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NATIVE AMERICANS, THE COURTS AND WATER POLICY: IS NOTHING SACRED?

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Abstract. *Public policy in such areas as the environment is increasingly being shaped by the courts as they resolve conflicts. There is some question whether the courts are able to include in policy decisions those values that are not derived from economic utility. In this article, the values represented by traditional Native American beliefs about nature and particularly water are examined. While Native Americans have won some court battles over water, the judges have usually decided on the basis of contractual and treaty agreements and not on the basis of the preservation of traditional values. Cases arising in the Great Plains reflect this tendency in judicial thinking.*

Earth was bountiful and we were surrounded with the blessings of the Great Mystery. Not until the hairy man from the east came and with brutal frenzy heaped injustices upon us and the families we loved was it "wild" for us. (Standing Bear 1933: 38)

American public policy seems dominated by a single perception of reality: the world of hard facts, of numbers, of concrete things. Decisions tend to be based on economic utility, and those factors that cannot be quantified are excluded. The conclusions drawn from hard facts may be cold comfort to those who believe not all values can be included within a mathematical equation. Even policy analysts, who apply rigorous science to the solution of political questions, wonder if they are really capable of improving public

policy. Mountains of numbers, however elegantly crunched, may not indicate a policy preferred by most humans. As a way to bring values back into the equation, some analysts have suggested a “forensic approach” to analysis. Experts representing the values implicit in a problem would be brought together in order to ensure intangible elements are not overwhelmed by brutal facticity.

One might ask if it is not the role of Congress to give primacy to values in policy-making. Congress’s function should be less to analyze facts than to give voice to the deeply felt sentiments of Americans. Supposedly, we go to the polls, not to choose the best scientist, but rather to elect a person most capable of expressing our values in public policy. The reality of modern democratic politics suggests a less exalted role for legislators. Presented with difficult issues and confronted by a number of aggressive groups, legislators have willingly relinquished their lawmaking powers to the judiciary and the bureaucracy. As Meier (1987: 4) remarked, they have “sublimated political issues into professional, technical, and administrative questions.” The effective meaning of deliberately vague words is left to be worked out by the administrative agencies and given final form when reviewed by the courts. Consequently, public policy has become “judicialized” (Rosenbloom 1983). The enactment of a piece of legislation is often the beginning and not the end of policy-making. Whether values important at the start of the process can remain intact is the subject of the present inquiry. Do the courts integrate values not amenable to economic calculation into their role in policy making? We consider here specifically the issue of the Native American concept of sanctity in water rights issues and policy.

The Sacred in Environmental Policy

Public policy dealing with the exploitation or protection of the natural environment is particularly susceptible to the limitations of analysis sketched above. To use Tribe’s (1974: 1317) term, “fragile values” may not survive purely objective examination, as “soft” information is driven out by “hard” data. Or just as bad, the “soft” may be translated into dollars and cents so that we may have to, for example, put a price tag on a beautiful sunset. If our

worldview is dominated by the purely utilitarian, there may be no valid way to stop a policy from moving toward a valueless extreme.

Tribe (1974: 1338) recommended a changed “legal and constitutional framework for choice,” a framework which allows us to rescue our perception of nature from the “conceptually oppressive sphere of human want satisfaction.” He suggested that the thing to be resurrected is the “sacred in the natural.” By sacred he does not mean that which has been consecrated by any formal theology, rather the possibility that the contemplation of nature can inform us about the human condition.

To see how far we have to go in introducing the sacred into policy-making by the courts, we will concentrate on cases involving the rights of Native Americans. This exercise, we hope, will be instructive in examining possible alternatives to traditional water policy. The particular focus of this article will be values raised by Native Americans in water-related cases in the federal district courts on the Great Plains from 1960 to 1990. The methods of selection of cases was limited to case law dealing with water and several values as protected by the Constitution. Cases were limited to those that could be linked or possibly linked to the “sacred” issue.

Water policy in the United States tends to reflect the policy process described above. Although the nation needs a comprehensive policy dealing with the quality and quantity of water, the efforts of Congress in this direction have been, at best, sporadic and piecemeal. Statements of water policy have frequently been the outcomes of narrowly defined issues brought before the agencies or the courts. Most cases concerned the simple determination of a particular water right in which the litigants were often nothing more than feuding neighbors. Even though significant environmental questions could be resolved in such a process, judges have been inclined to rule on the narrowly defined case at bar. Horowitz (1977: 54) observed that, although judges might have an opportunity to blaze new policy paths, “they continue to act very much within the framework of an old process, a process that evolved, not to oversee new programs or to oversee administration, but to decide controversies.” The courts, that is, are blind to the bigger picture, as they concentrate on the particular case, thus adjusting policy only at the margins.

Even with those limitations, it is possible to envision a judicial process that incorporates those values ignored by scientific analysis. Native American values, for example, are based on a perception of the world alien to Anglo-Saxon legal thought. At the same time, this perception is rooted in an identifiable group, with a number of legal rights, and, in somewhat autonomous areas. Native Americans have been increasingly willing to advance their claims in the courts. For their part, the courts have not been entirely hostile to the claims of Native Americans; only a few court decisions have been dedicated to the eradication of "Indianness." In short, if there is any valid body of values pertaining to the environment, and especially to water, traces of it should be found in the court cases.

The Native American View of Water

Is it appropriate to claim that Native Americans regard water as sacred? If water is viewed not as a resource to be exploited in order to satisfy human needs, but rather as a gift to be taken as it is offered, then the claim may be valid. Geopieté, or reverence for the land, is an important aspect of Native American belief systems (Tuan 1976). In general, Native American religions see humans, spirits, and nature as part of a whole. "Humanity is harmoniously fused with the natural world through the ritualization of space" (Highwater 1981: 126). Once one understands this vision of the Indian cosmos, the relationship to the land is better understood. According to Indian belief, the land was given to "the people" or the tribe by supernatural forces. Contact with these forces could be made at specific sites such as mountains and bodies of water in which physical and spiritual reality converge (Gordon 1985; Highwater 1981) and are often incorporated into the mythological tradition (Sack 1980). These places became sacred shrines as acknowledged loci of power. These areas are frequently associated with landforms, which are in turn connected with spiritual beings. The organization of space thus gives mythico-religious meaning to the land. Because Native American religious belief is so closely associated with specific geographical locations, the destruction or loss of these areas can have detrimental effects on the whole belief system. According to Deloria (1973: 81), "The vast majority of tribal

religions have a connection with a particular place, be it a river, plateau, valley or other natural feature.” Even the most nomadic Native American groups revere “Mother Earth.” The Lakota, for example, are deeply attached to the land and particularly the Black Hills (Tuan 1976) and consider that place the “sum of all that was powerful, sacred and full of mystery” (Lazarus 1991).

Despite this very strong sense of place, land is not perceived as a possession. Therefore, natural resources are not considered a commodity to be exploited or preserved but rather a further extension of the “gift of life” granted to them by the spirits. For many Plains tribes, “all land was holy, and any selfish contention in regard to a holy thing would bring nothing but evil results” (Gilmore 1966: 95). Therefore, important resources, such as mineral waters and thermal springs used in curing, were to be accessible to all people. The only responsibility which the tribe had was to perform the correct ceremonies and they would be amply supplied with food, water and timber.

For example, to the Pueblo Indians, the Anglo’s attempts to control nature (water) through digging wells or building reservoirs was anathema. In the Pueblo religion, “all the earth, sky, and water was their shrine” (DuMars et al. 1984:8). Water in particular was an integral part of the shrine and should not be changed. The proper response in the case of environmental fluctuation--drought or flood--was to wait for the cycle to complete itself. This belief in the balance of nature is frequently noted in a number of Native American philosophies. Gilmore (1966) states that the destruction of the environmental balance and loss of world symmetry was difficult for Plains Indians to endure.

One famous case of a Native American group’s attempt to take water “out of use” is that of the Taos Indians and Blue Lake in New Mexico. The lake had long been a sacred spot, the church for the inhabitants of Taos Pueblo. It is also believed to be the home of supernatural spirits and of some ancestors (Ellis and Dunham 1974). The controversy over the ownership of and access to the Blue Lake began in 1906, when President Theodore Roosevelt placed the area east of Taos Pueblo, known as “the Bowl,” under the administration of the Forest Service. The stated goal was the protection of a national wildland. However, this did not stop the use of the land and the government issued grazing permits as well as attempted to develop the area for tourism.

The use of the land in this manner, which despoiled the most sacred of sites, was unacceptable to the Taos Indians. They refused monetary compensation for the land when it was awarded to them by the Indian Claims Commission in 1965 and took their case to Congress where an act was passed adding the land to their reservation in 1970 (Sando 1976).

The Clash of Cultures

“When it comes to distributing water in the West,” according to Fradkin (1984: 155), “it has been the politically strong and aggressive who get it.” While true, the statement does not reveal the source of that strength and aggression. The idea of economic utility could not accommodate societies which, according to Sack (1980), map their environments by a variety of special locations or holy places, such as water sources and camp sites. What Natives regarded as a place of great sanctity, in which the working of the Great Spirit or Great Mystery could be felt, European settlers considered as territory to be subdued (Booth and Jacobs 1990: 32).

These differences in land-use philosophy have rarely if ever been appreciated by the political or legal systems of the United States. As stated by Williams (1986: 265), “European derived legal thought has sought to erase the difference presented by the Indian in order to sustain its own discursive context: European norms and value structures.” One of the primary components of the American ideology has been the need for the intensive use or improvement of land and its resources of which water is a part.

The tension between white and Indian thought and, consequently, between notions of property rights, goes back at least to Colonial times when, to the colonists, “Indians appeared to squander the resources that were available to them. Indian poverty was the result of Indian waste: *underused* land, *underused* natural abundance, *underused* human labor” (Cronon 1983: 56; emphasis added). And, following the idea that “savage” peoples did not have the same legal status and rights as “civilized” peoples, land could justifiably be appropriated. In addition, the Biblically-based imperative to “till the earth” made the apparent “underuse” of land by Native Americans morally untenable. The westward movement in the nineteenth century was

motivated by the ideals of development, progress, and prosperity; it was unthinkable that regressive attitudes, even in the name of religion, should stand in the way of the greater good (Gordon 1985). For whites, the Indian's perceived unwillingness to work the land was the cause of the Native's decline and so it was right that an "inferior" race be displaced (Dippie 1982). This philosophy carried over into the realm of law, which is derived from a worldview of progress and development and of the obligation to assimilate other cultures to that worldview (Williams 1986).

For Native Americans, the useful and the sacred are intermingled in their subsistence economy. Altering the local environment would mean perturbations in the rest of the system and the possible disappearance of needed resources. The difference between European and Indian land-use philosophy can be illustrated in the detrimental impact of various developmental projects intended to improve Indian land. One example of the conflict between white and Indian land use is the Pick-Sloan Plan developed by the Army Corps of Engineers and the Bureau of Reclamation in 1944. The purpose of the project was primarily for flood control and irrigation, but the dams would also provide hydroelectric power, navigation, recreation, and improved water supplies. More than 202,000 acres of Sioux land on five reservations were flooded by dams on the Missouri. The rising water managed to destroy almost all of the reservation's timber and 75% of the areas containing wild plant and animal resources (Lawson 1982). In addition to the loss of important resources in the way of food, medicines and building supplies, the loss of land had negative physiological effects as the Sioux "hated to give up their land and seek unfamiliar places to live" (Lawson 1982: 26).

Clearly, development that results in the destruction or radical alteration of Indian land will affect the sacred, whether in general terms of relationships with the Great Mystery or in particular in terms of site-specific rituals. Projects like Pick-Sloan have often been planned and implemented without the consent of Native Americans. Now, however, rather than placidly surrendering their land in the name of progress, Native Americans are becoming more active in challenging projects that might profane the sacred. The intrusion of progress into sacred lands is resisted when it is clear the project

will “undermine the religious power of sacred sites, inhibit communication with spirits, prevent the collection of healing herbs, and even kill tribal deities” (Gordon 1985: 1448).

The Case Law on Native American Water Rights

With respect to water law, Brown and Ingram (1987) argued that the development of water in the West must come to terms with the concerns of Native Americans. Such a reconciliation of interests will not be easy since, in Williams' (1986: 222) terms, “the white man’s law denies respect to the vision of the American Indian.” As Native Americans try to reassert their rights, the remedial action does not necessarily lead to a happy result, for either of the parties or environmental values. As Brown and Ingram (1987: 5) noted, “The consequence of the tribes having been left out of past water development decisions is the increasingly costly and timely negotiations over Indian water rights that currently clog the courts and political arena.” The claims and counterclaims that have come before the courts, on the surface, do not present a coherent picture.

The following analysis looks at cases involving Native American water rights with special emphasis on the Great Plains, to see if there is an indication of any capacity on the part of judicial policymakers to incorporate those “fragile values” into decisions affecting the environment. State courts have not been heavily involved in this area so most attention is directed toward the federal judiciary.

The leading case is *United States v. Winters*, (207 U.S. 564), decided by the US Supreme Court in 1908. This landmark decision upheld a circuit court injunction against non-Native Americans diverting water from the Fort Belknap Reservation in Montana. The conclusion was that Native Americans on reserved lands have rights to the water appurtenant to the land. Specifically, the court stated:

The government is asserting the rights of the Indians. But extremes need not be taken into account. By a rule of interpretation of agreements and treaties with the Indians, ambiguities

occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support purpose of the agreement and the other impair or defeat it. On account of their relations to the government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government, even if it could be supposed they had the intelligence to foresee "double sense" which might some time be urged against them.(577)

The case was a strong victory for Indians. The subject matter, ironically, involved a claim for the use of irrigation water on the reservation, not for its protection from use. That use in turn was related to the federal government's policy of turning the Natives into peaceful agriculturalists.

Since *Winters*, Native Americans have shown a preference for pressing their claims before federal rather than state courts (Moore 1985: 767). The possibility of state involvement still exists, which might have serious policy ramifications. In *In re Adjudication of All Rights to Use Water*, (531 F. Supp. 449 [D.S.D.] 1982), South Dakota had passed a law authorizing the state to bring action for the general adjudication of the priority of water rights in the state. The circuit court stated that "The scope of the lawsuit is, in a word, 'enormous'" (451). *Amicus curiae* briefs were submitted on behalf of the Native Americans to protect their rights to the traditional use of water and the supremacy of the federal courts in this area. The court concluded:

Amici strenuously argue that the mere presence of substantial Indian rights in this case places an obligation on this court to retain jurisdiction. Amicus Rosebud Sioux Tribe devotes its entire brief to a discussion of the historical role of the federal courts in protecting Indian rights. It is alleged that the somewhat political nature of the lawsuit and what the Rosebud Sioux Tribe calls the "traditional hostility of state courts to Indian rights" makes it impossible for the Indian claimants to get a fair hearing anywhere

but in the federal court. . . . This court cannot agree with this position. (454)

Reluctant to settle the dispute, the court remanded the case to the state court. The federal case indicated a setback to the Native American position on preserving a traditional use of water and, consequently, traditional lifestyles. Before the case came back to the state, it was settled out of court.

Another case, *Joint Board of Control of Flathead Mission v. The United States (Bureau of Indian Affairs and the Confederated Salish and Kootenai Tribes of the Flathead Reservation)*, (646 F. Supp. 410 [D. Mont.] 1986), is one in which Native American rights were secondary to traditional water uses. The BIA was challenged by Montana irrigators after it had allocated water to protect traditional tribal fisheries. The court ruled that the rights of the irrigators could not be ignored; it was reluctant to accept traditional tribal uses over development claims. Clearly, Native American “use” could be challenged by irrigation, a more acceptable form of use.

Two final cases represent less significant concerns than the one discussed above. In *Choctaw Nation v. Cherokee Nation*, (393 F. Supp. 244 [E.D. OK] 1975), the conflict focused on a boundary dispute in the Arkansas River. Of importance to this study is the court’s treatment of Native Americans as “nations” in resolving the dispute. The sovereignty of Native Americans has been conveniently disregarded in cases involving whites and the tribes. In this case, however, the court claimed, “in truth and in fact, [the tribes] were political bodies which were treated as independent nations sovereign in many of their rights” (243). If this view had been adopted in other cases, Native Americans could use their sovereignty to protect traditional values.

The final case from the Great Plains, *Kiowa Tribe v. City of Lawton*, (644 F. Supp. 1051 [W.D. OK] 1986), represents an instance in which Native Americans had limited success. The city of Lawton promised free water to the Kiowa Tribe. The court upheld the agreement, but only “for so long as the Ft. Sill Indian Boarding School is provided” (1055). The decision cannot be broadly related to lifestyle but is merely a victory for a government program related to Native Americans.

The Message from Other Courts

Wilkinson (1987: 121) contended that “water--the sine qua non of any society in the dry West--will be available in sufficient quantities for nearly all tribes.” He based his conclusion on the belief that the judges cannot shake their commitment to old contracts and treaties, “typically conducted in but a few days on hot, dry plains between midlevel federal bureaucrats and seemingly rag tag Indian leaders” (1987: 121). The courts are willing to honor these obscure agreements only as tangible property rights. That is, the judges are not interested in intrinsic values related to Indian water but rather in the letter of the law, and that letter is not necessarily hospitable to the sacred.

As the pressure for development demands a more efficient use of land and water, Native American culture continues to be threatened. Justice Brennan, in his dissent in *Lyng v. Northwest Indian Cemetery Protection Association*, (485 U.S. 439, 1988), lamented the loss of real protection to Native American values.

I find it difficult, however, to imagine conduct more insensitive to religious needs than the Government’s determination to build a marginally useful road in the face of uncontradicted evidence that the road will render the practice of respondent’s religion impossible. Nor do I believe that the respondents will derive any solace from the knowledge that although the practice of their religion will become “more difficult” as a result of the Government’s actions, they remain free to maintain their religious beliefs. Given today’s ruling, that freedom amounts to nothing more than the right to believe that their religion will not be destroyed. The safeguarding of such a hollow freedom not only makes a mockery of the policy of the United States to protect and preserve for Native Americans their inherent right of freedom to believe, express, and exercise their traditional religions, . . . it utterly fails to accord with the dictates of the First Amendment. (477)

The case was a setback for Native American rights and confirms Gordon's (1985: 1447) point that First Amendment claims are subordinate to the need for development.

The lesson to be drawn from circuit court cases outside the Great Plains is that Native American values are not necessarily protected. Two federal cases illustrate the precarious position of traditional concepts. *Badoni v. Higginson*, (455 F. Supp. 641 [D. Utah] 1977), concerned the Navajo request for an injunction to stop tourist activity in the area of Rainbow Bridge National Monument. The Navajos sought the injunction to prevent the destruction of their gods and sacred sites. Ceremonies were traditionally performed in the Bridge Canyon area and water from the springs were used for religious purposes. Tourism, the tribe contended, led to desecration of the holy places as well as "the drowning of entities recognized as gods by the plaintiffs" (644). The religious claims challenged the potential for economic growth. Acknowledging that the First Amendment rights constituted "a unique challenge to the projects and actions of the defendants," the court nevertheless concluded that tourism was not a threat to the Navajo's right to the free exercise of their religion (645).

The case of *Sequoyah v. Tennessee Valley Authority*, (480 F. Supp. 608 [E.D. Tenn.] 1979), represents another case in which the First Amendment argument failed for Native Americans. The Sequoyah sought injunctive relief against impoundment of the Tellico Reservoir on the Little Tennessee River. They argued that the flooding would infringe on their constitutional and statutory rights to exercise freely their religion. The court held that the interest of the government outweighed that of the Sequoyas. The court ruled:

The court has been cited to no case that ingrains the free exercise clause with property rights. The free exercise clause is not a license in itself to enter property, government-owned or otherwise, to which religious practitioners have no other legal right to access. Since plaintiff's claim no other legal property interest in the land in question . . . a free exercise claim is not stated here. (612)

Once again, property interests outweighed religious claims, although the court indicated that if one could link a property right to the First Amendment, a chance for success might exist.

Conclusion

The most surprising finding of this study was the paucity of litigation involving Native American water rights on the Great Plains. But if we add these few cases to others from different regions of the country, we may make some tentative conclusions. If the courts are major actors in policymaking in an area such as the environment, can we depend on them to integrate into the process those values that are not derived from economic calculation? Can fragile values, such as those represented by the Native American vision of the sanctity of nature, be incorporated within a policy? Our reading of the cases does not encourage us to believe the courts have the capability to protect those values. There is little romance in the law, only the gritty details of particular cases. The courts may be willing to protect Native American water rights because of ancient treaties or policies long abandoned by the federal government. They are not likely to attribute to a resource such as water any characteristics that are alien to white thinking, even if a case involves rights guaranteed by the First Amendment.

The reserved water rights of Native Americans still represent a formidable source of power, especially in the Western states that use the doctrine of prior appropriation. Reservations may therefore have a priority right to water over non-Indians and, as water becomes more critical to future development in the West, Native Americans will have to be heard (Hundley 1985). But courts are not the best listeners and it seems unlikely American law will change to a set of rules that, in Williams' (1986: 289) ideal, "would permit the free play of many different visions in the political and legal discourses of the world." To protect their traditional values, Native Americans are better advised to emphasize the more politically oriented branches of government, and particularly the legislature. It may be that native culture can show whites "the path to a sustainable Western environmental consciousness" (Booth

and Jacobs 1990: 43). But if that consciousness is to find its way into public policy, it will have to be expressed in legislation and not in judicial decisions.

Some might dispute the advice to take the legislative route to protecting fragile values especially when, "in a society out of balance with its context, protective devices for preserving the remnants of ecological balance, such as wilderness or multiple-use forests, remain virtually under threat" (M'Gonigle 1986: 273). To be sure, the federal government has not been especially concerned about environmental values when the reserved rights on its land are involved (Abrams 1987). However, reeducating the legislature may be easier and more productive than hoping for a transformation of the American legal mind. While it is true that Indians have, over the years, won some famous victories in the courts, it is not clear, we conclude, that Native American values have been promoted.

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