FOREWORD

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When I undertook editorship of this issue, I expected that I would get five or six articles on the several aspects of the Native American water rights issue and have a comprehensive summary of the status of the topic. Was I surprised! By the time I had half the articles and had talked with individuals from all over the United States, I realized that I could probably put together thirty articles and not have a truly comprehensive summary. Dismayed? Not at all. I am truly impressed with the breadth of the issue and the experience, dedication, scholarship, and insights that our authors bring to this issue of UPDATE. At the same time, I realized that I was no longer in control of the content and/or organization. And that is all right, because it reflects the fact that no one person or organization is in control of the topic itself, the long-term trends, the sequence of events, the complex interrelationships among individuals, communities, bureaucracies, customs, and the courts. I have sequenced the presentations that follow, and provide a brief guide to them below. Overall, I am thoroughly delighted with the result, and hope that our readers are as well.

This article is in two parts: first, a lay-person's introduction to the historical context and intricacies of the continuing battle over water rights for Native Americans (I and others have sometimes referred to them as "Indian water rights" for variety). Where it is appropriate to do so, I have cross-referenced my comments to the author's name [in brackets]. Between newsletters and the Internet (neither of which I have used in this presentation), there is no shortage of information on this topic; my intent here was to present a comprehensible summary of what is going on in this arena.

The second part is a brief summary guide to the articles that follow, a condensed connective commentary on the authors and their contributions.

HISTORICAL CONTEXT

David Getches related the story behind *Winters v. the United States* (207 US 564, 1908) in his 1989 presentation at the AWRA symposium on Indian Water Rights in Missoula, Montana. He personalized the story of an intrepid Indian Agent who went to bat for members of the Belknap Indian Reservation of the Gros Ventre and Assiniboine Indians of the Blackfeet Tribe. They found the flow of Montana's Milk River diminished owing to upstream appropriators. A courageous United States Marshall concurred and helped convince a judge. These three men, said Getches, "did what they had to do because it was right". The Winters Decision (an appeal to the Supreme Court) forever changed resources management in the western states and, ultimately, has affected court and resource management decisions in the eastern states as well. Winters rights (also referred to as "the Winters Doctrine") is one of three "species of Indian water rights" [S. Williams].

Although the upstream appropriators had complied with state law governing the right to use water under the state-sanctioned appropriation doctrine, which had been adopted throughout the arid western states following the decision in *Irwin v. Phillips* (5 Cal 140 (1885), 43 Am Dec 113, 1855) in the California gold fields,

> [t]he Court rejected this argument and found that state law did not control Indian water rights. Rather, it was held that the United States, when it recognized the Indian reservation through Congressional action, implicitly reserved sufficient water with the land in order to fulfill the very purpose for which the reservation had been created, namely, to help the Indians establish a new way of life based on the arts of non-Indian civilization, including agriculture.

This implied reservation of water was made to fit in with the appropriative rights under state law in one important way, by the assignment of a priority date – the date on which the Indian reservation was created. Since such dates almost always preceded non-Indian settlement as well as the establishment of many western states, this principle had the effect of giving priority to Indian reserved rights over most non-Indian appropriative rights. The Court also held that the Indian reserved rights, in contrast to state-created rights, continued in effect even though not put to beneficial use (one of the three criteria for a valid appropriation), and that they could expand to fit the purposes of the reservation (Folk-Williams 1982).

The decision was so controversial that it wasn't even

addressed for nearly sixty[1] years; Simms said "[h]istorically, Congress forgot to address the issue. Today, the potato's gotten so hot Congress wouldn't touch it with a ten-foot pole" (Simms 1980). Not until the decision in *Arizona v. California*, 373 U.S. 546 (1963) were the rights to water for Native Americans mentioned again in a Supreme Court decision. It is still a hot issue.

When finally addressed and defined in 1963, quantification of irrigation application per unit area and practicably irrigable acreage became issues of primary concern; some ramifications of that decision are still before the courts. The quantification of irrigable lands [S. Williams] and reasonable amounts of water for the incredibly arid real estate bestowed upon Native Americans meant potential economic disaster for the efforts of settlers who developed the water resources under state law, sanctioned by a state constitution -approving Congress. Stressed by constitutional questions on the one hand and treaty justice on the other, the United States stayed the course, although the reconciliation period has been long. It is confounded now with long-standing concerns over fish [Shelton] and wildlife [Spangler], water quality [Royster, Cottingham and Specking], endangered species [Leeper, McCool, Cottingham and Specking], and the land base itself [Shelton].

Irony above all: by the time the first of the many Native American water rights conflicts were litigated or negotiated, and settled, the reduction in the federal role of water development meant that once again the Indian population was beset by inequities. Governmental largesse for building dams, canals, and other water resource improvements was no longer the backbone of the Nation's water development programs. On the other hand, by then, the patterns of water use were largely set, and the Indians, finally, had (in many cases) the upper hand; if the non-Indian settlers and their descendants wanted to keep their developed water supplies, they would have to buy the rights from those who held them, and the economic scales tipped [McCool; S. Williams], although as we see below, not without inter-Indian conflict as well. With further litigation pertaining to on-reservation taxes, federal and state services, education and quality of life, and casino gambling, many Native Americans no longer face a life of poverty. Some decry these developments; but none can deny their existence.

The water resources issue did not develop in a vacuum [Shelton]. Nearly simultaneous growth of the American Indian Movement, the changing mission of the Bureau of Indian Affairs from a basic policy of assimilation to celebration of the potential contribution of Native American culture magnified the ground swell of both the civil rights and environmental quality movements of the 1960s and the 1970s. The legacy of those struggles as we prepare to enter the 21st Century includes the potential for water resources development for many tribes; economic improvement in the life of many – but most assuredly not all – Native Americans; a new, broader commitment to the value of diversity in our nation, and, hopefully, of the importance of that diversity to the very survival of democracy and mankind.[2]

Native American Houdenosaunee [Patterson] precepts include an ancient view of how mankind can live in sustainable harmony with nature: Never collect the first berries or fruit, nor keep the first fish caught, nor kill the first game you see; for then you will not have collected, kept, or killed the last. Native Americans also often engage in lengthy deliberations over how a proposed course of action might affect the seventh generation; this is frustrating to impatient progress-and-result-driven non-Indians who are less in tune with their environment. It is important for the non-Indian population to understand these and other Native American ideas, for they would be good resource management guideposts to live by for all of us.

Today, a large number of individuals and organizations are making it their business to understand Indian culture and to correct historical inequities that are inherently confounded with long-term basic principles of our water resources management. The list includes able bureaucrats, consultants, educators, lawyers, philanthropists, whole law firms, and citizens' groups; and there are newly-educated and empowered Native Americans, too, who are joining in the fight for justice over control and distribution of the resources necessary to economic stability and well-being. All in all, there are many, many people intimately involved with the issue of Native American water rights. Some of these people and organizations are represented by our dedicated authors, all of whom are too busy to add yet another demand on their time, yet who also all believe that contributing to this type of publication is an important part of telling their story and achieving their objectives. All are making a difference.

A GUIDE TO THE ARTICLES[3]

The lead article is by Susan M. Williams, partner in the Indian-owned law firm of Gover, Stetson & Williams, P.C. in Albuquerque, is entitled "An Overview of Indian Water Rights". Successful litigator in the Big Horn case of 1989, Williams is active in numerous other water rights cases and negotiations, and presents a comprehensive, legal summary that more accurately defines the arena than do I in this more general introductory piece. The reader will note that Williams refers to the issue of sovereignty of the federal government; in order for the Indians to successfully litigate water rights that were not very favorably looked upon by the state courts that have original jurisdiction over the state-based western water law, it was necessary for the United States to allow itself to be sued; this was granted by the McCarran Amendment of 1952, a thorough explanation of which is presented in "The McCarran Amendment and the Administration of Tribal Reserved Water Rights" by Jay F. Stein, partner in the Santa Fe law firm of Simms and Stein. Stein goes beyond the legislation and describes the current concerns that have resulted from the court successes of the Indians. These include interpretation of the status of water rights that might be transferred to non-Indians by sale and waters of the Bureau of Reclamation's Central Arizona Project. While Stein's article contains more legalese than many of us non-lawyers are comfortable with, it is a most informative and well-crafted, easy-to-read article; and it is important to remember that the specific terminology of the law is the basis for the way things are, for "telling it like it is".

Brett Lee Shelton's "A View From the Front Lines" presents an attorney's view of details, histories, and status of four current cases on which he is working or has worked, along with information on the operations of the Native American Rights Fund (NARF). These cases illustrate the wide-ranging set of topics affected by water rights, including fish and game and land use issues, along with traditional irrigation. Of special interest here are the relationships among the several tribal, state, and federal organizations involved.

Christopher L. Kenney, Director of the Office of Native American Affairs in the Bureau of Reclamation, brings alive the differences between litigation and negotiation in the resolution of complex water rights issues. He personalizes the recent past and current events, thereby highlighting the continuing need for the input of dedicated individuals. His article "The Legacy and the Promise of the Settlement of Indian Reserved Right Water Claims" ably describes the cycles of interest and activity, lip-service and commitment, culture and politics. Note especially the tie-in to the McCarran Amendment, the observation about changing BR activities and cost-sharing rules, and benefits of settlements to non-Indians.

Political Science Professor Daniel McCool writes about more of the specific details of the negotiated tribal claims to water in "Indian Water Settlements". Against the background of the preceeding articles, these stories take on new drama; and the difficulties and opportunities for funding settlements takes on new meaning.

An even more detailed account of the volatile issues in one specific locale – the San Juan River Basin – is illuminated by John W. Leeper, Civil Engineer with the Navajo Nation's Department of Natural Resources. His "Avoiding a Train Wreck" is, in his words, "only a slight exaggeration", but it makes exciting reading nevertheless. Against the important background of the Colorado River Compact, he brings in yet another dimension to the quantification issue, namely the role of the Endangered Species Act. His experience also clearly indicates the need for public participation in settlements.

Susan Cottingham, Program Director, and Joan Specking, Historical Researcher and Technical Team Leader, both of the Montana Reserved Water Rights Compact Commission join forces to present a detailed summary of a NARF- and Western States Water Council-sponsored symposium held in Portland in 1993. Several of the individuals participating in the symposium were on my list of potential authors, and I am happy to be able to present their specific strategies, views, and activities, along with reinforcement of the importance of the cultural context of the water resource for Native Americans, well documented earlier in Chris Kenney's article.

Neil Patterson, Technical Specialist for the Atlantic States Legal Foundation relates that organization's activities along with actions involving other tribes and international extensions. Note that this organization is in the east (Syracuse, NY), but its geographic area of activity is not so restricted. Again, the background of the Indians cultural consideration of natural resources is of continuing importance, here with the view of a Native American.

Associate Professor of Law at the University of Tulsa Judith V. Royster has a growing record and reputation for action on behalf of Native Americans. She is currently

involved in water quality issues and relationships between tribal, state, and federal governments. Here she orders and clarifies some of the activities involving the many responsibilities and authorities for compliance with the Clean Water Act.

Professor George Spangler of the Department of Fisheries and Wildlife at the University of Minnesota has been active in biological research that documents entitlements on behalf of several tribes in the midwest and Ontario, Canada. His technical expertise, and cultural and historical approaches are of considerable importance to several ongoing conflicts, and he has been able to establish the impact of introduced species on the aquatic ecosystems on which both Indians and non-Indians depend.

A summary comment: I hope you are as impressed as I am at the breadth of activities in the Native American water rights field; at the broad range of expertise that is being brought to bear on the problem; at the dedication of the individuals and the commitments to conflict resolution, largely through the development of partnerships; and at the communications abilities of the authors.

ACKNOWLEDGMENTS

I am indebted to all those who spent valuable time from incredibly busy schedules to help with this project. Only a deep dedication to furthering the rights of all people makes one set aside the time to get such a job done. The skill, drive, caring, and talents of those who are represented here is self-evident, and I am deeply grateful to them.

Thanks are also extended to several individuals (authors and non-authors alike) who took valuable time to put me in touch with the prospective contributors whose articles are here before you. They include people who didn't plan on contributing an article, but who spent time on the phone with me concerning details of the issues, providing names, and answering my many questions. Anne Crichton, Charles Howe, David Getches, Richard Simms, Robert Abrams, Bill Goldfarb, Steve Light, William Swan, Bob Williams, Tim Vollman, and Jack Manno.

I am particularly indebted to my late father, Algernon D. Black and to Richard A. Simms. The former because of his life-long role model in pursuit of justice for the oppressed; the latter because his 1980 article originally opened my eyes to the nature of the issues underlying the rights of Native Americans to life-giving water.

REFERENCES

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ENDNOTES

1. "Later cases of the federal courts" continues Folk-Williams, "extended the Winters Doctrine to cover all reservations created by executive order, as well as by treaty, and to the lands allocated to individual tribal members under federal statutes. In the landmark case of *Arizona v. California*, 373 U.S. 546 (1963) the Supreme Court stated that the principle of reserved rights extended to all federal reservations, not just to Indian lands." The concept of what is now known as the Reservation Doctrine was actually applied earlier in the decision in Nebraska v. Wyoming, 325 U.S. 589(1945), wherein the United States claimed all the unappropriated water in Platte River on the grounds that it had not disposed of the water rights it had acquired when it obtained the land "by cessions from France, Spain, and Mexico...." Colorado maintained otherwise as it impleaded in the case on the grounds that the United States had acquiesced to the state's right to grant appropriations by Congressional ratification of its constitution, the first to contain the appropriation doctrine.

2. Perhaps one of the more fascinating recent developments doesn't involve water rights at all – directly. In the summer of 1996, in an arid site along the Columbia River, a bone skeleton was discovered that was 9,300 years old, that is, he arrived – and died – shortly after the ice retreated. Kennewick Man, as this individual is known, is claimed by resident tribes as a part of their heritage under the 1990 Native American Graves Protection and Repatriation Act, but the well-preserved skull is "suggestive of Caucasoid features" (*Science*, v. 275, 7 March 1997, p. 1423). Once the ownership battles are settled in the courts, the definition of "Native Americans" may undergo some change, too, possibly further complicating rights to water under the Winters Doctrine.

3. I have attempted to make citations and footnotes uniform, but have deferred to several different styles of each. If changes in character formatting or style is now incorrect (or different from what an author submitted), I take full responsibility therefor, and apologize to the authors.