doctrine is limited to surface water. Here, however, the water in the pool is surface water.

Whether or not the Winters Doctrine applies to groundwater I believe remains a major issue.


The New Mexico case represented the first major constriction of Winters since its inception -- seventy years earlier.

The U.S. asserted Winters claims to instream flows for aesthetic, environmental, recreational and fish and wildlife purposes. The Court announced a primary and secondary purpose test.

The Court said Winters rights only extend to the primary purpose for which the reservation was created (forests) and not secondary uses or purposes (fish and wildlife preservation). As to the secondary uses, the Court said water rights would be subject to perfection under state law.

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The Primary-Secondary Test forewarns of enormous ramifications for Indian reserved water claims.

Last year the Supreme Court reopened Arizona v. California, 75 L.Ed.2d 318, to consider whether Indian water rights granted in the first case should be increased to take into account "OMITTED LANDS" -- lands omitted from consideration in the first case.

In referring to that earlier decision, the Court said:

"We held that the creation of the Reservations by the Federal Government implied an allotment of water necessary to make the Reservation livable." (Emphasis supplied)

The Court denied relief to the Indians in a decision that was clearly a departure from the earlier case. The Court decided that the amount awarded in the first instance was enough to make the "RESERVATION LIVABLE" and declined to consider any omitted acres even though they may have been "PRACTICABLY IRRIGABLE".

There is then a strong suggestion that the only water satisfying the PRIMARY PURPOSE of the "RESERVED RIGHT" is that amount necessary to make the "RESERVATION LIVABLE" -- and any amount more than that is for a SECONDARY PURPOSE requiring the perfection of water rights under state law.
The Court also saw a problem in rationalizing its first Arizona v. California decision and its more recent decision in U.S. v. New Mexico and so stated in the following language:

"We also fear that the urge to relitigate, once loosed, will not be easily cabined. The States have already indicated, if the issue were reopened, that the irrigable acreage standard itself should be reconsidered in light of our decisions in United States v. New Mexico, 438 U.S. 696, 57 L.Ed.2d 1052, 98 S.Ct. 3012 (1978) and Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658, 61 L.Ed.2d 823, 99 S.Ct. 3055 (1979), and we are not persuaded that a defensible line can be drawn between the reasons for reopening this litigation advanced by the Tribes and the United States on the one hand and the States on the other.


In that case, the problem involved the resolution of conflicting claims to a resource (fish) that had now become scarce, and with respect to it the Court said at page 669:

"In sum, it is fair to conclude that when the treaties were negotiated, neither party realized or intended that their agreement would determine whether, and if so how, a resource that had always been thought inexhaustible would be allocated between the Native Indians and the incoming settlers when it later became scarce."

This, of course, is exactly the same problem presented in the dispute over Indian reserved water rights, and Justice
Stevens drew a comparison between the dispute over fishing rights and the dispute over water rights which he said "were merely implicitly secured to the Indians by treaties that the Court enforced by ordering an apportionment to the Indians of enough water to meet their sustenance and cultivation needs, Arizona v. California, . . . Winters v. United States."

In referring to the district court's apportionment of anadromous fish between Indians and non-Indians, the following statement by the Court expressed its view that Indian reserved rights to a scarce resource may be decreased in consideration of the needs of non-Indians:

"If, for example, a tribe should dwindle to just a few members, or if it should find other sources of support that lead it to abandon its fisheries, a 45% or 50% allocation of an entire run that passes through its customary fishing grounds would be manifestly inappropriate because the livelihood of the tribe under those circumstances could not reasonably require an allotment of a large number of fish."

**How and By What Method Will the Problem Be Solved**

As to "How" -- I believe one thing to be certain. The ultimate resolution has to take the form of equitable apportionment. No other is reasonable nor politically supportable.

As to Method -- Three Avenues are Available:

A. Litigation

It is too expensive and time consuming. The subject is too complex; there are too many issues. Appellate courts
TRADITIONALLY AND CORRECTLY DEAL WITH ONE SPECIFIC NARROW question. There are many questions to be answered here:

1. Does Winters apply to groundwater?
2. Can the water be sold?
3. How will the primary-secondary purpose test be applied?
4. Is it only for agricultural use? What cost benefit concepts should be applied?
5. Does Winters extend to quality as well as quantity?
6. Who has right to manage the water?

These are only some of the substantive questions -- in addition to a horde of procedural questions that can be anticipated as we struggle through each phase of the litigation.

B. Negotiation as a Solution

Difficulties:

1. Some tribes are adamantly opposed to negotiation. They perceive a present advantage from judicial precedent. I believe they fail to perceive -- on the one hand -- that such a precedent extended to its ultimate limits can never be practically applied or politically enforced, and on the other -- the precedent is undergoing a significant change.

2. In most instances there is no surplus water which can be used to effect a settlement. Non-Indian users are resistant to giving up water rights:
A. WHICH HAVE BEEN ACQUIRED IN ACCORDANCE WITH LOCAL LAW; AND
B. WHICH HAVE BEEN ACQUIRED IN CONNECTION WITH FEDERAL RECOGNITION AND ENCOURAGEMENT.

3. THE SHEER NUMBER OF WATER CLAIMANTS -- IN SOME CASES AS MANY AS FIFTY TO A HUNDRED THOUSAND PRIVATE USERS, AS WELL AS, TWO OR MORE TRIBES -- MAKES NEGOTIATION EXTREMELY DIFFICULT.

POSSIBILITIES

IN JULY OF 1982, THE SECRETARY OF THE INTERIOR ANNOUNCED THE FORMATION OF AN INDIAN POLICY ADVISORY GROUP TO FACILITATE NEGOTIATED SETTLEMENTS OF INDIAN WATER CLAIMS. HE SAID THE DEPARTMENT WOULD GIVE THE "HIGHEST PRIORITY" IN PROVIDING SUPPORT WHERE IT IS REQUESTED -- AND WHERE THERE IS A FAIR CHANCE OF EFFECTING A SETTLEMENT.

THE WESTERN REGIONAL COUNCIL -- AND WESTERN GOVERNORS -- THROUGH THE WESTERN GOVERNORS' ASSOCIATION -- THREE INDIAN ORGANIZATIONS -- COUNCIL OF ENERGY RESOURCE TRIBES (CERT); THE NATIVE AMERICAN RIGHTS FUND (NARF) AND THE NATIONAL COUNCIL OF AMERICAN INDIANS (NCAI) HAVE EXPRESSED SUPPORT FOR NEGOTIATED SETTLEMENTS.

EARLIER THIS YEAR, SECRETARY CLARK EXPRESSED HIS STRONG INTEREST IN AND SUPPORT FOR NEGOTIATED SETTLEMENTS.

FOR REASONS ALREADY STATED -- ACHIEVING SUCCESS THROUGH NEGOTIATION WILL BE DIFFICULT. IT IS MY PERSONAL BELIEF
That settlements will not be achieved unless there is a significant federal commitment to fund Indian water projects. With such a commitment -- the results could be surprisingly satisfying. For example: The Papago and Ak Chin Settlements.

C. Legislation

In the end this may be the only solution. In a 1978 report to the Congress, the Comptroller General identified the following factors as supporting a legislative solution to this growing controversy:

1. "Congress is in the best position to consider all competing interests";
2. "A national policy to uniformly identify, quantify and administer reserved rights seems desirable"; and
3. "Certain unresolved and disputed areas of the law and their interpretation may require change."

In recent years, several commissions and task forces have addressed the problem of federal water rights and have called for clarifying legislation. Perhaps most prominent among these are the Public Land Law Review Commission and the National Water Commission, both chartered by Congress to engage in broad studies of federal land and water policies. Both called for legislation to clarify, govern and to a limited extent eliminate the assertion of federal reserved rights.
The PLLRC legislative proposal would have required:

1. Binding quantification of present and future water needs for reservations within a reasonable period of time;
2. Establishment of a procedure for administrative or judicial review of the reasonableness of the quantity claimed, or validity of the proposed use;
3. Payment of compensation to holders of state water rights that may be affected by use of the reserved right; and
4. Express reservation of water and quantification in creating new reserved rights.

Currently, there are at least four legislative proposals that have been advanced.

1. A proposal by Mr. Paul Bloom presented at a "Colorado River Working Symposium", Santa Fe, New Mexico, May 23, 1983. (Summary attached as Appendix A)

2. Water Rights Coordination Act of 1982 prepared by Mr. Charles B. Roe, Jr., Senior Assistant Attorney General, State of Washington. (Summary attached as Appendix B)

3. H.R. 3995 "Indian Water Rights Dispute Act introduced by Representative William Richardson, New Mexico, September 27, 1983. (Summary attached as Appendix C)
CONCLUSION

In conclusion, I wish to emphasize strongly one point that I believe is absolutely essential to any resolution of this problem. A recognition that it is a national problem, and that it requires a national commitment to solve it.

It exists because of the inexcusable dereliction on the part of the United States Congress and the Executive Branch -- for more that 75 years -- to address the problem and resolve it.

The United States has an obligation to all citizens -- non-Indians and Indians alike -- to quantify Indian reserved water rights in an equitable manner -- and thereby provide the certainty that is required for future planning and economic development. It has an obligation to provide Indian tribes with the necessary funds to put "wet" water to a beneficial use. Finally, to help provide for a future assured water supply, it has an obligation to see that we can have a system of water management that can be applied both on and off Indian reservations.
IF SUCH A NATIONAL COMMITMENT IS NOT MADE THEN I BELIEVE INEFFICIENT LITIGATION WILL EFFECTIVELY TIE UP WATER USES AND RESOURCE DEVELOPMENT IN THIS COUNTRY WELL INTO THE NEXT CENTURY.
Mr. Paul Bloom, a water lawyer and member of the Bar in New Mexico and Washington, D.C. -- in a paper entitled "The Law of the River" -- has suggested the use of Federal/State Compacts, for resolving water resource problems. He expresses doubt, however, that any effective implementation of Compacts can be accomplished without a Congressional mandate. Mr. Bloom's skepticism about an early solution to water allocation problems is reflected in the following observation:

"This failure to use compacts effectively in recent years derives from the understandable tendency of state, local and federal interests to defer painful concessions in water resource allocation, as long as they are not faced with the absolute requirement that those problems must be solved."

*   *   *   *   *

"It is very probable that the federal agencies faced with the necessity of making politically sensitive water need inventories, and formulating claims for a variety of controversial federal proprietary rights (like Indian rights), will not take these actions unless mandated to do so by the Congress or the courts."

Mr. Bloom's proposed legislative solution is summarized below:

**Purpose:** To effect a precise apportionment of water between states and the United States, acting both for itself and Indian Tribes.
Procedures and Timetable

1. Congress should legislate a time certain, after which the failure to reach good faith compromises among the states and the United States will result in mandated apportionment through litigation or a legislative resolution of the various problems.

2. The President shall order the relevant federal agencies to publish a priority list of target streams -- where a failure to agree on federal and state issues is preventing necessary planning and development of water resources. (1-1/2 year deadline)

3. Approval by Congress of the "priority list" constitutes its consent to the negotiation of federal/inter-state compacts for the resolution of all claims in the stream system. The Secretary of Interior shall be mandated to provide maximum financial assistance for studies involving water resources and probable needs.

4. Within two years, the President will be required to complete "quanitification of all federal proprietary claims made by the United States for its own agencies and for its Indian wards" in any of the streams on the priority list. To quantify Indian claims, the President shall appoint a "special representative".

Quantification amounts for federal and Indian claims shall be presented to an oversight committee of Congress for approval or change.
5. Following publication and approval of the priority list, necessary water studies and presumably the required "quantification of all federal proprietary and Indian claims", the States will have one year to accept an offer to negotiate a federal/interstate stream compact.

6. Failure to accept an offer to negotiate will be reported to a Jurisdictional Committee of both houses of Congress. The Committee shall have ninety days to initiate a direct legislative solution -- failing in which the President shall cause to be filed an original action in the U.S. Supreme Court to resolve all outstanding water allocation problems in the stream.
Summary of the
"Water Rights Coordination Act of 1982"

(Proposed by Mr. Charles B. Roe, Jr.
Senior Assistant Attorney General, State of Washington)

The "Water Rights Coordination Act of 1982" proposed by Mr. Roe is not restricted in scope to Indian Reserved Water Rights. It extends to all federal reserved rights, although certain provisions of the Act -- primarily those dealing with the relinquishment and use of the water right -- make distinctions between Indian reserved rights and other federal reserved rights.

Since the main purpose of this paper is to discuss legislative approaches for resolving disputes over Indian reserved water rights, no attempt will be made to discuss those provisions of the Act directed to other federal reserved rights.

PROPOSAL:

To provide a uniform method for adjudicating Indian reserved rights and to establish the time and manner in which the reserved right may be exercised.

PURPOSE:

The principal purpose of the Act is (1) to remove the uncertainty associated with reserved water rights by promoting the quantification and correlation of reserved rights and other water rights, primarily through state general adjudication proceedings, and (2) to confirm the powers of the states to establish and regulate rights to water regardless of location within the state.
PROCEDURES AND TIMETABLE:

1. Exercise of Indian Reserved Water Rights. Indian reserved water rights which have been exercised prior to the effective date of the Act will remain in full force. Exercisable rights may be transferred, but -- regardless of the ownership of title -- use of the reserved right is restricted, as follows:

   (a) The water may be used only within the general area of the reservation to which it originally related, and only for the specific use for which it was originally reserved; and

   (b) If the right is severed from the trust status and acquired by a non-member of the tribe, the right loses its priority status and becomes subject to state law both substantively and procedurally. The above limitations as to location and type of use, however, remain in force.

   Any Indian reserved right not exercised prior to the effective date of the Act and which is not exercised by December 31, 1992, shall be deemed forfeited and extinguished as of the latter date.

2. Compensation for Loss of Water Right. Any Indian tribe or member whose right as an owner or beneficiary has been forfeited may seek compensation, if authorized by the U.S. Constitution, from the United States. Claims must be filed in federal district court by December 31, 1993.
The exercise of a new Indian reserved right which "bumps" a junior priority right valid under state law would entitle the holder of the junior right to compensation by the United States for that portion of the right that is no longer exercisable.

3. **Adjudication of Water Rights.** Cases initiated in state court or administrative proceedings are not subject to removal to federal court. U.S. district courts may hear cases involving water rights, but states may move for a stay and deferment to state court proceedings if the state has instituted or will commence state proceedings within one year.

Indian tribes may be joined by any party in a suit initiated by a state or the United States.

States have the primary responsibility to administer, regulate and enforce all reserved rights confirmed in a final decree in an order entered in a general adjudication proceeding.

4. **Indian Water Projects.** Secretary of the Interior is directed to conduct a study and report to Congress within three years on the possibility of constructing new water projects to allow for the use by Indians of unexercised reserved rights.

5. **Miscellaneous.** Provides that a state has power to establish rights to use of waters upon or within lands located within original boundaries of a reservation and water rights to such waters established pursuant to state law prior to effective date of this Act are recognized and protected.
SUMMARY OF HR 3995
"The Indian Water Rights Dispute Act"
(Introduced by Representative William B. Richardson, New Mexico September 27, 1983)

PROPOSAL:

To create a federal board of experts to resolve disputes concerning Indian water rights, and to provide legal fees and expenses for litigants before the board.

PURPOSE:

To provide a forum for mediating and, if necessary, adjudicating disputes over Indian water rights and to monitor water usage involving Indians on a continuing basis.

PROCEDURES AND TIMETABLE:

1) Congress shall create the Federal Board on Indian Water Rights Disputes to consist of five members appointed by the president (with senate confirmation) for six year staggered terms. Members must be "specially qualified" by virtue of their training, education, or experience.

2) The Board shall attempt to mediate disputes involving water rights of an Indian tribe or a member of an Indian tribe upon the request of any party to such a dispute.

3) Upon petition to the Board by an Indian tribe or a member thereof, or by any person claiming water which is also claimed by an Indian tribe, or upon its own motion after an impasse at mediation is reached, the Board shall have jurisdiction to adjudicate disputes involving Indian water
rights. Findings of fact and conclusions of law by the Board are final unless overturned on appeal.

4) Appeals of the Board's decisions shall be to the U.S. Circuit Courts of Appeal, and to the Supreme Court by writ of certiorari. The scope of review shall be the same as provided in Section 706 of Title 5, U.S. Code, for the review of agency actions.

5) The Board shall monitor on a continuing basis "water use" in areas where there is a dispute over Indian water rights.

6) The Board shall fund investigations, attempts at mediation, and the legal expenses of all disputes before the Board, if the position of the party was justified. The Board, however, has power to review, reduce, or deny fees and expenses.

7) The Board shall have exclusive original jurisdiction over Indian water rights disputes, precluding federal district court jurisdiction, except as follows:

(a) Federal district courts would retain jurisdiction of any action filed before the date of enactment of this Act; and

(b) Federal district courts would have jurisdiction in civil actions to enforce rights determined under this Act.

The Act also amends 43 U.S.C. 666, commonly called the "McCarran Amendment" to withdraw consent by the United
States, by itself or on behalf of an Indian tribe to be sued in state court, if the state action was filed after the date of enactment of this Act.
Summary of
Indian Water Rights Act of 19
(Proposed by Western Regional Council)

PROPOSAL:

The Act provides for (1) the congressional quantification of Indian water rights; (2) compensation to Indians and non-Indians for displaced water rights; (3) coordination of water management both on and off reservations; and, (4) funding for new Indian water projects.

PURPOSE:

The Act seeks to avoid expensive and endless ad hoc litigation by providing a comprehensive quantification process. It places the burden on the federal government for resolving water allocation problems and for compensating those damaged by federal inaction and mismanagement.

PROCEDURES:

   a) Membership: The Commission would consist of seven members. Two appointed by the House of Representatives, two by the Senate, and three by the President.
   b) Powers: The Committee would have broad powers to investigate, to make rules, and appoint staff.
c) **Duties:**

(1) The Committee would undertake a comprehensive investigation and study of all claims to Indian reserved water rights and submit its findings and recommendations in a Report to the Congress and the President.

2. The study would cover the legal, social, economic and environmental impact of various quantification alternatives on a reservation by reservation basis. Among other things, the Commission would determine:

(A) The magnitude of unexercised reserved water rights claimed by both Indian Tribes and the United States for each basin or area and make an appraisal of the available water resources from which those rights could be satisfied;

(B) Existing water uses perfected under state law that would be adversely affected by the exercise of Indian reserved rights, and an analysis of the economic and social costs of making or not making the displacement of existing water uses by the exercise of Indian water rights a national obligation.

3. **Implementation Time**

As drafted, the Act does not contain specific deadlines. It would be the expectation of the Western Regional Council that manageable deadlines would be fixed upon introduction.
In conducting its work, it is anticipated that the Indian Water Rights Commission would select on a priority basis those areas where the water problems are the most critical and submit its report to Congress in stages. Target dates would be for the Commission to complete all recommendations to Congress within three years, and Congress would have two years to complete the quantification process by enactment of appropriate legislation.

The proposed Act does not preclude "quantification" by either judicial decree or negotiation if such should occur before congressional enactment. Indeed, it would be the hope that the Commission process would encourage and enhance the prospects of negotiated settlements.

4. Water Management

Following quantification of Indian water rights, whether by negotiation, judicial decree or congressional action, the Secretary of the Interior is required to establish a water management plan for each reservation consistent with the law of the state in which the reservation is located.

5. Compensation

Suits claiming monetary compensation for valid water rights displaced under this Act could be brought in a federal district court within two years of the quantification date by Indians, Indian tribes or owners of state water rights. The obligation for payment would lie with the United States and not
the States or holders of state water rights -- but only if the Constitution requires such payment. The monetary damage remedy is exclusive, and no specific performance is allowed under the Act.

6. **Indian Water Projects**

The Act establishes an Indian Water Projects Fund and Commission for the purpose of financing projects that will result in the beneficial use of water quantified either by this act, by negotiation or by judicial decree.
INDIAN WATER RIGHTS ACT OF 19

(Proposed by Western Regional Council)

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, that this Act may be cited as the "Indian Water Rights Act of 19".

TITLE I - FINDINGS, POLICIES AND PURPOSES

Sec. 1. The Congress finds that:

(a) In most of the arid and western states, which have experienced unprecedented population increases and industrial and agricultural growth in recent decades, there are existing or impending crises in the management and use of water resources. In these states, the impact of Indian reserved water rights is greatest.

(b) In these states, valid water rights and claims to water rights by Indians often arise from judicially implied reservations by the United States at the time it created Indian reservations by treaty, act of Congress or by Executive Order.

(c) The judicial recognition or enforcement of these Indian rights often creates conflicts between Indian and non-Indian water right claimants, and inflicts severe hardships and economic losses on individuals and public and private entities which have water rights that were validly perfected in good faith under state law after an Indian reservation was created.

(d) The uncertainty over Indian water rights makes it impossible for users, potential users, State Administrators,
Federal Agencies and Indian Tribes to determine the quantity of water available for existing or new uses.

(e) A case by case resolution through the judicial system of the many questions regarding unquantified Indian water rights involves complex, protracted and costly litigation that will last for decades and impair the adoption and effective implementation of comprehensive water management plans and the development of an energy and resource base essential to the security and welfare of the nation.

Sec. 2. It is declared to be the policy of the Congress that:

(a) The satisfaction of reserved Indian water rights, which have long remained unexercised, is the primary obligation of the federal government, which created these rights, and not the obligation of the states.

(b) Primary responsibility for the establishment, administration and regulation of water rights shall remain in the States and, consistent with the retention of powers necessary to protect the national interest in the use of water, all Federal Agencies and entities shall cooperate fully with and be subject to the administration of water rights codes of the various States;

(c) All unquantified Indian water rights shall be precisely quantified within two years after submission of the Commission's report, and thereafter the Secretary of the Interior shall establish water management plans for each reservation which
shall be consistent with such quantification and the water manage-
ment programs of the states in which the reservations are located.

(d) The quantification of Indian water rights shall be achieved through (1) a process of comprehensive investigation and study of all Indian water rights claims by an Indian Water Rights Review Commission and subsequent recommendation by that Commission to the President and Congress on quantification amounts, and (2) by legislation, precisely quantifying all Indian water rights unless prior to the effective date of such enactment, an Indian water right has been precisely quantified by a final decree or established through negotiation.

(e) An opportunity be provided to obtain compensation for beneficiaries of Indian water rights and holders of other rights to use water, if the water rights held by such beneficiaries or holders are prohibited from being exercised under the provisions of any quantification established by Act of Congress.

Sec. 3. For purposes of this Act:

(a) "Acre-foot" means the amount of water necessary to cover one acre of land to a depth of one foot.

(b) "Indian water right" means a right held or claimed by an Indian or Indian Tribe or the United States on behalf of an Indian or an Indian Tribe, to use water of a river system and source, not based on state law.

(c) "State water right" means any right to the use of water owned, established, possessed, or acquired under the laws of any state.
(d) "Negotiation" means an agreement concluded between an Indian or an Indian Tribe and a state having jurisdiction and authority over all unappropriated water of a river system and source encompassed in such negotiation, and an approval by the Secretary of the Interior of the quantified amount agreed upon in such negotiation.

(e) "Compensation" means the amount, if any, required to be paid by the United States Constitution.

(f) "Federal water right" means a right, other than an Indian water right, held or claimed by the Federal government to use water of a river system and source, not based on state law, but impliedly or expressly created or established by the United States in conjunction with the reserving or withdrawing of public lands of the United States for a special use.

TITLE II - ESTABLISHMENT OF COMMISSION

Sec. 1. (a) There is hereby established an Indian Water Rights Review Commission, hereinafter in this Act referred to as the "Commission".

(b) The Commission shall be composed of seven members appointed for the term of the Commission as follows --

(1) two members appointed by the Chairman of the House Interior and Insular Affairs Committee;

(2) two members appointed by the Chairman of the Senate Energy and Natural Resources Committee; and
(3) three members appointed by the President of the United States.

(c) The Commission shall have a Chairman and Vice Chairman who shall be elected from among the members of the Commission appointed pursuant to subsections (b)(1), (b)(2), and (b)(3).

(d) No member of the Commission may be a member of Congress or an employee of any other agency of the United States during his term of service on the Commission.

(e) Vacancies in the membership of the Commission shall not affect the powers of the remaining members to execute the functions of the Commission and shall be filled in the same manner as in the case of the original appointment.

(f) Five members of the Commission shall constitute a quorum but a smaller number, as determined by the Commission, may conduct hearings.

(g) Members of the Commission shall serve without compensation but they may be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the Commission.

COMPREHENSIVE INVESTIGATION AND STUDY

Sec. 2. The Commission shall make a comprehensive investigation and study of claims to Indian water rights in the United States and recommend to Congress and the President the precise quantification of all Indian water rights on an annual acre-foot basis and the amount of compensation, if any, to any
The investigation and study shall include:

(1) identification of all legal issues relating to the quantification of Indian water rights;

(2) an analysis of the social, economic and environmental impacts of the various quantification alternatives;

(3) an analysis of the intention of Congress or the President in setting aside, establishing or modifying each Indian reservation, including an identification of each relevant document;

(4) an analysis of the potential unquantified Indian and Federal water rights for each major river basin, including:

   (A) the magnitude of Indian water rights claimed by each Indian or Indian Tribe in each such basin;

   (B) the magnitude of federal water rights claimed by the United States in each such basin;

   (C) an appraisal of the available water resources from which the Indian and Federal water rights may be satisfied;

   (D) a quantification of existing water uses claimed or established under state law, by class of use, that would be adversely affected by the exercise of Indian water rights;
(E) an analysis of the economic, environmental and social costs incurred by existing water users as a result of the exercise of Indian water rights;

(F) the availability of facilities required to make beneficial use of Indian water rights and the costs of making such facilities available; and

(5) an analysis of the economic and social costs of making or not making the displacement of existing water uses by the exercise of Indian water rights a national obligation.

POWERS OF THE COMMISSION

Sec. 3. (a) The Commission or, on authorization of the Commission, any committee of two or more members of the Commission, is authorized to sit and act at such places and times, to require by subpoenas or otherwise the attendance of such witnesses, including Indian tribes, and the production of such books, papers, and documents, to administer such oaths and affirmations, to take such testimony, to procure such printing and binding, and to make such expenditures, as it deems advisable. Upon the authorization of the Commission subpoenas may be issued over the signature of the Chairman of the Commission or of any member designated by him or the Commission, and may be served by such person or persons as may be designated by such Chairman or member. The Chairman of the Commission or any member thereof may administer oaths or affirmations to witnesses.
(b) The Commission may make such rules respecting its organization and procedures as it deems necessary, except that no recommendation shall be reported from the Commission unless a majority of the Commission assent.

(c) The provisions of sections 192 through 194, inclusive of title 2, United States Code, shall apply in the case of any failure of any witness to comply with any subpoena when summoned under this section.

(d) The Commission is authorized to secure from any department, agency, or instrumentality of the executive branch of the Government any information it deems necessary to carry out its functions under this Act and each such department, agency or instrumentality is authorized and directed to furnish such information to the Commission and to conduct such studies and surveys as may be requested by the Chairman or the Vice Chairman when acting as Chairman.

(e) If the Commission requires of any witness or of any Government agency the production of any materials which have theretofore been submitted to a Government agency on a confidential basis and the confidentiality of those materials is protected by statute, the material so produced shall be held in confidence by the Commission.

(f) The Commission is authorized to accept and use donations of money, property (whether real or personal), and uncompensated services from any person whether public or private for the purpose of carrying out the provisions of this Act.
Sec. 4. (a) The Commission shall submit a report containing the results of its study and investigation under section 3, together with recommendations for quantification thereon, to the President of the United States, the Chairman of the Senate Energy and Natural Resources Committee, and the Chairman of the House Interior and Insular Affairs Committee on or before January 1, 19__.  

(b) A copy of the Commission's report containing the results of its study and investigation under section 3 with respect to the water right claim of a particular Indian or Indian Tribe, together with the Commission's recommendation for quantification and compensation shall be filed with the United States District Court and become a part of the record in any action for compensation filed under Title IV of this Act.  

(c) The Commission shall cease to exist three months after submission of such report. All records and papers of the Commission shall thereupon be delivered to the Administrator of the General Services Administration for deposit in the Archives of the United States.

COMMISSION STAFF

Sec. 5. (a) The Commission may, by record vote of a majority of the Commission members, appoint a Director of the Commission, a General Counsel, and such staff as it deems necessary. The Commission shall prescribe the duties and responsibilities of such staff members and fix their compensation at per
annum gross rates not in excess of the per annum rates of compensation prescribed for employees of standing committees of the Senate.

(b)(1) In carrying out its functions, under this Act, the Commission is authorized to utilize the services, information, facilities and personnel of the executive department and agencies of the Government with or without reimbursement, and the head of any such department or agency is authorized to provide the Commission such services, facilities, information and personnel to the Commission.

(2) The Commission is authorized to procure the temporary or intermittent services of experts, consultants, or organizations thereof by contract at rate of compensation not in excess of the daily equivalent of the highest per annum rate of compensation that may be paid by employees of the Senate generally.

(c) A person who provides voluntary and uncompensated services to the Commission shall not by reason of such service be deemed to be an employee of the United States. Any such person may be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of service to the Commission upon the approval of the Chairman.

AUTHORIZATION OF APPROPRIATIONS

Sec. 6. There is hereby authorized to be appropriated a sum not to exceed ____________ to carry out the functions of the Commission. Until such time as funds are appropriated pursuant to this section, salaries and expenses of the Commission
shall be paid one-half from the contingent fund of the Senate and one-half from the contingent fund of the House upon vouchers approved by the Chairman. To the extent that any payments are made from the contingent funds of the Senate and House prior to the time appropriation is made, such payments shall be chargeable against the maximum amount authorized herein.

TITLE III - ADMINISTRATION, REGULATION AND MANAGEMENT OF WATER

Sec. 1. Following quantification of Indian water rights on any reservation, whether by Act of Congress, by negotiation or by judicial decree, the Secretary of Interior shall establish a water management plan for each reservation which, except as is necessary to be consistent with the act, agreement or decree quantifying the water right, will have the same effect as any management plan developed under the law of the state in which the reservation, or any part thereof, is located.

Sec. 2. The sovereign immunity of Indian tribes is hereby waived, and any other impediments to jurisdiction in state courts are hereby removed for any action to administer, enforce or implement the quantification by Act of Congress of any Indian water right.

TITLE IV - COMPENSATION

Sec. 1. An Indian or Indian Tribe that is the beneficiary of an Indian water right is entitled to compensation from the United States, pursuant to section 3 of this title within
two years from the effective date of any quantification established under the provisions of this Act for any damages sustained because the water right or some portion thereof is prohibited from being exercised under any quantification established by Act of Congress.

Sec. 2. The owner of a state water right previously exercised that is prohibited from being exercised by reason of any quantification established by Act of Congress or by judicial decree of an Indian water right that is senior in priority to the state water right is entitled to compensation from the United States pursuant to section 3 of this title, within two years from the date such quantification is established for any damages sustained because the state water right is no longer exercisable.

Sec. 3. The sovereign immunity of the United States is hereby waived for all claims of compensation described in sections 1 and 2, and the United States District Courts shall have jurisdiction over all such claims for compensation. The remedy for damages provided hereunder shall be exclusive.

TITLE V - NEW INDIAN WATER PROJECTS

Sec. 1. (a) There is established an Indian Water Projects Commission, composed of the Chief Administrator of Indian Affairs of the Department of the Interior, the Administrator of the Water Resources Council, and five members of the public at large, knowledgeable in water resources management and law, appointed by the President, of which two shall be enrolled members of Indian Tribes recognized by the Secretary of Interior and one
a State employee knowledgeable in water resources. The members of the initial Indian Water Projects Commission shall be appointed within thirty days after the effective date of this Act. Of the members from the public at large, two shall be appointed for a term ending _______, ___, one shall be appointed for a term ending _______, ___, one shall be appointed for a term ending _______, ___, and one shall be appointed for a term ending _______, ___. Thereafter each member of the Indian Water Projects Commission shall be appointed for a term of four years. Vacancies shall be filled within ninety days for the remainder of the unexpired term by appointment of the President in the same manner as the original appointments. Each member of the Indian Water Projects Commission shall continue in office until his successor is appointed. No member shall be appointed for more than two consecutive terms. The Chairman of the Indian Water Projects Commission shall be appointed by the President.

(b) The primary responsibility of the Indian Water Projects Commission shall be to allocate funds from the Indian Water Project Fund to finance projects relating to putting the water to beneficial use in accordance with the Indian water rights quantified under this Act or by negotiation or by decree. The criteria for allocating funds for projects shall include but are not limited to the following:

(1) Projects shall, consistent to the extent practicable with the criteria hereinafter set forth, be designed to secure maximum economic benefit in the use of the waters.
(2) The distribution of funds shall be made so as to assure benefits from projects to as many Indian Tribes as is reasonably attainable.

The Indian Water Projects Commission may establish, by adoption of rules and regulations, further criteria as it deems consistent with the policies of this Act and the objectives of this title.

(c) The projects authorized for funding in this title may, and the Indian Water Projects Commission is encouraged to, include projects jointly developed with State and other government agencies which are designed to increase the water quantity and improve water quality on a comprehensive basis within a river system and source for the benefit of both Indian Tribes and others. The Indian Water Projects Commission is directed to fund such comprehensive projects to the maximum extent practicable and to that end explore with Federal agencies, State governments and other all reasonable possibility for development of such projects.

(d) There is appropriated the sum of _________ to the Indian Water Project Fund.