A View From Front Lines: Current Status Of Four Water Right Cases

Brett Lee Shelton

Native American Rights Fund

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The Native American Rights Fund (NARF) is a private, nonprofit, charitable organization founded in 1970 to address the need for a national perspective in the practice of federal Indian law. When NARF was first created, its Board of Directors defined five priorities, in order to help protect the most important rights of Indian people within limited resources. These priorities are:

(1) the preservation of tribal existence;
(2) the protection of tribal natural resources;
(3) the promotion of human rights;
(4) the accountability of governments to Native Americans; and
(5) the development of Indian law.

For the past 26 years, NARF has represented over 190 tribes in 31 states in legal areas including water rights, land claims, tribal restoration and recognition, hunting and fishing rights, protection of Indian religious freedom, and many others. In recent years, Indian water resources activities have been a major focus of NARF efforts.

Establishing tribal water rights serves each of the NARF priorities well. Water resources are crucial, especially in the arid West, as tribes attempt to become more self-sufficient. Water is essential for economic development, for other natural and cultural resources such as fisheries. In some cases, even drinking water is in short supply on Reservations. Current cases on NARF's docket represent a good cross-section of recent Indian water law developments, as well as posing several unique problems requiring the generation of creative and collaborative solutions.

NARF's current docket includes helping to establish and protect Indian water rights on behalf of four Native American Tribes, located throughout the Western United States. Following is a summary of NARF's activities in each of these cases, and an explanation of the subtleties that make each case unique.

Nez Perce (Idaho)

NARF represents the Nez Perce Tribe of Idaho in efforts to secure its water rights in the Snake River Basin Adjudication (SRBA). If the Tribe's efforts are successful, resolution of the case would serve to reverse the trend of decreasing salmon populations in the Pacific Northwest, and restore salmon populations to a viable level. The Tribe is claiming sufficient water for instream flows to protect tribal fisheries and for irrigation and domestic uses. Settlement negotiations with the State of Idaho and private parties have been proceeding, for the most part, simultaneously with litigation.

The SRBA is the general stream adjudication, in Idaho state court, of all water rights on the Snake and its tributaries. Basins to be adjudicated in the SRBA cover roughly 87% of Idaho's land area. SRBA is perhaps the biggest general stream adjudication ever undertaken in this country, with over 150,000 claims filed. The Nez Perce Tribe and the United States, on its own behalf and as trustee for the Nez Perce Tribe, have filed the most controversial claims in the litigation. They have filed instream flow claims, in 1134 drainages, to virtually all of the water in the Snake, Salmon, and Clearwater River basins in order to support tribal treaty-based fishing rights.

The basis of the Tribe's instream flow claims is that instream flow is necessary in order for salmon to survive in the area. Under its treaties with the United States, the Tribe has an exclusive right to take fish in streams "where running through or bordering" the Nez Perce Reservation, and the "right of taking fish in all usual and accustomed places in common with citizens of the Territory." *See* Art. III, Treaty with the Nez Perce, 12 Stat. 957 (June 11, 1855). In order for the treaty right to fish to have any meaning, there must be fish to catch. Thus the treaty fishing right must also entitle the Tribe to enough water to support the fishery. (*See* James C. Tucker, "Federal and Tribal Reserved Right Claims in the SRBA", 3 Idaho Water Law News 12 (Spring 1995) for a discussion of the imposing legal issues that must be addressed in order to resolve the Tribe's water rights claims).

For many years, the Columbia and Snake Rivers have been managed under the assumption that dams, timber harvest, and other development activities could proceed while salmon and other species were propped up with technology. But notwithstanding increasing investments in mitigation technology, salmon populations have declined over the decades, contributing to major litigation with respect to Indian treaty fishing rights in the Pacific Northwest during the 1970s. In response, during the 1980s the region initiated a biological restoration program for which hundreds of millions of federal dollars were expended. But dramatically worsening salmon declines have still occurred in the 1990s. In the early 1990s, Snake River salmon were listed under the Endangered Species Act. More species are proposed to be added to the list. Additional litigation of Endangered Species Act issues in the area is underway. *See Northwest Resource Information Center, Inc. V. Idaho*, 56 F.3d 1060 (9th Cir. 1995); *American Rivers v. National Marine Fisheries Service*. 1995 WL 464544 (D.Or. 1995).

With the extinction of some salmon species and the precipitous decline of others, the notion that technology -- fish hatcheries, barges to transport fish past dams, mechanical devices to avoid the dams' turbines, etc. -- could make up for the loss of free-flowing rivers and extensive habitat degradation has drawn increasingly damaging, and now likely fatal, criticism from the scientific community. There is a rapidly-developing consensus among scientists – documented most recently by the Northwest Power Planning Council's independent scientific report, *Return to the River* -- that wild salmon need a functioning ecosystem. Preservation of salmon thus requires not managing the river systems, but un-managing them, at least in part, to allow the river systems to move toward more natural conditions.

The Tribe's first priority in the SRBA is recovery and restoration of its anadromous fishery, which it reserved in its treaties with the United States. The traditional culture of the Nez Perce people, like that of many Pacific Northwest Indians, in many ways revolves around salmon and other fish species. In many ways, the fate of the Tribe is vitally linked to the fate of the salmon. This relationship frames the Tribe's interests in determining its water rights.

It has become clear that the decline of Idaho salmon runs has been caused in large part by dams and reservoirs along the Columbia and Snake rivers in Washington, Oregon, and Idaho. State borders are of no significance to the fish as they attempt to make their way upstream to spawn. Thus, because neither a litigated nor a negotiated Idaho-only resolution in the SRBA would be likely to result in the restoration of a viable treaty fishery in Idaho, the Tribe has advocated for a regional, ecosystem-wide solution.

For the past year, at the joint request of the United States, the Tribe, the State of Idaho, and private water users, the instream flow rights litigation was stayed in order to allow settlement talks to proceed. Non-binding exploratory discussions were held between the parties. This framework allowed discussion and study of a wider range of settlement possibilities, focusing mainly on two major areas: 1) possible reconfiguration of the dam/reservoir system on the mainstream of the Columbia and Lower Snake Rivers; and 2) preservation of existing prime habitat in the Salmon and Clearwater basins in Idaho. While it seems clear that salmon survival will require breach and/or draw-down of several dams and reservoirs along the Lower Snake and Columbia Rivers, both to facilitate fish passage and to cool waters that are currently warmed during retention in reservoirs, the region's Indian tribes are thus far the only major interests to endorse such an approach. A tribally-proposed conceptual outline of a settlement that would amount to a "regional fix" of the Columbia-Snake salmon crisis was introduced and discussed at some length, but agreement has been elusive because of the many competing interests in the Columbia-Snake system. Thus, in March 1997, preparation for litigation of the case resumed. Litigation and negotiations will now proceed simultaneously, in order to prevent unnecessary delays in reaching a resolution.

Klamath (Oregon)

One of the most ground-breaking cases in Indian water law has been that of the Klamath Tribe. NARF has represented the Klamath Tribe and its members through several federal court cases, and continues to represent the tribe in the current, less litigious, stages of determining its water rights.

In 1909, Oregon instituted an application-and-permit system for administration of state water rights, so all post-1909 water rights should be clearly documented. However, the status of water rights with priority dates prior to 1909 remain unsettled. Since about 1975, the State of Oregon, through the Oregon Water Resources Department, has been attempting to determine the quantity and priority of all federal, tribal, and pre-1909 state-based water rights in the Klamath Basin Adjudication. The Klamath Tribe challenged the

OWRD's adjudicatory jurisdiction under the McCarran Amendment, but the challenge proved unsuccessful.

United States and Klamath Tribe v. State of Oregon, Department of Water Resources, 44 F.3d 758 (9th Cir. 1994).

The Klamath Tribe's water rights are the result of a unique history. The Klamath Reservation was established for members of the Klamath, Modoc, and Yahooskin (Paiute) Tribes by treaty in 1864. Treaty with the Klamath, etc., October 14, 1864, 116 Stat. 707. The Treaty provided that the Tribes reserved the exclusive right to hunt, fish, and gather medicinal and edible plants within the Reservation. *Id., Article 1*. The Tribes, now collectively referred to as the Klamath Tribe, thrived on the Reservation for many years. Then, starting in about 1940, the federal government's policy towards Indians shifted to one in which assimilation of Indians into the mainstream was very aggressively pursued. The Klamath Tribe was one of several victims of this era of federal policy commonly called the "Termination Era". *See* Robert N. Clinton, American Indian Law, 3rd ed., 1991, pp. 155-158. Following the federal policy of the era, the Klamath Reservation was terminated by an act of Congress in 1954. Klamath Termination Act, August 13, 1954, ch. 732, 68 Stat. 718, 25 U.S.C. § 564 et seq.

Notwithstanding termination of the Reservation, the Klamath Termination Act reserved all water rights of the Tribe which existed at the time of termination. *Id.*, 68 Stat 718 at § 14, 25 U.S.C. at § 564m. The effect of the 1864 Treaty and the 1954 Termination Act was interpreted by the Federal District Court for the District of Oregon in *United States v. Adair*, 478 F.Supp. 336 (D.Oregon 1979):

The Treaty granted the Indians an implied right to as much water on the Reservation as was necessary to fulfill [the purposes of the Reservation]. The termination of the Reservation did not abrogate the Indians water rights [citing 25 U.S.C. § 564m]. The Indians are still entitled to as much water on the Reservation lands as they need to protect their hunting and fishing rights. *Id.*, 478 F.Supp. at 347. The Ninth Circuit Court of Appeals modified and upheld the decision of the District Court, holding that the Tribe retained the rights to an amount of water sufficient to support agriculture, hunting, and fishing on the former Klamath Reservation, and that the priority date of the rights was "time immemorial". *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied sub nom* Oregon v. United States, 467 U.S. 1252, 104 S.Ct. 3536, 82 L.Ed.2d 841 (1984). Quantification of the Tribe's water rights was left for subsequent proceedings, however.

Since 1987, the NARF has assisted the Klamath Tribe in its efforts to quantify the rights confirmed in *Adair*. Presently, one of the more problematic issues in the quantification efforts involves the existence of two endangered species of fish in the tribal fisheries. The fish are called by the Indians c'wam ("tchwam") and kuptu ("cup-too"), and by non-Indians "suckers". The fish mature in Upper Klamath Lake, which borders the former Reservation, and spawn in streams on the former Reservation. Both species play an important role in the traditional culture of the Tribe. United States Bureau of Reclamation draw-downs of Klamath Lake, in order to meet irrigation needs downstream, pose a severe threat to the continued survival of the fish. Draw-downs also affect the ability of tribal members to gather important plants that normally grow in the lake and riparian zone. NARF is currently continuing with a major initiative to change management of Upper Klamath Lake by the Bureau of Reclamation in order to better protect the Tribe's treaty-protected fishery, including the two endangered species of fish. This effort, which includes helping the Tribe assess the strength of its lake studies and water rights litigation options related to Upper Klamath Lake and develop appropriate quantification strategy options, has produced significant favorable management changes. Written interim management plans for 1995 and 1996 adopted the Tribe's proposed water level for fishery purposes. An agreement to develop a long-term water plan was also made.

The State of Oregon is proceeding with the Klamath Basin Adjudication requirement that all claims, including those of the Tribe, be filed by April 30, 1997. NARF continues to assist the Tribe in obtaining and reviewing the hydrological, biological, and other studies required to adjudicate the Tribe's reserved water rights to support its 1864 Treaty hunting and fishing rights. NARF has also been working with the Oregon Department of Water Resources to develop a timeline for adjudication and to fashion an appropriate an appropriate settlement negotiations framework for exploring a comprehensive, basin-wide Indian water rights settlement. Finally, NARF continues to ensure that the United States adequately represents tribal interests, as the Tribe's trustee, by reviewing and evaluating the legal and technical work done by the United States on the Tribe's behalf.

Chippewa-Cree Tribe of the Rocky Boy's Reservation (Montana)

The first Indian water rights settlement to go before Congress during the Clinton administration is likely to be one settling the claims of the Chippewa-Cree Tribe of the Rocky Boy's Reservation in Montana. The Tribe and the Montana Reserved Water Rights Compact Commission have submitted to the Montana State Legislature a compact that quantifies the Tribe's on-Reservation water rights, sets out details for administration of on-Reservation water rights, and secures state support for federal Congressional legislation authorizing a Municipal, Rural, and Industrial (MR&I) system to provide domestic water to the Reservation. The Tribe approved the Compact, as amended, on February 21, 1997. The Montana House of Representatives approved the Compact on February 25, 1997, and the Montana House of Representatives is expected to grant its approval in April of 1997. NARF represents the Tribe and provides legal assistance to the Tribal Negotiating Team in its negotiations with the State and federal governments in all of these activities.

After ratification by the Montana state legislature of the compact, a final decree dismissing the Tribe's water claims and approving the quantification portions of the compact will be issued by the Montana State Water Court, and federal ratification will also be sought. Federal ratifying legislation will include the terms of the Compact, provisions authorizing construction of an MR&I water system to meet the future domestic water needs of the Tribe, and other pertinent provisions required to settle the Tribes water rights claim. The Tribe hopes that the federal bill can be introduced in Congress in 1997, and a Congressional hearing scheduled for later this year.

Technical analysis and filing of claims to establish the Chippewa-Cree Tribe's water rights started in 1982. The first proposed compact to address settlement of the Rocky Boy's Reservation water was submitted to the State and federal governments in 1992. Several drafts later, the Tribe and Montana have reached an agreement on a Compact that resolved quantification and administration issues for the Tribe's on-Reservation water and provides the Tribe with the option of withdrawing from the Compact if a satisfactory system to provide additional domestic water to the Reservation is not forthcoming in the federal ratifying legislation. The Department of Interior has not yet approved the Compact, but a feasibility study of several alternatives for supplying additional water to the Reservation is expected to be completed in May 1997. Based in part upon the outcome of the feasibility study, federal legislation ratifying the compact between the Tribe and Montana and authorizing an MR&I system for the Tribe pipeline project will then be formulated.

Tule River (California)

Determination of the water rights of the people of the Tule River Indian Reservation is at a very early stage in its development. The case is of particular interest as an introduction to the way determination of tribal water rights is framed at the beginning of the process.

The Tule River Indian Reservation is located on rugged and rocky land in the foothills of the Sierra Nevada mountains of south-central California. Located within the aboriginal territory of the Tule people, the Reservation was formally set aside by President Grant in 1873. The formal setting aside of the reservation marked the last step in a long series of attempts by the United States to find the Tule people a permanent homeland.

Attempts to find the Tule people a homeland first began in the early 1850's. In an effort to extend the policy of placing Indians on reservations to the California tribes, Congress authorized, and President Millard Fillmore appointed, Commissioners to make treaties with the California Indians. In June of 1851 the Commissioners negotiated the Paint Creek Treaty with the forefathers of the Tule River Indians. By this treaty, the Indians agreed to cede the majority of their aboriginal territory for a permanent reservation which they would occupy as their homeland. Although non-Indians settled on the land ceded by the Tribe, the treaty was not ratified, and no land was set apart for the Tribe.

The next plan was to settle the California Indians on military reservations. Pursuant to this policy, in about 1856, the Tule Indians were settled on a parcel of land on the main branch of the Tule River. The land at this location was relatively lush and fertile. The Tribe successfully practiced irrigation and produced crops. The land was described as being "located in a narrow valley, on each side of a small stream in a sheltered nook, green and smiling, with a decidedly tropical semblance, heightened by some handsome fig trees and grape-vines, and the extreme mildness and geniality of the climate."

The present Reservation, on the other hand, is characterized by rugged, rocky land and is located on the South Fork of the Tule River. Since the Tribe first settled on the current Reservation, they have used the water from the South Fork as their primary source of domestic and irrigation water.

During the summer, the primary growing season in the area, the water supply on the Reservation often runs very low. Meanwhile, the tribal population is growing. Often, the summer water supply cannot meet even the needs of the Tribe, much less those of downstream users. The dry summer months contrast with the rainy, run-off season which occurs earlier in the year. The Tribe has engaged NARF's services to help secure its water rights in the face of these conditions. The Tribe's ultimate goal is to provide its people with a stable water supply and reliable water distribution system.

Normally, assisting a tribe in securing its water rights entails much legal, economic and engineering research. For the most part, a tribe's water rights are determined by the Winters doctrine, or the doctrine of federally reserved water rights. Under current federal Indian law, the amount of federally reserved water to which a tribe is entitled is most often determined by the practicably irrigable acreage (PIA) of the reservation. The PIA is the total acreage that is susceptible to sustained irrigation at a reasonable cost. To determine PIA, it must be shown that the land is physically capable of sustained irrigation, and that the acreage is irrigable at a reasonable cost--that is, the benefits received from irrigation must outweigh the costs of irrigation. With the help of an engineers and economists, NARF can determine the extent of the practicably irrigable acreage on the Reservation. These firms examine the land to determine things like its soil type and slope. They also evaluate the climate of the area, the types of crops that can be grown in the area, and market for particular crops.

In addition to determining a tribe's PIA, or the amount of water it is entitled to, a determination has to be made as to a tribe's "priority date." A Tribe's water rights are normally federal rights, which are subject to state rights in existence when the federal Reservation is established. If another water user has acquired a state-based right to water in a river prior to the federal creation of a reservation, the United States could only reserve what water was left in the river above and beyond what water to which the settler was established rights. The United States could not take the rights to the water away from the settler who was there first.

Historical facts pertaining to a particular Reservation must also be considered in determining tribal water rights. One historical incident relating to the Tule River basin is that the rights of downstream non-Indian appropriators were adjudicated in a California state court in 1916. Neither the Tribe nor the United States was a party to the 1916 adjudication. This fact created a problem in subsequent years. After 1916, downstream users complained that irrigation systems utilized on the Reservation were wasteful, thus depriving them of their fair share of the water in the South Fork of the Tule.

In an attempt to address the conflicts between the downstream water users and the Tribe, the United States and a ditch company which operated downstream from the Reservation entered into an agreement in 1922. The agreement purported to allocate water between the Tribe and the ditch company. The effect of this agreement would have to be considered in determining the Tribes present water rights.

Before the Tribe can secure a stable water supply, it needs to analyze and perfect its water rights. NARF will continue to investigate and oversee the legal and technical aspects involved in determining the Tribe's water rights. The Tribe has also taken great steps to see that the water needs of its people are fulfilled, including developing a Water Resources Division of its Natural Resources Department which primarily manages the distribution of domestic water on the Reservation.

Brett Lee Shelton (J.D., Stanford, 1996; M.A., Kansas, 1990; B.S., Baker University, 1987), is an enrolled member of the Oglala Lakota Nation in South Dakota. He works on contract with the Native American Rights Fund and is admitted to the State Bar of California (1996) and the Cheyenne River Sioux Tribal Court (1994).

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The Native American Rights Fund's success over the past 26 years could not have been achieved without the financial support it received from throughout the country. To find out how to make a contribution to NARF write: NARF Development Department, 1506 Broadway, Boulder, CO 80302, call (303) 447-8760, or visit our internet site at: www.narf.org