Joint Statement of Department of Water Resources of Arizona, Colorado River Board of California, and Colorado River Commission of Nevada on House Bill 2642 Before the Committee on Interior and Insular Affairs House of Representatives

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House of Representatives

submitted by

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NATURAL RESOURCE DEVELOPMENT IN INDIAN COUNTRY

Natural Resources Law Center
University of Colorado
School of Law
Boulder, Colorado

June 8-10, 1988
Joint Statement
of
Department of Water Resources of Arizona,
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Committee on Interior and Insular Affairs
House of Representatives
September 16, 1987

Mr. Chairman, I am Ralph Hunsaker, I am an attorney with O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears of Phoenix, Arizona. I represent the Central Arizona Water Conservation District; however, today I am also appearing on behalf of the Department of Water Resources of Arizona, the Colorado River Board of California, and the Colorado River Commission of Nevada. These three agencies have the responsibility to speak for their states on policy with regard to the management and use of the Colorado River. I am accompanied by Alan Kleinman, Director of the Arizona Department of Water Resources, Dennis Underwood, executive Director of the Colorado River Board of California, and Jack Stonehocker, Director of the Colorado River Commission of Nevada.
We appreciate the opportunity to testify before your Committee on H.R. 2642.

The issue of Indian and other reserved water rights continues to be one of the most troubling to deal with in areas of the western United States where water is in short supply. The Winters doctrine of Indian reserved water rights is a recognized aspect of western water law, and the right of Indian tribes to develop their reservation lands is unquestioned. However, because Winters rights do not depend on past use of water, uncertainty as to the magnitude of Indian water rights claims and if and when they will actually be exercised makes administration of rights difficult and subjects long standing junior appropriators to having their use of water cut back or terminated, disrupting the economies they represent. This is an unavoidable consequence of the Winters right generally.

However, in the past few years, the Department of the Interior has made a significant change in course in dealing with Winters rights which has worsened the uncertainty problem. It now views them as a financial tool to accomplish Indian water rights settlements rather than as an opportunity for land development within reservation boundaries, which is the rationale the courts have used in development of the doctrine. The Winters doctrine, which has been developed entirely through court action, has never been extended by a court to permit sale of the water apart from the land. Traditionally, the Department, to meet Indian financial
needs or to settle monetary claims of tribes, has requested appropriations from Congress. It apparently now views sale of these water rights outside of reservation boundaries as a money making opportunity and a way to reduce federal budgetary needs.

Further discussion of the issue of whether Winters rights may be sold for use off the reservation and apart from the land is provided in an attachment to this statement.

The Colorado Ute Indian Water Rights Final Settlement Agreement of December 10, 1986 represents a complex and apparently comprehensive resolution of Winters water rights for the Ute Mountain Ute and Southern Ute Tribes on the stream systems involved. Two important principles regarding off reservation use within Colorado are a part of that settlement: (1) the requirement that Winters rights be subject to state administration of water rights and (2) subordination of the priority dates of each Winters right to protect junior appropriators. We feel that these two principles represent a significant advance for the administration of Winters rights and believe they should be considered in every settlement of this character.

Our concern with the settlement is found in Article V B(b) of the Settlement Agreement. That language states:

"Solely as a compromise for the purposes of this settlement, the parties agree that the Tribes may, under this Agreement, use the project and non-project reserved water rights secured to the
Tribes by this Agreement outside the boundaries of their reservations:

* * *

b. outside the State to the extent permitted by any:

(i) State law;
(ii) Federal law;
(iii) interstate compact; or
(iv) international treaty

that pertains to the Colorado River or its tributaries, including the appropriation, use, development, storage, regulation, allocation, conservation, exportation or quality of those waters; provided, however, that nothing in this Agreement shall be construed to establish, address, or prejudice whether, or the extent to which, any of the aforementioned laws do or do not permit, govern or apply to the use of the Tribes' water outside the State."

Management and use of Colorado River water is governed by a series of interstate compacts, international treaties, United States Supreme Court decrees, federal and state statutes and contracts collectively described as "The Law of the River" which apportions water rights between basins and among the seven Colorado River Basin states and establishes a priority system to the use of Colorado River water. These documents, painfully developed over the past 65 years, have been relied upon institutionally by the seven Colorado River Basin states in the development of their apportioned Colorado River water and, in the
case of Mexico, its annual guaranteed delivery of river water pursuant to the Mexican Water Treaty between the United States and Mexico.

A basic premise of the river's priority of use system is that water which cannot be beneficially used by a Colorado River right holder becomes available to meet the water needs of lower priority right users, which may not otherwise be met. By the same token, unused apportionments of one state can be beneficially used by another state until such time as those waters are needed by the state to which the water was apportioned. Given that the river has been fully apportioned and that the states' total apportionments and the delivery obligations pursuant to the Mexican Water Treaty far exceed the river's long-term supply, the selling and leasing of a state's unused apportioned water for use in another state by any entity is inconsistent with The Law of the River and would severely injure other river users. It would allow a party with no Colorado River water rights to obtain priorities to and take Colorado River water away from entities and states with long standing rights.

As an example of the importance of The Law of the River apportionment and priority scheme one only needs to review the testimony and reports leading up to the passage of Public Law 90-537, the Colorado River Basin Project Act, which among others authorized the Animas - La Plata Project and the Central Arizona Project. The feasibility of the Central Arizona Project was and
is dependent upon receiving all water that is not needed in the Upper Basin. If this water is sold, it would diminish the yield of the Central Arizona Project. The Congress was keenly aware of this in its authorization of the project.

The Indian reservations involved in the Settlement Agreement are located in Colorado and transfer of their rights as set forth in the agreement outside Colorado to another state within the Colorado River system would be inconsistent with and therefore not permitted by The Law of the River.

Attached to this statement is a more in depth review of The Law of the River with regard to the Settlement Agreement. The key provisions of The Law of the River on this issue are the Colorado River Compact of 1922, the Boulder Canyon Project Act of 1928, the Upper Colorado River Basin Compact of 1948 and several Supreme Court decisions and decrees in Arizona v. California. Running through each of these is the basic theme of protecting the rights and interests of the two basins and each of the states to the use and priorities of their apportioned share of Colorado River water. The apportionment and priority scheme is comprehensive in dealing with the waters of the river, designates quantities and priorities for use within each of the states, and identifies which state will be charged with the use involved.

The foundation document is the 1922 Colorado River Compact which divided the water of the Colorado River System between the Upper Division states of Colorado, New Mexico, Utah and Wyoming.
and the Lower Division states of Arizona, California, and Nevada. The Compact apportions from the Colorado River System to each of the two Basins "the exclusive beneficial consumptive use to 7,500,000 acre-feet of water per annum". It requires the Upper Division states to allow at least 75,000,000 acre-feet of water to arrive at Lee Ferry every ten years. It also provides:

"The States of the Upper Division shall not withhold water, and the states of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses." [Article III (e)].

The development of the Lower Basin and apportionment of its 7,500,000 acre-feet share under the Compact began with Congressional passage of the 1928 Boulder Canyon Project Act. In so doing, Congress explicitly approved the Compact and made the rights of the United States to Colorado River System water, "as well as the rights of those claiming under the United States," subject to the Compact. This presumably makes Indian reservations claiming Colorado River System waters, such as the Ute Mountain Ute and Southern Ute Tribes, subject to the Compact.

This Act, in addition to authorizing construction of Hoover Dam and the All-American Canal, preempted state water rights administration of the mainstream of the River within the Lower Basin and made a contract with the Secretary mandatory for any diversion of water.
The Supreme Court, in *Arizona v. California*, *supra*, 373 U.S. 546 (Opinion) 376 U.S. 340 (1964) (Decree), adopted the apportionment scheme of the Boulder Canyon Project Act and also recognized broad discretion in the Secretary of the Interior to allocate and distribute waters from the mainstream of the Colorado River available for consumptive use in the Lower Basin.

Unlike the Lower Division States, which had to rely on the Supreme Court to finally apportion the Lower Basin share of Colorado River Compact waters, the states with claims to the Upper Basin share were able to agree on a division among them. The 1948 *Upper Colorado River Basin Compact* was signed by Arizona, Colorado, New Mexico, Utah, and Wyoming.

These documents and others making up The Law of the River bar the interstate and interbasin transfer of the Winters water rights of the Ute Indian reservations. They require that the user basin or user state be charged with the use of the water under the water accounting system they establish. They do not recognize or establish any procedures whereby such transfers could be accommodated or dealt with or the transferring state could be charged with the water use. In addition, while priority dates are set forth in the Settlement Agreement for use of these waters within the State of Colorado, there is no process for evaluating priorities across state lines and accommodating the impact on those in other states.
The sale of Winters water within the State of Colorado has been considered in some detail in the Settlement Agreement. Priority dates and administrative problems have been settled and the rights of junior appropriators have been protected. The opposite is true with regard to interbasin and interstate sales. The disclaimer language in Article V of the Settlement Agreement does not begin to answer these questions and essentially abandons all of them once again to the courts, a result none of the states wish to contemplate. The purpose of the Settlement Agreement was to eliminate litigation.

We therefore believe that this provision is ill conceived and will only serve to disrupt the entire structure of rights and priorities to and use of Colorado River water developed and relied upon over the past 65 years since the Compact was agreed upon. We ask that the legislation be amended to prohibit interstate and interbasin sales and to protect states and individuals not signatory to the Settlement Agreement. We have attached proposed amendments to Sections 4, 5 and 11 of H.R. 2642 to accomplish these results.

As I have indicated, we are greatly concerned about the actual impact and legal implications of Congressional endorsement of the off-reservation use of Winters water rights. The proponents of H.R. 2642 assert that section 5 of the bill is designed solely to avoid the possible applicability of the general restrictions against alienation of Indian land in the Indian
Non-Intercourse Act (25 U.S.C. 177). However, the broad authorization of section 5 to transfer *Winters* water "in accordance with Article V of the Agreement" grants unqualified Congressional "approval" of the off-reservation use which is our principal concern. The present disclaimer language in subsection 5 (c) does not adequately negate the implications of such a legislative "authorization". Consequently, we propose simply to modify subsection 5 (a) to remove the possible impediment of the Indian Non-Intercourse Act, which is the proponents' stated objective. This direct approach leaves the validity of the off-reservation use dependent on a source other than the statute, while new subsection 5 (c) (2) expressly negates the Settlement Agreement and the statute as the course of that authority, except as to parties to the Settlement Agreement.

With respect to our second concern, that off-reservation use might violate The Law of the River, we have proposed a two pronged defense to that possibility. We believe that out-of-state uses, which present the most serious problem for the reasons I have already outlined, should be prohibited and would add a new subsection 5 (b) (3) to so provide. This should be acceptable to the Tribes, since their representatives advise us that they have no plans for any such transactions.

For in-state uses, we propose in a new subsection 5 (b) (4) that the Secretary be required to give notice and an opportunity to comment on such a proposal in order to permit public evaluation.
of a specific proposed transaction to determine whether it conflicts with The Law of the River. This is a fair procedure and should not impose any undue burden on the Tribes.

We propose to amend section 5 (c) to conform to our proposed amendment of subsection 5 (a), i.e., that this Act would not constitute a statutory authorization for off-reservation use. Subsection 5 (c) (1) would be amended to make it clear that the bill is not intended to amend The Law of the River. Since the Boulder Canyon Project Act, the Colorado River Storage Project Act and the Colorado River Basin Project Act are all supplemental to the "reclamation laws" which are "waived" by Section 4 (b), the latter section is also made subject to the disclaimer language in section 5 (c) (1).

The legal attributes of any existing federal implied water rights that may attach to the Tribes' reservations can only be determined by the courts. Consequently, new subsection 5 (c) (2) of our amendment makes it clear that the legislation and the Settlement Agreement (1) do not validate any claim by the Tribes of their legal right to make off-reservation uses under any reserved water right which may attach to their reservations, (2) shall not constitute a defense to any claim or injury by a party who is not signatory to the Settlement Agreement and (3) shall have no precedential value with respect to any other legislation or litigation.

Because of the implications in Article V of the Settlement Agreement which our proposed amendments to H.R. 2642 are designed
to neutralize, we propose an amendment to section 11 of the bill to reverse the specified rule of construction by providing that the Settlement Agreement shall be construed in a manner consistent with the Act, not vice-versa.

Mr. Chairman, the three Colorado River Basin states that I speak for today have indicated that they may wish to submit additional materials on this important piece of legislation. I, therefore, request that the record be held open to allow for this.
SEC. 4. PROJECT RESERVED WATERS.

(a) WATER FROM ANIMAS-LA PLATA AND DOLORES PROJECTS.--The Secretary is hereby authorized to use water from the Animas-La Plata and Dolores Projects to supply the project reserved water rights of the Tribes in accordance with the Agreement.

(b) APPLICATION OF FEDERAL RECLAMATION LAWS.--With respect to the project reserved water supplied to the Tribes or their lessees from the Dolores and Animas-La Plata projects and subject to the limitations of subsection 5(c), Federal reclamation laws shall not apply to those project reserved waters except to the extent that those laws may also apply to the other reserved waters of the Tribes. Federal reclamation laws shall not be waived or modified by this subsection insofar as those laws are required to effectuate the terms and conditions contained in article III, section A, subsection 1 and 2, and Article III, section B, subsection 1 of the Agreement.

* * *

SEC. 5. TRIBAL WATER USE CONTRACTS.

(a) GENERAL AUTHORITY.—Subject to the approval of the Secretary and to the provisions of its constitution, each Tribe is authorized to enter into water use contracts to sell, exchange, lease, or otherwise temporarily dispose of water in accordance with Article V of the Agreement, but the Tribes shall not permanently alienate any water right.—The
(a) WAIVER OF INDIAN NON-INTERCOURSE ACT - No otherwise valid contract entered into by either Tribe for the sale, exchange, lease or other temporary disposition of water to which it may be entitled under existing law shall be subject to the provisions of 25 U.S.C. 177; provided that (1) the Tribes shall not permanently alienate any water rights or enter into Tribal water use contracts which exceed 50 years in duration, including all renewals, and (2) such Tribal water use contracts shall be subject to approval by the Secretary as provided by subsection (b) of this section.

(b) APPROVAL BY SECRETARY.— (1) The Secretary shall approve or disapprove any water use contract submitted to him within 180 days after submission or within 60 days after any required compliance with section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) whichever is later. Any party to such a contract may enforce the provisions of this subsection pursuant to section 1361 of title 28, United States Code.

(2) In determining whether to approve or disapprove a water use contract, the Secretary shall determine if it is in the best interests of the Tribe and, in this process, the Secretary shall consider, among other things, the potential economic return to the Tribe and the potential
environmental, social, and cultural effects on the Tribe. The Secretary shall not be required under this paragraph to prepare any study regarding potential economic return to the Tribe, or potential environmental, social, or cultural effects, of the implementation of a water use contract apart from that which may be required under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).

(3) No Tribal water use contract shall be approved or implemented for the use of that water outside the State of Colorado pursuant to this statute or the Agreement.

(4) Whenever the Secretary is requested to approve a Tribal water use contract for off-reservation use of water within the State of Colorado, he shall publish a notice of such request in the Federal Register and afford interested parties not less than 60 days within which to comment on such proposal. The Secretary shall make written findings in support of his decision and publish the text of his decision in the Federal Register, which decision shall not become effective until 60 days thereafter. The Secretary's decision to approve or disapprove any proposed contract shall be subject to judicial review in accordance with the Administrative Procedure Act.

(5) Where the Secretary has approved a water use contract, the United States shall not thereafter be
directly or indirectly liable for losses sustained by either Tribe under such water use contract.

(c) SCtPE-OF-AUTHORIZATION. LIMITATIONS--(1) The authorization-provided-for-in-subsection provisions of subsections (a) and (b) shall not amend, construe, supersede, or preempt any State law, Federal law or contracts, interstate compacts, United States Supreme Court decrees, or international treaty that pertains exclusively to the Colorado River or its tributaries, including the appropriation, use, development, storage, regulation, allocation, conservation, exportation, or quality of those waters.

(2) Neither this statute nor the Agreement to which it relates validate or are intended or shall be construed to validate any claims with respect to the Tribes' ability to make off-reservation use of water, nor shall this statute or that Agreement constitute a defense to a claim by any party not signatory to that Agreement. The provision of the Agreement which permits the Tribes to enter into water use contracts for the delivery of water outside the reservation and within the State of Colorado, pursuant to the Agreement and subject to its restrictions with respect to conformity to State administration of water rights, is made explicitly for the purpose of settling the existing and prospective lawsuits among the signatory parties. This tribal opportunity shall have no precedential value in any
other legislation or litigation.

(d) PER CAPITAL PAYMENTS.--The proceeds from a water use contract may not be used for per capita payments to members of either Tribe.

* * *

SEC. 11. RULE OF CONSTRUCTION.

(a) IN GENERAL.--This Act The Agreement shall be construed in a manner consistent with the Agreement this Act.

(b) INDIVIDUAL MEMBERS OF TRIBES.--Any entitlement to reserved water of any individual member of either Tribe shall be satisfied from the water secured to that member's Tribe.
The current, proposed legislation seeks to implement the Colorado Ute Indian Water Rights Final Settlement Agreement, dated December 10, 1986. Article V(B)(b) of that Settlement Agreement authorizes the Ute Mountain Ute and Southern Ute Indian Tribes to use their water rights secured under said agreement not only outside the boundaries of their reservations, but "outside the State [of Colorado] to the extent permitted by any:

"(i) State law;
(ii) Federal law;
(iii) interstate compact; or
(iv) International treaty

that pertains to the Colorado River or its tributaries..." (Settlement Agreement, p. 60.) However, the aforementioned collection of laws (part of what is referred to as "The Law of the River") do not permit out-of-state transfers to any extent and therefore the language of the agreement creates a false impression by implying that such transfers may be legally permitted.

"The Law of the River" is that collection of interstate compacts, international treaties, court decrees, federal and state statutes, and contracts that control Colorado River operations and the rights and priorities to Colorado River water. The Law of the River is based on a scheme that apportions water rights among states and between basins within the Colorado River System, and a priority system to the use of Colorado River water. A basic premise of the river's priority to use system is that water which cannot be beneficially used by a Colorado River right holder becomes available to meet the needs of lower priority right users, which needs may not otherwise be met. By the same token, unused apportionments of one state can be beneficially used by another state until such time that those waters are needed by the state for which the water was apportioned.

The two Indian Tribes involved herein are located in Colorado,
and any possible transfer of their rights outside Colorado to another state or to another basin within the Colorado River System would impact upon, be contrary to, and thus not be permitted by the apportionment and priority scheme of The Law of the River.

I. The Law of the River

a) The Colorado River Compact

The foundation document is the 1922 Colorado River Compact by which the seven western states in the Colorado River System divided the waters in that system between two basins. The Compact defines the Colorado River System as that portion of the Colorado River and its tributaries within the United States [Article II(a)]. It defines Upper and Lower Basins of the Colorado River System according to where waters from those areas drain into the Colorado River. Those parts of Arizona, Colorado, New Mexico, Utah, and Wyoming that naturally drain into the Colorado above Lee Ferry are defined as the Upper Basin; those parts of Arizona, California, Nevada, New Mexico, and Utah that drain into the Colorado below Lee Ferry are defined as the Lower Basin [Article II(e)(f)(g)]. As is apparent, three of the seven states--Arizona, New Mexico, and Utah--contain areas in both the Upper and Lower Basins. However, Utah and New Mexico, along with Colorado and Wyoming, are defined as Upper Division states while Arizona, along with California and Nevada, are defined as Lower Division states [Article II(c)(d)].

The Compact apportions from the Colorado River System to each of the two Basins "the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum [Article III(a)]. It requires the Upper Division states to allow at least 75,000,000 acre-feet of water to arrive at Lee Ferry every ten years [Article III(d)]. It also requires:

"The States of the Upper Division shall not withhold water, and the states of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses."

[Article III(e)].

The Compact also protects "present perfected rights" to Colorado River System waters and provides that such rights in the Lower Basin be satisfied out of the stored water once a storage capacity of 5,000,000 acre-feet has been provided on the main Colorado River within or for the benefit of the Lower Basin [Article VIII].
b) **Lower Basin Allocations and Development**

The development of the Lower Basin and apportionment of its 7,500,000 acre-feet share under the Compact began with Congressional passage of the 1928 Boulder Canyon Project Act (BCPA). In so doing, Congress explicitly approved the Compact [Sec. 13(a)] and made the rights of the United States to Colorado River System water, "as well as the rights of those claiming under the United States," subject to the Compact. [Sec. 13(b).] Indian reservations, such as the Ute Mountain Ute and Southern Ute Tribes, which claim Colorado River System waters under the United States, are therefore subject to the Compact. Congress not only made the Act subject to the terms of the Compact [preamble] but also made the Act effective only upon one of two contingencies: 1) ratification of the Compact by all seven states; or 2) ratification by six of the seven states, including California, plus California’s enacting a law limiting its consumptive use share of the Lower Basin apportionment to 4,400,000 acre-feet per year plus not more than one-half of any surplus or unapportioned waters available to the Lower Basin [Sec. 4(a)]. Congress also authorized the three Lower Division states (Arizona, California, Nevada) to enter into an agreement apportioning among them the Lower Basin share and providing for use of tributary water [Sec. 4(a)]. Six states, including California, did ratify the Compact, and California did pass the California Limitation Act, thus making the BCPA effective. However, the three states never agreed on an apportionment of the Lower Basin’s share, leaving it to the United States Supreme Court, in *Arizona v. California* (1963) 373 U.S. 546, to rule that Congress had indeed apportioned the Lower Basin share itself in section 4(a) of the BCPA.

The BCPA promoted Lower Basin development by authorizing construction of what came to be known as Hoover Dam and the All-American Canal. In authorizing construction of the dam, Congress was providing for storage capacity on the main Colorado River, both within and for the benefit of the Lower Basin, far in excess of the 5,000,000 acre-feet mentioned in Article VIII of the Colorado River Compact. The BCPA again mentioned the need to satisfy present perfected rights (sec. 6), but also gave the Secretary of the Interior even broader authority to contract for the delivery of water stored behind the dam to the whole variety of claimants in the Lower Basin, not just to present perfected rights holders. Congress made a contract with the Secretary mandatory for any use of stored water: “No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.” (Sec. 5).

The Supreme Court, in *Arizona v. California*, supra, 373 U.S. 546 (Opinion) 376 U.S. 340 (1964) (Decree), adopted the apportionment scheme of the BCPA and also recognized broad discretion in the Secretary of the Interior to contract and distribute Colorado...
River System waters available for consumptive use in the Lower Basin. In the 1964 Decree, the Court defined “mainstream” as the mainstream of the Colorado River downstream from Lee Ferry, including reservoirs [Art. I(B)], and defined “waters controlled by the United States” to include all waters in that “mainstream,” including reservoirs [Art. I(E)]. The Court then enjoined the United States (i.e., the Secretary of the Interior) from releasing any “waters controlled by the United States” except in accordance with a high priority accorded to the satisfaction of present perfected rights without regard to state lines [Art. II(A)(2-3)] and only in accord with the aforesaid apportionments and “only pursuant to valid contracts” between the Secretary and any “users” in Arizona, California, or Nevada [Art. II(B)(1-3, 5)].

It is thus apparent that any and all Colorado River mainstream and reservoir water below Lee Ferry is controlled by the United States and can only be allocated and distributed in the three Lower Division states pursuant to contract. This is even true as to present perfected rights, where an ongoing process seeks to let contracts to holders of such rights recognized in the Court’s 1979 Supplemental Decree (Arizona v. California (1979) 439 U.S. 419. But the vast majority of the three Lower Division states’ apportionments had been contracted for years earlier, even before the Court’s 1963 decision. In California, prioritized contracts for 5,362,000 acre-feet of consumptive use were made in the early 1930’s pursuant to the Seven Party Agreement entered into by major California users in 1931. Similar contracts were entered with Arizona and Nevada in the early 1940’s. The Lower Basin’s full 7,500,000 share, and more, has been contracted for with priority dates no later than the 1930’s and 1940’s, and the Secretary must distribute mainstream water in accordance therewith under the Court’s mandate in the 1964 Decree in Arizona v. California.

To reaffirm United States administration in accord with the “Law of the River,” Article III of the 1964 Decree explicitly enjoins Arizona, California, and Nevada, as well as the major California water user parties to the case, from interfering with “releases and deliveries in conformity with Article II of this decree, of water controlled by the United States;” [Art. III(B)] and

“From diverting or purporting to authorize the diversion of water from the mainstream the diversion of which has not been authorized by the United States for use in the respective states; and provided further that no party named in this Article and no other user of water in said states shall divert or purport to authorize the diversion of water from the mainstream the diversion of which has not been authorized by the United States for its particular use;” [Art. III(C)]

“From consuming or purporting to authorize the
consumptive use of water from the mainstream in excess of the quantities permitted under Article II of the decree." [Art. III(D)].

The 1964 Decree also provides that:

"Consumptive use of water diverted in one state for consumptive use in another state shall be treated as if diverted in the state for whose benefit it is consumed." [Art. I(K)].

and enjoins the United States as to charging water use:

"Any mainstream water consumptively used within a state shall be charged to its apportionment, regardless of the purpose for which it was released;" [Art. II(B)(4)].

Articles I(K) and II(B)(4) both mandate charging the apportionment of the State in which water is consumptively used for any water taken from the Colorado River system. These two articles would apply to the five states which were parties to Arizona v. California—Arizona, California, Nevada, New Mexico, and Utah—as well as to the United States on behalf of Indian reservations.

The 1964 Decree allows each Lower Division State the use of its own Lower Basin tributaries [California has none] without diminishing its share in the mainstream apportionment. "Tributaries" are defined as all stream systems which naturally drain into the mainstream below Lee Ferry [Art. I(F)] and the United States is enjoined from reducing "the apportionment or delivery of mainstream water to users within the States of Arizona and Nevada by reason of any uses in such states from the tributaries flowing therein;" [Art. II(C)].

c) Upper Basin Allocations and Development

Unlike the Lower Division States, which had to rely on the Supreme Court to finally apportion the Lower Basin share of Colorado River Compact waters, the five states with claims to the Upper Basin share were able to agree on a division among them. The 1948 Upper Colorado River Basin Compact was signed by Arizona, Colorado, New Mexico, Utah, and Wyoming.

Unlike the Lower Basin apportionment, the Upper Basin Compact charges each state for use of its tributaries. It defines the "Colorado River System" as that portion of the Colorado River and its tributaries within the United States [Art. II(a)], the "Upper Colorado River System" as that portion of the System above Lee Ferry [Art. II(i)], and then apportions the Upper Basin's 1922 Compact share in the Upper System by awarding Arizona up to 50,000 acre-feet of consumptive use per annum and dividing what
is left between the other four signatory states on a percentage basis [Art. III(a)(1,2)]. These apportionments are based on the requirement that "Beneficial use is the basis, the measure and the limit of the right to use;" [Art. III(b)(2)]. The Upper Basin Compact establishes a multi-state Upper Colorado River Commission to administer these apportionments as well as its other provisions [Art. VIII].

Article IX(a) of the Upper Basin Compact provides, in part:

"No State shall deny the right of the United States of America and . . . no State shall deny the right of another signatory State, any person, or entity of any signatory State to acquire rights to the use of water . . . in one State . . . for the purpose of diverting, conveying, storing or regulating water in an upper signatory State for consumptive use in a lower signatory State, when such use is within the apportionment to such lower State made by this Compact . . . ."

The Upper Basin Compact contains specific provisions similar to Articles I(K) or II(B)(4) of the 1964 Decree in Arizona v. California requiring the apportionment of the State in which water is consumptively used to be charged for any such water taken from the Colorado River System. First, it applies to water use by the United States:

"The consumptive use of water by the United States of America or any of its agencies, instrumentalities or wards shall be charged as a use by the State in which the use is made. . . ." [Art. VII].

Second, it applies to use of water from five different Colorado System rivers which flow in more than one State -- the La Plata, Little Snake, Henry's Fork, Yampa, and San Juan:

"All consumptive use of water of [the river] and its tributaries shall be charged under the apportionment of Article III hereof to the state in which the use is made. . . ." [Arts. X, XI, XII, XIII, and XIV].

The Upper Basin Compact contains language concerning rights of the United States:

"Nothing in this Compact shall be construed as:

" . . . .

"(C) Affecting any rights or power of the United States of America, its agencies or instrumentalities, in or to the waters of the Upper Colorado River System. . . ." [Art. XIX (b)].

6.
This language does not refer to Indian reservation rights or power. Indian reservations are neither "agencies" nor "instrumentalities" of the United States. When reservations are to be included, the term "wards" is used, as in Article VII, infra, where the language "... its agencies, instrumentalities, or wards" (emphasis added) is used. Therefore, Indian reservations rights can be affected by this Compact.

Once the 1948 Upper Basin Compact apportioned the Upper Basin's 1922 Colorado River Compact share, major development could proceed. The result was the 1956 Colorado River Storage Project Act which authorized four major dam/reservoir storage projects in the Upper Basin -- Flaming Gorge on the Green River, Curecanti on the Gunnison, Navajo on the San Juan, and Glen Canyon on the mainstream Colorado above Lee Ferry.

d) The Colorado River Basin Project Act and the Operating Criteria

Following the Arizona v. California decision fixing Arizona's share of the Lower Basin apportionment, Congress passed the Colorado River Basin Project Act in 1968. It authorized construction of the Central Arizona Project along with several Upper Basin projects. It also limited the apparent discretion given the Secretary of the Interior by the 1964 Decree [Art. II(B)(3)] to apportion water among Lower Basin users in times of shortage, that is when less than 7,500,000 acre-feet of mainstream water is available for consumptive use in the Lower Basin. The 1968 Project Act provides that in time of such shortage, the satisfaction of California's full Lower Basin apportionment (4,400,000 acre-feet of consumptive use), plus early priority uses in Arizona and Nevada, shall take priority over any mainstream releases to the Central Arizona Project [Sec. 301(b)].

The 1968 Project Act also provides:

"Rights of the upper basin to the consumptive use of water available to that basin from the Colorado River system under the Colorado River Compact shall not be reduced or prejudiced by any use of such water in the lower basin." [Sec. 603(a)].

This section appears related to Articles I(K) and II(B)(4) of the 1964 Decree in Arizona v. California and to the provisions in the 1948 Upper Colorado River Basin Compact under which consumptive is charged against the apportionment of the state of use. Under this section 603(a), the Upper Basin rights cannot be "reduced" by any Lower Basin use of Colorado River System water. This would apply to any attempt to transfer an Upper Basin right or diversion for consumptive use in the Lower Basin and would preclude diminishing the Upper Basin's 7,500,000 acre-feet share.
under the Compact by the amount of such consumptive use, necessarily implying that the Basin (and State) of actual use is the Basin (and State) to be charged.

Finally, the 1968 Project Act also requires the Secretary of the Interior to develop operating criteria for the storage reservoirs authorized by the Boulder Canyon Project Act (Lake Mead) and the Colorado River Storage Project Act (Lake Powell and the Flaming Gorge, Curecanti, and Navajo storage reservoirs) toward meeting the 1944 Mexican Treaty obligation, the Upper Division States' 75 million acre-feet every ten years delivery obligation at Lee Ferry, and other goals [Sec. 602(a)]. This requirement reinforces the prior conclusion that the United States controls and administers all mainstream water below Lee Ferry in accordance with the Law of the River and establishes that such control also extends to the major Upper Basin storage reservoirs.

There is much, much more that could be discussed about the "Law of the River," including reference to the Mexican Treaty of 1944 and the 1974 Colorado River Basin Salinity Control Act, but the previous discussion should provide sufficient basis for analyzing the issues raised by the potential off-reservation transfer of Indian reservation Winters rights.

II. Off-Reservation Transfers of Ute Mountain Ute and Southern Ute Indian Reservation Water Rights For Use Outside of Colorado

a) Transfers For Use in the Lower Basin

The Colorado River Compact of 1922 allocates water between the Upper and Lower Basins and controls interbasin transfers. It reserves to each basin, "respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum" (emphasis added) [Article III(a)], and thus bars the transfer of an Upper Basin right, such as that of one of the Ute Tribes, to any user in the Lower Basin.

The key words in Article III(a) are "exclusive . . . consumptive use." Even were "use" not qualified, how could it possibly refer to the transfer of a portion of the Upper Basin entitlement to an entity in the Lower Basin whereby that entitlement is consumptively used in the Lower Basin? The Upper Basin is only entitled to water it can use, but how can it be deemed to have used water that is consumptively used elsewhere? The words "exclusive" and "consumptive" only reinforce this conclusion. The Upper Basin's right is to "consumptive use" of the water and this use must be "exclusive." Not only must the water be consumptively used by the Upper Basin, but that use must be exclusive, thus precluding any consumptive use in the Lower Basin.

The water rights of the two Ute Indian Tribes are part of
Colorado's share (under the 1948 Upper Colorado River Basin Compact) of the Upper Basin entitlement (under the 1922 Colorado River Compact). Any attempted interbasin transfer of tribal water rights would thus violate the Colorado River Compact and be prohibited by it. These tribal rights are subject to the Compact by virtue of the Boulder Canyon Project Act, in which Congress explicitly approved the Compact [sec. 13(a)] and provided that the "rights of those claiming under the United States" were subject to the Compact [sec. 13(b)].

Even if interbasin transfers were not prohibited outright by Article III(a) of the 1922 Compact, the only types of transfers that would be desirable and attempted would be illegal pursuant to other provisions of the Law of the River. The central issue is which basin's entitlement would be charged for the water use. The transfer of a water right makes sense only if the entitlement of the transferor (which may or may not be the diverter) is charged, not that of the consumptive user/transferee. And where the transfer is interbasin, it makes sense only if the entitlement of the transferor basin is charged, not that of the transferee basin. The idea is to transfer a right that might otherwise go unused to a user who would not otherwise be able to get water at all, easily, or with such a high priority. But if the user's apportionment is charged, that cannot work. In the present case, if the user/transferee is an entity in the Lower Basin, where the 1922 Compact entitlement is already apportioned between three States and oversubscribed, the user cannot both take water and charge that use against the Lower Basin's entitlement without illegally displacing its higher priority claimants. And if the user/transferee state's apportionment of the Lower Basin entitlement were not oversubscribed but instead still available for appropriation, then there would be no need for a transfer from another Basin and such a transfer would not be attempted. The point is that the only interbasin transfers that would be advantageous, and thus attempted, would be illegal.

This can best be analyzed by looking at the two methods by which any off-reservation transfer of tribal water rights could be effected. Either the reservation earmarks as its entitlement a certain amount of water in the river system so that an entity in another basin, state, or off-reservation in the same state can divert and use that amount of water under a transferred claim of right; or the reservation diverts water itself and physically transfers it to an entity for use in another basin, state, or off-reservation in the same state.

For interbasin transfers, the first method is doubtless the cheaper, more desirable, and perhaps only practical way to

1. The same issue is central to the analysis of interstate transfers, as we shall discuss, infra.
proceed. But even assuming such earmarking could occur in the Upper Basin, the Secretary can release such water for use in the Lower Basin only pursuant to valid contract and only in accord with the respective apportionments of Arizona, California, and Nevada under the 1964 Decree [Arts. II(B)(1-3, 5)]. Moreover, these three states and other parties to the lawsuit, including all major Colorado River water users in California, are specifically enjoined from interfering with the Secretary’s operations and from diverting or purporting to authorize any diversion of water outside the system of contracts with the Secretary or in excess of the respective apportionments [Arts. III (B,C,D)]. The Secretary has already long since entered contracts with water users in the three states for the full amounts of their respective apportionments. (Seven Party Agreement contracts in California and the 1940’s contracts with Arizona and Nevada). Therefore, any proposed Lower Basin user/transferee of an Upper Basin Indian reservation right could enter into a contract, if at all, with a very low priority and therefore a water entitlement only in years of extreme surplus. The user/transferee would be no better off than if it had simply attempted to contract directly with the Secretary without any transfer of right, so the transfer would be of no advantage. Any attempt by the user/transferee to divert water under the Indian reservation early priority without contract would be illegal as would be any action by the Secretary allowing a diversion without contract or awarding a contract with a priority date ahead of those already contracted for years earlier by other users in the respective state.

Moreover, Article II (B)(4) of the 1964 Decree and section 603(a) of the 1968 Colorado River Basin Project Act make it clear that the apportionment of the State/Basin where the water is consumptively used will be charged for such use, thus defeating the whole purpose of the transfer, as discussed supra. Article II (B)(4) requires the Secretary to charge the apportionment of the State (Arizona, California, or Nevada) in which the mainstream water is consumptively used. Section 603(a) applies this same rule as to use in the Lower Basin rather than a particular state. It provides that Upper Basin consumptive use rights under the Colorado River Compact shall not be reduced by any use of Colorado River system water in the Lower Basin, which necessarily implies that any use in the Lower Basin must be charged to the Lower Basin, not the Upper Basin. These two requirements preclude any advantage in an interbasin transfer of an Upper Basin Indian reservation water right. Such a transfer is desirable only if the transferor State and Basin are charged with the water use.

The second method to make such a transfer is for the Indian reservation itself to divert the water and transport it directly, physically to the user/transferee in the Lower Basin without the water ever entering the mainstream below Lee Ferry and thus coming under control of the Secretary. Such an alternative might
avoid some legal obstacles, but would encounter others, not to mention the practical, financial problem of arranging an alternative (to the river system) means to transport the water hundreds of miles to the user/transferee.

Article III(e) of the Colorado River Compact would prohibit such transfer. It does not allow states of the Upper Division to "withhold water" or States of the Lower Division to "require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses." Just as with "use," discussed supra, the common sense meaning of this requirement is that the Upper Division cannot withhold water that cannot be put to reasonable use by the states (or entities thereof) who withhold it. Putting water to reasonable use does not mean diverting it and transporting it hundreds of miles away from it to be used somewhere else. If the initial diversion without consumption constitutes the "use," what about the actual consumption? Surely the water is "used" when it is actually consumed. So does that mean it can be "used" twice as a legal proposition? Such a reading of "reasonable use" simply makes no sense. The common sense reading of Article III(e) prohibits an Upper Division state diversion for interbasin transfer and consumptive use in the Lower Basin.

Even if Article III(e) of the 1922 Compact did not bar this second method of interbasin transfers from Upper Division States, Article I(R) of the 1964 Decree in Arizona v. California defeats the purpose of such transfers. It provides:

"Consumptive use of water diverted in one state for consumptive use in another state shall be treated as if diverted in the state for whose benefit it is consumed."

This language is directly applicable to the situation at hand. The state (and basin) of consumptive use would be charged for said use, thus rendering the transfer pointless. It is clear that the Decree intends that all Colorado River System waters (excepting Lower Basin tributaries) reaching Lower Basin users be subject to its provisions and that transferring Upper Colorado River System waters around the mainstream cannot avoid the Decree's provisions as long as that water is used by a party to, or in a state that is party to, that Decree.

b) Transfers For Use in Another State in the Upper Basin

Just as Article III(a) of the 1922 Colorado River Compact bars interbasin transfers, so does Article III(b)(2) of the 1948 Upper Colorado River Compact bar interstate transfers within the Upper Basin. Under Article III(b)(2), each state's apportionment under the Upper Basin Compact is based on the requirement that "[b]eneficial use is the basis, the measure, and
the limit of the right to use." This does not include the words "exclusive" and "consumptive" as does Article III(a) of the 1922 Compact, but its meaning is clear. It means that vis-a-vis other states with Upper Basin apportionments, a state only has the right to use that portion of its apportionment that it puts to beneficial use. But what does beneficial use mean? Can "use" possibly refer to the transfer of right to an entity in another state whereby the water entitlement is consumptively used in another state, especially when that state has its own apportionment under the Upper Basin Compact? Any suggestion that "beneficial use" can occur at some point other than the actual point of beneficial consumptive use of the water is simply manipulation of words. Of course, the term "beneficial use" can be explicitly defined as, for example, in the California Water Code section 1011 where conservation of water (i.e. nonuse) is classified as a "beneficial use." But when legislatures (or interstate compacts) do not speak, and the Upper Basin Compact does not in the present matter, "use" in "beneficial use" must be given its common sense meaning which is to use, not to divert for someone else's use, and not to transfer a right so that someone else can divert and use. It is thus clear that any of the five states with an apportionment under the Upper Colorado River Basin Compact can exercise that right only to the extent that the particular state beneficially uses that right.

If an Indian reservation in the Upper Basin attempts to divert water for use in another Upper Basin state or transfer its water right for exercise in another state, then that right has not been put to beneficial use by the state in which the reservation is located and cannot come within that state's apportionment under the Upper Basin Compact. As such, the Indian reservation's exercise of control over that water, by either diverting it or transferring a right to use it, would put its state in violation of the Compact vis-a-vis other Upper Basin states. To the extent the Indian reservation right has been established and quantified, as part of its state's allocation scheme, then exercise of that right would be subject to that scheme so as not to violate the Compact, and an interstate transfer would thus be prohibited. Even had the Indian reservation Winters right been judicially established independent of the state scheme, it is arguable that the United States, in approving the Upper Basin Compact [63 Stats. 31] has bound the Indian reservations to its terms, including the beneficial use requirement that would bar interstate transfers and thus not extinguish the Winters right but merely put limits on the extent (if any) of its transferability. This conclusion is buttressed by comparing Articles VII and XIX(b) of the Upper Basin Compact. As noted, supra, Article XIX(b), exempting rights of the United States, its agencies, and instrumentalities from the requirements of the Compact does not apply to Indian reservations because of the absence of the word "wards," which does appear, as in Article VII, when reservations are to be included.
Even if Article III(b)(2) of the Upper Basin Compact were not an outright bar to interstate transfers within the Upper Basin, other provisions of that Compact indicate that the state of the transferor would not be charged for the water and thus render illegal the only type of transfer that would be advantageous. These other provisions do not authorize interstate transfers of any rights, including those of Indian reservations, but do indicate that in instances of multi-state involvement in the exercise of a water right, the state to be charged is the state in which the water is consumptively used.

Article IX(a) necessarily implies that a downstream state in the Upper Basin, or any person or entity in the state, can acquire rights to divert water in an upstream state for consumptive use in said downstream state as long as that use is within the downstream state's apportionment under the Upper Basin Compact. However, this article appears to be limited to the situation in which the diverter/right holder and ultimate user is the same person or entity, but who, for engineering or other technical reasons, needs to make its diversion in an upstream state rather than in the state where the water is to be used. This is not the same as a transfer of rights where the diverter/right holder and ultimate user are two different persons or entities, as would be the case involving one of the Ute Indian Reservations and some user in another state.

Even under the situation contemplated by Article IX(a), the language of that article requiring that the downstream use be within that state's Compact requirement clearly implies that the water use would be charged to the apportionment of the state of consumptive use, not that state in which the transferor held the right and/or diverted the water.

Several other Upper Basin Compact provisions contain the requirements of charging the user state. One applies to use by the United States or its agencies, instrumentalities, or wards, including Indian reservations [Article VII]; but such a provision is necessary to clarify the need to charge any federal use against the state in which it occurs and does not imply an interstate transfer. Five other provisions apply to rivers which flow through more than one state [Articles X-XIV]; and again, these provisions are occasioned by the flow of a river in two states and do not necessarily imply an interstate transfer of water right. Finally, various provisions of Article V dealing with water losses during reservoir storage provide that reservoir losses of water stored for use in particular Upper Basin States shall be assigned to those respective states.

What does seem apparent is that in every instance of multi-state involvement in the exercise of a water right explicitly dealt with by the Upper Basin Compact, the requirement to charge the user state is imposed. Thus, even if interstate transfers of Indian reservation water rights were permitted in theory, the
only type of transfer that would be advantageous and thus attempted--where water use is charged to the transferor, not the transferee--would be illegal.

**Conclusion**

For the reasons stated herein, any interbasin or interstate transfer of the water rights of the two Ute Indian Reservations would be impermissible under The Law of the River.
An issue of great concern today is whether Indian water rights, commonly referred to as Winters rights, may be sold for use off the reservation and apart from the land. No case to our knowledge has so held. Moreover, a leading commentator has noted that there are no general federal statutes that authorize the sale or lease of Indian water rights apart from the land. (Cohen, *Federal Indian Law Handbook*, 1982.) An examination of the nature of the right, an implied right at the time of the reservation and the basis of the right, an adjunct to the land for the purpose of making the reservation a productive area, dictates that Winters rights should not be sold for use off and apart from the land. Indeed, to allow the sale of the right for off-reservation use may well defeat the very purpose of the right, to add to the productivity of the reservation.

This issue is of particular significance to the lower Colorado River water users as the river has been apportioned by interstate compact, Supreme Court decrees, federal legislation, and federal contracts. Under that system, commonly referred to as "The Law of the River," what one user does not use is

1. It is possible that some Indian tribes may have rights which are not derived from *Winters v. United States*, but based instead upon aboriginal or pueblo rights. (Tarlock, *One River, Three Sovereigns: Indian and Interstate Water Rights* (1987) Land & Water L. Rev., Vol. XXII, No. 2, p. 647.) The nature, extent and characteristics of such rights have not been litigated.

2. Indeed, 25 U.S.C. § 177 may prohibit such a sale without the approval of the United States. That section provides in part:

"No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."
available to the next priority and what is unused in one state may, under certain circumstances, be used in another state. To the extent that reservations with Winters rights in the Colorado River Basin may market their rights, the entire federal scheme of water allocation will be undermined and there will be a gallon-for-gallon reduction of long-standing rights and contractual priorities. Those who have no rights, under the existing federal priority system, will be able to purchase the paramount priority and diminish the amount of water available pursuant to contracts made over 50 years ago with the Secretary of the Interior. As will be demonstrated, this long-standing federal allocation of an interstate stream should not be undermined by the sale of Winters rights. The very nature and intent preclude any implication that Winters rights should be sold for use off the reservation.

Winters rights were derived from the case of Winters v. United States, (1908) 207 U.S. 564 [52 L.Ed. 340], which was an action commenced by the United States to restrain non-Indians from constructing or maintaining dams or reservoirs or in any manner preventing the water of the Milk River, a non-navigable river, from flowing to the Fort Belnap Indian Reservation. The tribe had, by an 1888 agreement with the United States, relinquished its lands in return for a reservation for a permanent home. No water right was mentioned in the agreement, however, without such a right the land would be useless to the tribe. The Court found that it was the policy of the government and the desire of the tribe to change the tribe's habits and to become a pastoral and civilized people. In order to accomplish these objectives and on a smaller tract of land than they had previously occupied, the Court found that there would have to be a change in the physical condition of the land; i.e., water would have to be provided. Moreover, the Court followed the basic rule of interpretation of agreements with Indians, that is, ambiguities are to be resolved in favor of the Indians. The Court went on to examine the circumstances surrounding the creation of the reservation. Of apparent influence were the following: the United States in 1889 had expressly reserved 1,000 miners inches per year for domestic and irrigation uses and in 1898 the tribe itself had diverted another 10,000 miners inches per year to be used for agriculture. More importantly, perhaps, was the Court's view that the Indians had had command of all the land and water, and had now relinquished that claim, to do so without the promise, implied though it may be, of water would have made no sense. Thus, the Court held that the United States impliedly reserves water for the benefit of Indian reservations when water is necessary to fulfill the purposes of the reservation. In other words, intent is inferred if previously unappropriated water is necessary to accomplish the purposes for which the reservation was created.
Three factors must be analyzed before a Winters right may be implied: the reason for the establishment of the reservation, the characteristic of the land of the reservation, and the needs of the Indians on the reservation. In examining these three factors, however, if the right is properly implied, the right arises without regard to the equities that might favor competing water uses. (Colville Confederated Tribes v. Walton (9th Cir. 1985) 752 F.2d 397, 405, cert. den. 106 S.Ct. 1183 "Colville II".) However, Winters rights are an exception to the usual rule that the United States defer to state law in the area of water rights. (See United States v. New Mexico (1978) 438 U.S. 696, 715; 57 L.Ed.2d 1052.)

Thus, the purpose of the reservation, rather than an actual application to beneficial use, determines the quantity of water to which a reservation may be entitled. Arizona v. California, (1963) 373 U.S. 546, is the landmark quantification case. The Special Master determined that five Indian reservations, along the lower Colorado River, should be awarded water based on the number of practicably irrigable acres within the reservation. The Special Master reasoned that the initial purpose of creating the reservations was to enable the tribe to develop a viable agricultural economy and that the intention of the United States was to reserve that amount necessary to satisfy the expanding water needs of each reservation. In speaking of the right, the Special Master wrote, "as pointed out above, the more sensible conclusion is that the United States intended to reserve enough water to irrigate all of the practicably irrigable lands on a reservation and that the water rights thereby created would run to defined lands, as is generally true of water rights".

3. There are two possible conceptual underpinnings for the Winters rights, the tribe itself retained the right if it did not expressly relinquish the right, or the United States reserves the right when it created the reservations. In the case of the lower Colorado River reservations, the Special Master in Arizona v. California held that the United States had reserved that right.

4. Because federal reserved rights are an exception, the Supreme Court has emphasized the importance of the limitation of such rights to that essential to accomplish the purpose for which the land is reserved. (United States v. Adair (9th Cir. 1984) 723 F.2d 1394, cert. den. 104 S.C. 3536; see also infra at pp. 4, 6, & 7.)

5. In Arizona v. California, the Special Master extended Winters rights to reservations created by Executive Orders.
Moreover, the Special Master later again emphasized the connection of the Winters right and the land and wrote, "[t]hey are of fixed magnitude and priority and are appurtenant to defined lands." (Report at 266.) Practically irrigable acreage is not the only standard which a court may use to award Winters rights, for the Court must look to the purpose of the reservation. Thus in Colville Confederated Tribes v. Walton (9th Cir. 1981) 647 F.2d 42 ("Colville I") and Colville II, the Court found a right to water to maintain replacement fishing grounds, where the natural habitat had been destroyed. It would appear that a non-consumptive use, such as for fishing or hunting, cannot be later turned into a consumptive use, and such rights may not be transferred. (See United States v. Adair 723 F.2d 1394.)

Regardless of whether the purpose of a reservation was agricultural or fishing, or some other purpose, the underlying rationale of Winters rights is to make the reservation itself more productive.

In determining the amount of water which is to be available to the Tribes, the Supreme Court has shown a trend toward practical limitations and a willingness to balance the equities of competing water uses with those Tribes under modern-day circumstances. Those cases have emphasized the scarcity of water and the lack of foreseeably that the resource would become scarce. Three cases of significance have been decided regarding quantity. Two of them deal with federal-reserved rights in general and not Winters rights specifically, but the courts have spoken approvingly of those cases in discussing Winters rights.

6. The Special Master did not reach the question of whether the Tribes were entitled to change the use of the water on the reservation. (Report at 265.) However, the parties by a later stipulation agreed that the Tribes could use the water for purposes other than irrigation.

7. Interestingly, the Court in Adair found that even though the Tribe had transferred all their lands, that their hunting and fishing rights and the Winters right necessary to maintain hunting and fishing, survived.

8. These are obviously factors of importance of the case in the lower Colorado River basin. To the extent that the Tribes have been awarded water and may be awarded additional water in the lower Colorado River basin, that would mean a gallon-for-gallon reduction for certain public entities who serve Colorado River water within the State of California.
In Cappaert v. United States, (1976) 426 U.S. 126 [48 L.Ed.2d 523], the United States asserted a federal-reserved water right for the Devil's Hole National Monument.²/ A pool within Devil's Hole was the home of a rare species of pupfish. By Presidential Proclamation, Devil's Hole had been withdrawn from the public domain. The Cappaerts were pumping groundwater some 2-1/2 miles from Devil's Hole, but the pumping had caused the level of the pool to decline. The reservation of Devil's Hole, of course, preceded the state permitted pumping of the Cappaerts. The Court held: "[t]he implied reservation of water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation and no more". (Cappaert at 141.) Here, the purpose of the reservation was to preserve the pool for unusual features of scenic, scientific, and educational interest; therefore, the Court held that the amount of water which was reserved was only that amount which was necessary to preserve the pool for scientific interest, including a water level sufficient to serve as a natural habitat for the pupfish. The Cappaerts were required to curtail their pumping so that the reservation received its minimal needs, i.e., that which was adequate to implement the objectives of the reservation. Cappaert was followed by United States v. New Mexico, (1978) 438 U.S. 696 [57 L.Ed. 2d 1052], in which the United States asserted federal-reserved rights for the Gila National forest from the Rio Mimbres River. The United States sought water for among other purposes, the preservation of the forest, aesthetic, recreational, and fish preservation purposes. The Court recognized that in the federal-reserved right claims, which are based upon an implied right, that the courts had carefully examined the asserted right and the specific purposes for which the right is reserved and concluded that without water the purpose of the reservation would be defeated. However, the Court noted that prior cases had repeatedly emphasized that the amount of water which is reserved is that amount necessary to fulfill the purposes of the reservation and no more. The Court in New Mexico reasoned that where water is necessary to fulfill the very purpose of the reservation, that it is reasonable to conclude even in the case of express deference to state law, that the United States intended to reserve necessary water. However, where water is

²/ Some have cited Cappaert for the proposition that Winters rights are also applicable to groundwater. Such a citation is incorrect, since the Court in Cappaert specifically referred to the pool as surface water. To the extent that groundwater pumping affected the surface system, the Court found that the United States could enjoin the groundwater pumping.
valuable for a secondary use, such as the in-stream uses which the United States had sought, then the inference is that the United States will acquire that water right in the same manner as any other public or private appropriator. Thus, the Court looked to the primary purpose of the reservation and determined that the United States intended to reserve the water to preserve the timber only.10/ This case importantly recognized that in instances of implied reserved water rights, that it frequently requires a gallon-for-gallon reduction and that this fact had not escaped Congress, and must, therefore, be weighed in determining what if any water Congress reserved for use in the national forest. It was noted that the federal reserved rights doctrine is built on implication and is an exception to Congress' explicit deference to state water law in other areas. The Court limited the right to the primary purpose of the reservation.11/

New Mexico was followed by the case of Washington v. Fishing Vessel Assn.'s, (1979) 443 U.S. 658 [61 L.Ed. 2d 823]. Washington involved the interpretation of treaty fishing rights. By treaty the tribe was allowed the right to take fish at all its usual and accustomed grounds and stations in common with all citizens of the territory. The issue in the case was focused on whether the treaty gave the tribe only access to or an actual portion of each run of fish.12/ The Court reasoned that when the contract was negotiated that neither party

10. It could be suggested that courts should interpret intent strictly to include only those uses that were clearly contemplated in the land grant. (Indian Claims to Groundwater: "Reserved Rights or Beneficial Interest", 33 Stanford Law Review 103 (Nov. 1980).)

11. The primary purpose of a reservation is not limited to one purpose only. In U.S. v. Adair, 723 F.2d 1394, the Court held that it was not required to identify a single essential purpose, rather it found that fishing, gathering, and agriculture were all primary purposes.

12. In interpreting treaties, the Court reasoned that such a treaty is essentially a contract between two nations and unless the nations were at war and one is defeated, it is reasonable to assume that the contract was negotiated at arm's length. The Court found that standard applicable in this case. The principle must, however, be coupled with the usual deference accorded to Indians. These principles, taken together, lead to the principle that it is Indians' likely understanding which must prevail.
realized nor intended that their contract would determine whether and how a resource thought inexhaustible at that time would be allocated between the Indians and incoming settlers when it became scarce. Therein the Court held:

"As in Arizona v. California and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than is necessary to provide the Indians with a livelihood that is to say, a moderate living." (Id. at 685).

The Court set the maximum amount of fish which could be taken by the tribe and left open the possibility that the tribe's share could be reduced. For example, if the tribe dwindled to a few members or if the tribe found another source of support, the right could be reduced, since the livelihood of the Tribes under such reduced circumstances could not reasonably require a large allotment of fish. The Court opened the door to allow a reduction but not an increase in the tribe's maximum entitlement. By awarding a maximum, the Court satisfied a certainty and finality standard, but also left room for some flexibility for changing circumstances.

While those cases discussed above were not Winters cases, the Ninth Circuit in United States v. Adair, 723 F.2d. 1394, cited with approval the Cappaert and New Mexico cases and held that two guidelines had been established by those two cases regarding Winters rights; water rights are implied only where water is necessary to fulfill the very purpose of the reservation and not for secondary uses; and the scope of the right is circumscribed by the necessity that calls for its creation in other words, it reserves only that amount necessary to fulfill the purpose of the reservation and no more.

Thus, these cases recognized the exceptional nature of federal-reserved rights and the need to limit such rights in the face of today's realities. Even though it appears to be well-settled law that the tribe can lease and sell, under limited circumstances, land and water together, that limited right to sell does not support the right to sell such right apart from the land. In Skeem v. United States, (1921) 273 Fed. 93, land had been allotted to individual Indian tribal members and subsequently leased to a non-Indian. The Court found that the patents under which the individual tribal member had received his allotment made no express indication as to whether or not the water right would be lost if the land was leased, therefore, the Court implied a right to lease a portion of the water with the land although the Court did not directly deal with the quantity or extent of the lessee's rights.
Court was of the view that treaties should be construed in light of the purpose to induce the Tribes to relinquish their nomadic ways, become farmers and that meaning should be given to such agreements which would enable the Tribes to cultivate all of the land so reserved.

In United States v. Hibner, (D. Ida. E.D. 1928) 27 F.2d 909, the Court relying upon Skeem, found that a non-Indian purchaser of an allotment receives what was actually used by the tribal member and what the non-Indian allottee can put to use with reasonable diligence. The water is accorded the same priority date as the other Indian water rights. The rationale for allowing an Indian allottee to sell his land and the associated water right was expressed by the Court in Colville I, where the Court reasoned that because the use of the reserved right was not limited to fulfilling the original purpose of the reservation, Congress had the power to grant reserved rights to individuals and to allow the transfer of such rights to non-Indians; whether it did so is a question of congressional intent. Since the Allotment Act was passed before Winters, the Court held that Congress did not consider transferability and, therefore, the Court must determine what Congress would have intended. The Court adhered to the principle that the diminution or termination of an Indian right requires express legislation or a clear inference of Congress of its intent to do so. Here, the Court was unable to find such an intent for it was often the water right which gave the land value. Therefore, the Court held that an allottee may convey its ratable share of the reserved right and that the non-Indian successor acquires a right to water which is being appropriated by the allottee at the time title passes plus the amount which the non-Indian successor puts to beneficial use within a reasonable period of time, but no more than the Indian allottee was entitled. Indeed, the Ninth Circuit has two restrictions on the transfer of Winters rights, the non-Indian right is limited by the number of irrigable acres owned, and if the non-Indians fail to use the water, it is lost and cannot be reacquired by the tribe. (United States v. Anderson (9th Cir. 1984) 736 F.2d 1358.) Thus, the rationale of these cases wherein tribes or individual Indian allottees lease or sell a Winters right do not support the sale of water apart from the land. Indeed, if they were separated, the land could be valueless which would defeat the very purpose of Winters.

To allow the sale of Winters rights off the reservation would be contrary to the very intent and purpose of the right. Winters rights were created as an adjunct to land and have no existence apart from the land. ("Considerations and Conclusions Concerning The Transferability of Indian Water Rights" 20 Natural Resources Law Journal 91, January 1980, Jack D. Palma II.) Indeed, surplus water is beyond the scope
of retained water rights for although the Tribes are entitled to water rights, they are entitled to only the minimum amount necessary to satisfy the purposes for which the reservation was created. Moreover, Winters is an exception to the rule that the United States defers to state law in the acquisition of water rights and the intent to reserve such rights is implied. Can it really be said that at the time of the creation of the reservations that the United States or the Tribes contemplated that water would be sold for use off the reservation? It is clear that at the time of creation, the parties were seeking to change the way of life of the Tribes by making them pastoral and agricultural entities. To be sure, some of them also retained fishing and hunting rights, but it is most unlikely that the parties would have contemplated that the Tribes would sell water as they sold crops. The intent was to make the reservation, which was a reduced amount of land, productive enough to allow the Tribes no less than the same standard of living as that which they enjoined on their larger reservation. They were not intended to benefit third parties unrelated to the reservation, which would be the case if other non-Indian users were allowed to purchase the tribe's water rights for use off the reservation.