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# INDIAN TRIBES IN THE WATER MARKETING ARENA

*Steven J. Shupe\**

## *Introduction: Controlling Tribal Water Resources*

During the latter half of the 19th century, land-related issues were central to controversies between Indian tribes and non-Indians moving into the western United States. In this era, Indian tribes asserted their rights—both in legal arenas and in the countryside—to protect lands that were critical to their survival. Although controversies over defining land-related rights remain important to many tribes, in the latter part of the 20th century the primary resource focus has shifted. Today, *water* issues are of fundamental importance in Indian Country. By necessity, tribal governments are fighting to assert and protect their rights to water, as both tribal and off-reservation communities, industries, and other water-using activities continue to expand.

A number of key questions have confronted tribal governments in developing their strategies in this era of water resource conflict. One question hotly debated among tribal leaders, particularly in the 1970s, was whether to assert their reserved water rights legally or to leave them unquantified. Another strategic issue involves whether to sit down at negotiation tables with state and federal interests to resolve water conflicts, or to litigate. More recently, the matter of leasing Indian water entitlements has been debated among tribal leaders who want economic development, but who are concerned about the potential effects of water marketing.

In looking at these strategic questions, it is clear that there is no single answer applicable to all Indian tribes. However, one central theme emerges in tribal discussions and actions related to precious water resources. That theme is *control*. In formulating its water resource strategy, each tribe wants to maximize its control over water in order to promote tribal goals and to prevent off-reservation interests from asserting pressures that

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may undermine those goals.<sup>1</sup> Negotiation, litigation, quantification, marketing, and other decisions are weighed in relationship to how they affect a tribe's ability to control its water resources, both in the present and future.

Control over water resources can be asserted by tribal governments in a number of ways. Jurisdictional control is promoted through the development of comprehensive water codes<sup>2</sup> and other regulatory programs for water administration and quality protection. Actual use of reservation waters by a tribe and its members is another straightforward means of control. Where a tribe lacks the financial resources to put the water to beneficial use itself, it may be able to increase control through formulating water marketing contracts for leasing its entitlements.

Indian tribes understand the potential importance of water leasing, not only in terms of asserting control, but also for economic development. Many tribal efforts have been made in the past months to evaluate various water marketing alternatives in order to generate capital. To assist tribal leaders in assessing their options, this article provides a look at water marketing and the issues involving tribal participation. The first section begins with a comprehensive overview of the nature and extent of water marketing in the western United States. The second section then moves into an analysis of Indian water leasing. This section describes both the legal setting underlying tribal water marketing as well as recent efforts to obtain congressional approval for off-reservation leasing. The article concludes with a summary of the issues and controversies that demand resolution in the near future.

### *Overview of Water Marketing*

The era of water allocation is coming to a close in the western United States. Although unappropriated streamflows for new

1. The importance of *control* does not imply that tribal water management should proceed completely independent of state management efforts. Effective water management and control by a tribe often is enhanced by coordinating with neighboring state and tribal governments. Water is a mobile resource and knows no jurisdictional boundaries. Efficient management, particularly the protection of water quality, actually may depend upon intergovernmental cooperation in many instances.

2. A number of tribal water codes and ordinances have been enacted in recent years to administer, control, and protect water resources on Indian reservations. Several tribal governments now have water resource offices that are responsible for implementing the associated water management programs. See Shupe, *Water in Indian Country: From Paper Rights to a Managed Resource*, 57 U. COLO. L. REV. 561, 570-74 (1986).

uses persist in a few locales, little additional supply is available in the West simply from constructing new dams, wells, and diversions. Also, where new supplies can be developed or imported, the projects are usually prohibitively costly without federal funding—and the days of easy federal money for water projects are over.<sup>3</sup> In addition, contemporary concerns over environmental protection can make it too costly or impractical to develop new water supplies. As a result, the most feasible option for meeting new water demands for many users has become water marketing—the transfer of existing water supplies or entitlements to new uses.

An understanding of the water reallocation era begins with recognizing the many types of transactions that fall under the category of water marketing. The most important distinction is the difference between the sale of *water rights* and the sale of *water*. Someone who owns an entitlement to use water, such as a senior irrigation rights holder, may market either the permanent right to annually divert water (*i.e.*, a sale of water rights) or simply lease the water to another user for a fixed period of time (*i.e.*, a sale of water). In addition, water marketing may include a number of innovative transactions in which parties arrange dry-year options, conservation credits, exchanges of supply, and water rights portfolios. Each of these types of water marketing, as further described in the following sections, has emerged in recent years throughout the West.

### *The Permanent Sale of Water Rights*

The sale of water rights has become a common feature of the western landscape in recent years. Particularly during the recent slump in the agricultural economy, many farmers found that they could make more money by selling their water rights than by raising irrigated crops. Buyers have been primarily urban developers and municipalities who need additional supplies to meet projected growth.<sup>4</sup> Also, investors who perceive that the

3. Up until the 1970's ample funding was generally available for federal water projects under the Reclamation Act of 1902, 43 U.S.C. § 391. Beginning with the Carter Administration, new water projects have been rarely pursued, and even those already authorized by Congress have run into snags. The federal government now requires significant contributions (called "cost sharing") from states and local sponsors for the construction of new dams and distribution systems.

4. When cities or developers buy water rights for future needs, they usually lease the associated water back to the seller for continued irrigation. Under laws of the western states, if water rights are no longer being put to beneficial use, they risk being forfeited and permanently lost. Typical statutes provide that rights are forfeited if the associated water is not used beneficially for a period of from three to five years. See generally Shupe, *Waste in Western Water Law: A Blueprint for Change*, 61 OR. L. REV. 483 (1982).

price of water rights will rise in the future have entered the market as buyers in recent years. These investors typically lease the water back to irrigators until the right is resold at a profit to a city or other end user. Purchases of water rights to maintain flows in important fishing streams and recreational rivers has also begun occurring on a small scale, with major growth in this sector expected. Industries and energy companies do not currently represent a major buyer category due to the recent decrease in growth within these sectors. A rebound in these industries, however, is also expected to stimulate additional water marketing pressures.

More than \$100 million dollars have been spent on western water rights over the past two years, primarily in Colorado, Arizona, and other areas of the Southwest.<sup>5</sup> In Colorado, this activity has been driven by cities and developers along the Front Range (e.g., Denver, Colorado Springs, Fort Collins) that have purchased agricultural water rights to meet growing water demands. Prices range from \$1,000 per acre-foot<sup>6</sup> (ac-ft) of water rights north of Denver to more than \$5,000/ac-ft in some locales with limited alternative supplies. In Arizona, water rights are selling from around \$1,000/ac-ft in the Phoenix and Tucson areas, with additional major purchases of "water ranches"—agricultural land purchased solely for the associated water entitlement—occurring in the rural areas of the state. Both investors and cities who have recently bought water ranches plan to transport the associated water away from the rural areas to meet future urban demands.

The area around Reno, Sparks, and Carson City in western Nevada is also experiencing an active market in water rights. Here, senior irrigation rights are purchased between \$2,000 and \$3,000/ac-ft by developers and municipal water purveyors facing impending water shortages. Prices for water rights are appreciably lower in central Utah where the immediate demand for new supplies is not so great. More than 100,000 ac-ft of water rights have been purchased since 1987 in the Salt Lake City area at prices between \$160 and \$250/ac-ft of permanent water entitle-

5. The data and recent examples of water marketing are taken from 1987 and 1988 issues of *Water Market Update*, a monthly newsletter published by Shupe & Associates, Inc. in Santa Fe, New Mexico.

6. An acre-foot (ac-ft), equal to 325,829 gallons, is the quantity of water that covers one acre of land to a depth of one foot. One ac-ft is sufficient to serve the in-house and lawn-watering needs of one to two average homes in the West. During a May through September growing season, irrigated crops typically consume between one and three ac-ft/acre of applied water.

ment. Prices rise to more than \$1,000/ac-ft for water rights in New Mexico and southern Nevada where purchases occur regularly but generally in small volumes (less than 100 ac-ft per transaction).

Some regions are noteworthy for their absence of active markets for water rights. In the Pacific Northwest and the Missouri River basin, few water rights are sold because available supplies exceed demands in most locales.<sup>7</sup> In these regions, new users usually can appropriate additional water rights or lease a long-term supply from a reservoir owner with surplus quantities. California is another area that does not support significant water rights sales, even though it is facing water shortages. A majority of the supply in California is delivered under contract with state and federal water projects, with relatively few privately held water rights in existence that can be freely and securely marketed. This has made California a ripe breeding ground for water leases and innovative exchange arrangements.

### *The Leasing of Water*

Water leasing occurs when a user buys a fixed quantity of water over a specified period of time, rather than purchasing a permanent right. Leasing often arises during drought years when certain users run low on existing supplies and buy water from others to meet demands through the dry spell. For example, junior water users with orchards and other high value crops may buy water for the late irrigation season from neighboring alfalfa irrigators who hold senior rights. Leases can also be arranged for longer terms such as where an industry builds a plant with a 40-year life and purchases water from a reservoir owner through a 40-year lease to serve the plant.

Prices for water leased in various areas of the West cover a broad range. In Idaho, where farmers with surplus entitlements sell more than 100,000 ac-ft annually in formal water banks sanctioned by the state, 1988 prices ranged from \$2.50 to \$5.50/ac-ft for a one-time use of the water during the irrigation season. However, these prices, set by the water banks' governing boards, are well below actual market value. During dry years, water in these areas of Idaho sold outside the bank for more than \$50/

7. Even though few water rights transactions occur in the Pacific Northwest, regional sales are expected to pick up in the near future. The need to enhance salmon runs to meet Indian treaty rights, obligations owed to Canada, and local recreational and commercial fishing demands creates pressures to transfer existing irrigation rights to instream flow rights.

ac-ft. The only other government-sanctioned water bank in the West operates in the Los Angeles area where groundwater is leased on a yearly basis at prices between \$100 and \$240/ac-ft.

Owners of reservoirs with excess water often enter leasing arrangements with local water users. For example, the federal Bureau of Reclamation offered in 1988 to sell water from its Green Mountain Reservoir in western Colorado at prices of \$6/ac-ft for agricultural use, \$10/ac-ft for municipal use, and up to \$80/ac-ft for industrial use. Also in 1988, the Central Arizona Project leased surplus waters to Phoenix area customers at prices ranging from \$35 to \$82/ac-ft. Another recent lease arrangement found the California Department of Fish and Game purchasing 45,000 ac-ft of reservoir water for \$5.64/ac-ft to release into the Stanislaus River to assist migrating salmon.<sup>8</sup>

### *Innovative Marketing Arrangements*

A number of water marketing arrangements that do not qualify as either straight leases of water or water rights purchases have been explored by parties in recent years. These innovative arrangements include options to buy water only during drought years, funding water conservation measures in return for the salvaged water, exchanges of supply between users, and investments in water rights portfolios.

#### *The Dry-Year Option*

Many cities and other users have sufficient water to meet future demands in all but the driest years. As a result, several municipalities have assessed entering option agreements with irrigators to purchase their senior water during dry years only. This type of arrangement allows the existing water rights holders to continue farming in most years, and gives the city a cost-effective way to firm up its supply.

Such an arrangement was signed a number of years ago by a Utah city and a nearby irrigator. The city paid the irrigator \$25,000 for entering the option arrangement for a 25-year period and, during those dry years in which the city takes the water supply, it will give the farmer \$1,000 plus the value of the quantity of hay lost as a result of the arrangement. On a much

8. The Department of Fish and Game is getting additional benefit from the leased water. After being released to assist the upstream migration of adult salmon, the water was diverted into duck ponds along the San Joaquin River to assist waterfowl during the winter. In the spring, the water will be discharged back to the river to aid the out-migration of juvenile salmon to the ocean. WATER MARKET UPDATE, Nov. 1988, at 5.

larger scale, the Metropolitan Water District of Southern California (MWD) in 1987 offered a similar arrangement to farmers in the Palo Verde Irrigation District. MWD offered \$200 for each acre placed in the program, and \$400/acre each time it asserted its option to transfer the water during dry years from irrigation to municipal use. MWD hoped to divert 4.6 ac-ft of water from each acre of land placed in the option program, but the irrigators declined the offer. During the summer of 1988, the East Bay Municipal Water District in northern California unsuccessfully offered irrigators a dry-year option based upon a payment for the water at \$50/ac-ft, a price considered to fall well below fair market value.

### *Conservation Credits*

Another water marketing alternative being explored by a number of parties is the financing of irrigation improvements in exchange for the conserved water. In Wyoming, the city of Casper paid for upgrading irrigation systems in the Casper-Alcova Irrigation District in order to salvage several thousand a ac-ft of water annually from the district for new municipal use. Also, MWD has begun a pilot program to salvage Colorado River water imported to southern California irrigators in leaky canals. Through a multi-million dollar canal lining project, which includes the participation of the Coachella Valley Water District, MWD hopes to conserve up to 100,000 ac-ft annually for municipal use. Additional water conservation credit efforts are currently under serious consideration in other California irrigation districts,<sup>9</sup> and in Oregon and Washington.

### *Exchanges of Supply*

Water marketing is also taking place where a user trades water and some money in exchange for another user's supply that is more suitable. Motivations for these exchanges may be that the alternative supply is of higher quality and saves on treatment costs, or that it can be transported through existing diversion networks thus precluding the need to construct new canals. This latter type of exchange is relatively common in the Colorado Front Range where cities buy water rights in adjacent basins and exchange them for water that can be piped through existing transmountain diversion systems.

9. In December 1988, MWD agreed to an arrangement with the Imperial Irrigation District of south-central California to fund \$92 million of irrigation improvements to conserve water. The parties expect that the measures will allow MWD to divert 100,000 ac-ft/year of conserved water to meet growing municipal water demands.



The California drought of 1988 has spurred exploration of a water exchange in the San Francisco region in order to protect the quality of supplies to 1.1 million customers of the East Bay Municipal Utility District (EBMUD). EBMUD has proposed delivering 60,000 ac-ft of low-quality water from the San Joaquin Valley delta, which is influenced by salt water from the San Francisco Bay, to local irrigators in exchange for the irrigators' 60,000 ac-ft entitlement to pure water flowing from the Sierra Nevada mountains down the Mokelumne River. Although the state disapproved the plan in August 1988 (due primarily to environmental concerns), EBMUD is continuing to pursue the exchange concept.<sup>10</sup>

Another type of exchange initiated in California, with potential application elsewhere, is trading surplus surface waters in wet years for more secure supplies during droughts. MWD and other entities in California are exploring this option by offering to recharge surplus surface waters in agricultural districts (*i.e.*, putting the surplus water into the groundwater table under the district) during wet years in exchange for diverting the local irrigation rights during droughts. In subsequent dry years in which MWD diverts the irrigation rights for municipal use, the farmers would pump the underlying water that MWD had previously recharged and exchanged with them.

### *Water Investment Portfolios*

A further recent development in the water marketing field involves water investment portfolios. Investors in water rights have been active in local water markets for a number of years, primarily in Colorado. These investors have purchased water rights in expectation that they will be able to sell them to end users (*i.e.*, cities, industries, developers) at a profit in the future. A new twist on this concept has arisen recently wherein a group of investors will pool their money to purchase a diverse portfolio of water rights. The manager of the portfolio, acting on behalf of the investors, may acquire groundwater entitlements, surface rights, irrigation district shares, reservoir stock, and other water entitlements that appear to be secure water rights and that are expected to appreciate in value.

The first of these portfolios was begun in 1985 by a water rights manager who raised \$35 million from East Coast investors to buy Colorado water rights.<sup>11</sup> A second fund of \$20 million

10. WATER MARKET UPDATE, Sept. 1988, at 14.

11. WATER MARKET UPDATE, Jan. 1987, at 12.

was started by the same sponsor in 1988 for purchase of water rights in several southwestern states. Also, a number of other managers and investors are currently exploring the portfolio concept as a means of entering the western water market.

Investors also have recently been approached by promoters in regards to investing in Indian water rights. One concept involves finding an Indian tribe that will establish a tribal water corporation in which the investors could buy stock. The plan is designed to (1) provide the tribe with an immediate influx of cash from the stock sale, and (2) give investors a long-term return on their money when the tribal corporation subsequently leases the senior Indian waters to off-reservation cities and other users. This concept, as well as water marketing in general, raises a number of issues that are generating controversy in the West.

### *Major Issues and Controversies*

#### *Third Party Effects and the Public Interest*

Under western state law, water or water rights cannot be transferred if such change would adversely affect other water users. Few states, however, have implemented strong restrictions on transfers in order to prevent harm to the general public interest. This has created controversy, particularly in rural regions where entities are purchasing rights for transfer to metropolitan areas. Local residents fear that even a small amount of water moving out of agriculture to the cities will erode the local tax base, undermine the general economy, and alter the character of the rural community. Also, environmental advocates, although at times supportive of water marketing in instances where it precludes the need for new dams, want water transfers subordinated to the public interest in rivers, lakes, streams, and wetlands.

#### *Sale of Conserved Water*

The preceding legal tenet that water rights cannot be transferred to the detriment of existing users creates controversy over attempts to market conserved water. Should irrigators who line their canals and reduce seepage be allowed to market the salvaged water? The answer is generally "no" in most western states if other downstream users have diverted the seepage upon its return to the stream. But what if the seepage that is salvaged historically had been irretrievably lost and not reused by down-

stream appropriators?<sup>12</sup> Little certainty surrounds the answer to this question. Some western states consider the irretrievably lost water to be wasted, and the irrigator has no right to salvage and market it. Other states have seen that such a policy provides no incentive for conservation and thus have enacted statutes to allow the marketing of salvaged water. In passing such a statute in 1987, the Oregon Legislature decided that roughly twenty-five percent of the saved water should be dedicated back to the public to support flows needed for fish, wildlife, and other instream resources.<sup>13</sup>

### *Marketing Federally Supplied Waters*

The question of who gets the benefits of water transfers arises also in the context of federally supplied waters. Although many of the contracts that the Bureau of Reclamation has with irrigators stipulate that Bureau water cannot be marketed for private profit, other contracts are silent on this issue. Should private irrigators who historically have benefited from the federally subsidized water now be allowed to make a profit by selling it to municipalities, or should all the additional marketing revenues go back to the U.S. treasury? Or perhaps it would be most equitable to earmark the additional profits to support Indian water projects—a sector of the West that generally was excluded from the benefits of the 1902 Reclamation Act.<sup>14</sup> Different people have varying opinions on this issue, opinions that promise to generate continuing controversy until the United States takes a definite position on the marketing of federally supplied water.

On December 16, 1988, the Department of the Interior<sup>15</sup> took a step toward clarifying the federal position on water marketing. It issued a policy statement containing seven principles that were generally supportive of private marketing of federally supplied waters.<sup>16</sup> In the preamble to the principles, the Department also

12. This is the type of situation associated with MWD'S water salvage efforts in the Coachella and Imperial valleys. Water lost from leaky canals and through inefficient practices flows into the saline Salton Sea and cannot be rediverted for beneficial use. In 1985, the state of California enacted a statute explicitly allowing the sale of salvaged water in such cases. See CAL. WATER CODE § 1011 (Deering 1986).

13. OR. REV. STAT. § 537.470(3) (1987).

14. See *infra* note 21 and accompanying text.

15. The Bureau of Reclamation, which is the primary agency for developing and operating federally sponsored western water projects, lies within the Department of the Interior.

16. The entire text of the seven principles can be found in WATER MARKET UPDATE, Jan. 1989, at 9.

stated its goal "to afford maximum flexibility to State, Tribal, and local entities to arrive at mutually agreeable solutions to their water resource problems and demands."<sup>17</sup>

### *The Role of State Governments*

State governments are struggling with identifying the appropriate positions and roles they should take in this era of water reallocation. Some have adopted a passive role, allowing water marketing simply to unfold under existing laws and policies framed in an earlier time. Others have considered laws to constrain water marketing in order to protect rural areas, although few actual restrictions have been implemented. On the other hand, many western states have taken a supportive role and are trying to facilitate water marketing by reducing costly red tape (*i.e.*, legal and engineering fees) in transferring water rights to new uses.

A handful of western states have taken this supportive role a step further and have considered entering the water market as participants. New Mexico is assessing appropriating all remaining groundwater in the state and marketing it to new users. South Dakota and Nebraska also have looked at their role as potential sellers in regional markets. Montana actually enacted a statute in 1985 mandating that any new major water appropriations must be leased from the state.<sup>18</sup>

### *Interstate Marketing*

A major motivation behind states like Montana, Nebraska, and New Mexico wanting to enter the water market as participants stems from their desire to maintain control over interstate water transfers. In 1982, the U.S. Supreme Court struck down Nebraska's anti-export statute, ruling that water is an article in interstate commerce that states cannot unreasonably regulate.<sup>19</sup> This opened up private opportunities for regional water marketing, but it also created a plethora of concerns for western state officials who wish to prevent users from appropriating, buying, or otherwise transporting water across state boundaries.

17. *Id.*

18. MONT. CODE ANN. § 85-2-141 (1988). Major appropriations are defined as those exceeding an annual diversion of 4,000 ac-ft or a diversion rate of greater than 5.5 cubic feet per second. *Id.* at § 85-2-141(6). To date, no leasing by the state of Montana has occurred primarily because major new local water demands waned with the decline in the coal industry.

19. *Sporhase v. Nebraska*, 458 U.S. 941, 953 (1982).

The issues are complicated further by the fact that a number of major western river systems are allocated by interstate compact and court decrees among the states that utilize the river. Many officials argue that these compacts prevent effective water marketing among interstate users, particularly in the Colorado River basin where marketing pressures are rising. Others disagree and are assessing ways to market water between states in basins governed by compacts, such as from western Colorado to San Diego, California, and from northern New Mexico to El Paso, Texas. The complexity of interstate transfers grows even deeper in those river basins that are overlaid by what many consider the toughest controversy in the new era of reallocation—Indian water marketing.

### *The Marketing of Indian Water*

The marketing of water by Indian tribes in the western United States has become a divisive issue both on and off the reservations. Legal ambiguities leave the issues clouded, as do many social and economic questions associated with the transfer of tribal waters to non-Indian use. On one hand, many entities and individuals favor the marketing of Indian water to off-reservation users. For example, a number of Indian tribes perceive the leasing of their water to off-reservation users as a short-term means of raising capital for long-term growth. Many non-Indians with growing water demands also support Indian water leasing as a means to bring certainty into their future supplies and as a useful vehicle for arriving at water rights settlements with tribes. In addition, federal officials see Indian water marketing as a way for tribes to raise capital to augment the money available from a tight federal budget.

On the other hand, strong opposition exists in the West against Indian water marketing. Many Indian people fear that leasing water to off-reservation users will ultimately lead to the loss of their water rights. Others feel that the very concept of treating water as a commodity for sale is wrong. A number of western state governments and non-Indian water users are also adamantly opposed to off-reservation leasing. They fear that they may end up having to pay for water in those areas where tribes have legal claims to water resources, but where off-reservation users historically have been the ones using the supplies. Worse yet, they fear that off-reservation water marketing would enable the tribes to reallocate water from historic uses to new users that are willing to pay the tribes' price.

*The Legal and Institutional Setting*

The pressures and opportunities to market Indian water arise from the fact that Indian tribes legally are entitled to large water rights superior in priority to most non-Indian users in the West.<sup>20</sup> In many instances, the paper entitlement to water under the *Winters v. United States* doctrine has not been translated into actual supplies on the reservations. During the major water development era in the West set in motion by the 1902 Reclamation Act, Indian water rights essentially were ignored. According to the prestigious National Water Commission:

With few exceptions, the [Reclamation] projects were planned and built by the federal government without any attempt to define, let alone protect, the prior rights that Indian tribes might have had in the water used for the projects. . . . In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for the use on the Reservations it set aside for them is one of the sorrier chapters.<sup>21</sup>

In the current era in which easy federal funding of major water projects has dried up, tribes have difficulty in developing new on-reservation irrigation activities and other water-intensive projects for stimulating economic growth. Consequently, the most feasible alternative for obtaining on-reservation benefits from Indian water rights often may involve the marketing of water to off-reservation users. But can tribal governments market their water to non-Indians under existing law?

The legal framework that addresses this issue has its roots in the 18th century. A series of enactments dating back to 1790, called the Indian Nonintercourse Acts, invalidates the transfer of land by Indian nations and tribes unless Congress has authorized the transaction.<sup>22</sup> These acts were designed to prevent private individuals, states, and local entities from purchasing land from Indian tribes independently of federal policy and control. This restriction spills over into water resources, since "land" is interpreted under the Nonintercourse Acts to include the resources associated with land. The question then arises as to whether Congress subsequently has given its approval to tribal water marketing to non-Indian users.

20. *Winters v. United States*, 207 U.S. 564 (1908).

21. U.S. NAT'L WATER COMMISSION, *WATER POLICIES FOR THE FUTURE—FINAL REPORT TO THE PRESIDENT AND CONGRESS OF THE UNITED STATES* 474 (1973).

22. 25 U.S.C. § 177.

The answer to this question begins with a 1955 federal statute<sup>23</sup> that delegates to the Secretary of the Interior the authority to approve leases of Indian land. This statute is interpreted as fulfilling the congressional consent requirement of the Nonintercourse Acts vis-a-vis leasing land to non-Indians. Moreover, leases of reservation lands to non-Indians under this authority have included the use of tribal waters to serve the purposes of the lease. By interpreting "land" in the 1955 Act to include water resources, the Secretary also has approved the outright leasing of tribal water to non-Indians for on-reservation use. For example, the Navajo and Hopi tribes lease several thousand ac-ft annually to the Peabody Coal Company for a slurry pipeline originating in their joint use area.<sup>24</sup>

Although congressional consent has been given to on-reservation water leasing, no such general approval is found for marketing water off the reservations. Although legal arguments may still be made that congressional consent is not needed, in practical terms no reputable water buyer would invest in an Indian water lease without the security of explicit congressional approval. Consequently, tribes that are pursuing off-reservation water marketing have gone to Congress to attempt to receive authorization.

### *Efforts in Congress*

Prior to October 1988, the Tohono O'odham Nation (formerly called the Papago Tribe) in southern Arizona was the only tribal government to have received explicit congressional authorization to market its water entitlements off reservation. Under the Southern Arizona Water Rights Settlement Act of 1982, the Tohono O'odham Nation may "sell, exchange, or temporarily dispose" of its water rights subject to approval by the Secretary of the Interior of specific contractual arrangements. Net proceeds from any such sale "shall be used for social or economic programs or for tribal administrative purposes which benefit" the nation.<sup>25</sup>

During 1987 and 1988, three major Indian water settlement bills were introduced in Congress, each with explicit provisions for off-reservation marketing. As described in the following

23. 25 U.S.C. § 415.

24. For additional details of this lease, see WATER MARKET UPDATE, Oct. 1987, at 7.

25. Southern Arizona Water Rights Settlement Act of 1982, Pub. L. 97-293, § 306(c)(2), 96 Stat. 1261, 1280.

subsections, major difficulties were encountered regarding the marketing provisions.

### *The San Luis Rey Act*

The San Luis Rey Indian Water Rights Settlement Act<sup>26</sup> was introduced into Congress in 1987 as Senate Bill 795, with the intent of providing extensive tribal opportunities to market water to off-reservation users in the San Diego, California area. Under the original language of the bill, the Indian Water Authority of the San Luis Rey Bands was empowered to "use, lease, sell, exchange, control, and manage" any of its water resources on or off the reservations.<sup>27</sup> In November 1987 committee hearings, this marketing authorization was restricted severely, limiting off-reservation water sales to only local irrigation entities based on a fixed price. Then, in June 1988, the explicit marketing opportunities were eliminated from the bill. Instead of receiving imported water and a right to market its water resources, the San Luis Rey Indian Bands agreed to language establishing a \$60 million tribal development fund. The Reagan Administration, however, threatened to veto the bill if it passed, due to the amount of federal money required under the new settlement.

After additional amendments were incorporated into the bill, the San Luis Rey Settlement Act was enacted by Congress in October 1988. The Act reduced the tribal development fund to \$30 million, but promised the bands an additional 16,000 ac-ft/yr of imported water. Also, although off-reservation water marketing is not included in the bill, the door was left open for the bands to receive compensation for their water. In the final settlement to be worked out among the parties, the bands may lease the 16,000 ac-ft of supplemental water to three specified local water entities.<sup>28</sup>

26. Pub. L. No. 100-675, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 4003.

27. S. 795, 100th Cong., 1st Sess., 133 CONG. REC. S3538-40, 3539 (1987).

28. The bill provides:

Such supplemental water shall be provided for use by the Bands on their reservation and the local entities in their service areas pursuant to the terms of the settlement agreement and shall be delivered at locations, on a schedule and under the terms and conditions to be agreed upon by the Secretary of the Interior, the Indian Water Authority, the local entities and any agencies participating in the delivery of water. It may be exchanged for water from other sources for use on the bands' reservations or in the local entities' service areas.

San Luis Rey Indian Water Rights Settlement Act § 106(c).



*The Colorado Ute Settlement*

Off-reservation marketing provisions also proved controversial in the Colorado Ute Indian Water Rights Settlement Act.<sup>29</sup> The bill was introduced during mid-1987 to implement an agreement reached by the Ute Mountain Ute Tribe, Southern Ute Tribe, the states of Colorado and New Mexico, and local water interests to settle their water rights conflicts and to pursue construction of the \$500 million Animas-La Plata water supply project.<sup>30</sup> Section 5 of the Act provided that the tribes may sell, exchange, or lease their water, but limited the duration of a purchase contract to no more than 50 years. Also, any water marketing contract was made subject to approval by the Secretary of the Interior after determining whether the arrangement is "in the best interests of the tribe." In evaluating those interests, the Secretary shall consider the probable economic return as well as the potential environmental, societal, and cultural effects on the tribe. Finally, section 5 specifically prohibited the use of funds generated by any water contract for per capita payments to tribal members.<sup>31</sup>

Despite these restrictions, the marketing provisions proved too controversial to be palatable to congressional committee members. In April 1988, the Senate Select Committee on Indian Affairs eliminated the specific marketing provisions and replaced them with a simple waiver of the Indian Nonintercourse Acts. The waiver would remove any congressional restrictions on off-reservation marketing by the Colorado Ute tribes, but would leave issues unresolved regarding how interstate compacts, past court decisions, and other components of the law of the Colorado River might influence off-reservation leasing.<sup>32</sup>

On August 4, the Senate Committee on Energy and Natural Resources voted to maintain the waiver of the Nonintercourse Acts, but inserted additional language that proved troublesome to tribal advocates. The amendments provided that any Ute water marketed off-reservation would lose its character as a reserved water right and "shall become a Colorado State water right during use of that right off the reservation fully subject to State laws, Federal laws, interstate compacts, and interna-

29. Pub. L. No. 100-585, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2973.

30. H.R. 2642, 100th Cong., 1st Sess., 133 CONG. REC. H9343-55 (1987); S.1415, 100th Cong., 1st Sess., 133 CONG. REC. S8589-91 (1987).

31. H.R. 2642 § 5.

32. *Id.* § 5(a).

tional treaties.”<sup>33</sup> The committee report made clear that this language was intended to subject a leased water right to forfeiture for non-use<sup>34</sup> and other provisions of state law, even after the term of any lease agreement ended.

The committee report also contained language inserted by Senators McClure and Wallop equating Indian reserved water rights to federal reserved water rights. Their analysis contended that such rights arise solely in instances where lack of the water “would utterly defeat the purpose for which the lands were reserved.”<sup>35</sup> According to the senators, since water marketed off-reservation by definition is not needed for on-reservation purposes, it must lose its reserved right characteristic and become a state water right.

Although the parties to the Ute settlement agreed to the bill’s new language, the concepts reflected in the new provisions and report were fought heavily by advocates from other Indian tribes. Senators Inouye and Bradley successfully led the effort to modify the bill’s provisions and to insert language into a new joint committee report to counter the previous conclusions on the nature of Indian reserved water rights.<sup>36</sup> The new language retained the concept that a reserved water right leased from the Ute tribes becomes a state water right but, according to its sponsors, “includes language to assure absolutely the reversion of that state right back to a reserved right whenever the water ceases to be used beneficially off-reservation.”<sup>37</sup> Senator Bradley’s floor amendment provides as follows:

[A] Tribe may voluntarily elect to sell, exchange, lease, use or otherwise dispose of a portion of a water right confirmed in the Agreement and consent decree off its reservation. If either the Southern Ute Indian Tribe or the Ute Mountain Ute Indian Tribe so elects, and as a condition precedent to such sale, exchange, lease, use, or other disposition, that portion of the Tribe’s water right shall be changed to a Colorado State water right, but be such a State water right

33. *Id.* § 5(c)(1) (prior to final amendment on Oct. 14, 1988).

34. For more on state forfeiture law, see *supra* note 4.

35. *Joint Report of the Select Committee on Indian Affairs and the Committee on Energy and Natural Resources*, S. REP. No. 555, 100th Cong, 2d Sess. at 12 (ordered to be printed Sept. 28, 1988 to accompany the Colorado Ute Indian Water Rights Settlement Act of 1987).

36. *Id.* at 1-4.

37. 134 CONG. REC. S16,250 (daily ed. Oct. 14, 1988) (statement of Sen. Bill Bradley).

only during the use of that right off the reservation, and shall be fully subject to State laws, Federal laws, interstate compacts, and international treaties.<sup>38</sup>

During the October 14 floor debate, Senator McClure disagreed with Senator Bradley regarding the effect of this language and concluded that the change has "no substantive effect at all." He maintained that "once the water rights under the agreement become a State water right they will continue to be a State water right."<sup>39</sup> Under this position, water that the Utes choose to lease for a period off-reservation would forever be subject to forfeiture and other provisions of state water law.

These differing opinions on the meaning of the language likely will remain controversial until a court rules on congressional intent underlying the provision. It is clear, however, that Congress did not intend to set a precedent in the Colorado Ute Act. Senator Bradley included a second floor amendment in response to concerns that the language might set a dangerous precedent for other tribal water marketing proposals. The new provision states that "no provision of this Act, the Agreement, or the final consent decree shall be construed as altering or affecting the determination of any questions relating to the reserved water rights belonging to other Indian Tribes."<sup>40</sup>

### *The Salt River Bill*

In early 1988, the Salt River Pima-Maricopa Indian Community Settlement Act<sup>41</sup> was introduced to settle Indian and non-Indian disputes in the Phoenix area. Among other provisions, the settlement called for the purchase of 13,300 ac-ft/yr of the tribe's water entitlement by Phoenix on a 99-year lease. The water, to be purchased for a total payment of \$16 million, is associated with the tribe's Central Arizona Project (CAP) entitlement rather than with its *Winters* rights in the local watershed.

President Reagan signed the bill into law on October 28, 1988. The final bill maintained the off-reservation marketing provisions, with one modification. Instead of only Phoenix paying for and receiving the tribe's 13,300 ac-ft/yr CAP entitlement, seven cities in central Arizona now are involved in the leasing

38. H.R. 2642 §5(e)(1), 134 CONG. REC. S16,254 (daily ed. Oct. 14, 1988).

39. 134 CONG. REC. S16,253 (daily ed. Oct. 14, 1988).

40. H.R. 2642, § 11(b), 134 CONG. REC. S16,255 (daily ed. Oct. 14, 1988).

41. S. 2153, 100th Cong., 1st Sess., 134 CONG. REC. S2015 (1988); H.R. 4102, 100th Cong., 2d Sess., 134 CONG. REC. H752 (1988).

arrangement. The lease is scheduled to run from January 1, 2000, through the year 2098.<sup>42</sup>

### *Summary*

The disputes over Indian water marketing will continue in Congress as additional tribes attempt to assert their authority to lease water—and as non-Indian water interests grow increasingly nervous about the implications of these attempts. A key issue appears to be the character of the water that is proposed for off-reservation leasing by the tribes. In general, more controversy surrounds the marketing of Indian water entitlements based on *Winters* reserved rights than on the leasing of non-*Winters* water (e.g., waters imported to a tribe from projects as part of a settlement agreement). Whereas opponents to off-reservation leasing may reluctantly acquiesce to a specific instance of marketing of imported waters, they strongly object to *Winters* rights leasing proposals that could spill over as precedent to other areas of the West. Not surprisingly, the most vocal opponents to off-reservation leasing of *Winters* rights are water users in basins where large Indian reservations have undiverted water rights.

Another battle line that has become clear in recent congressional hearings involves the out-of-state marketing of water by Indian tribes. Some non-Indian interests support allowing off-reservation leasing, as long as the water cannot be transferred out of state. This position stems from the fact that many state officials can accept off-reservation marketing as long as the benefits of the ultimate water use accrue to the local economy. Consequently, when tribes voice their desire for authority to market out of state, additional opposition is generated quickly.

The details of the Colorado Ute settlement will likely remain controversial into the 1990s. In particular, what are the implications of a leased Indian reserved water right being designated a “state water right”? Will other tribes be willing to accept this designation as a condition of off-reservation water marketing? Even though Congress explicitly stated that the Colorado Ute Act establishes no precedent,<sup>43</sup> other tribal and non-Indian interests are assessing the “state water right” concept for off-reservation leasing of Indian waters. Because many tribes are suspicious of exposing their water rights to state law control,

42. Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512, 102 Stat. 2549 (1988).

43. See 134 CONG. REC. S16,248-55 (daily ed. Oct. 14, 1988).

additional applications of this concept in water agreements are likely to generate significant controversy.

In looking back at the issue of Indian water marketing and forward to future congressional sessions, a final major question emerges: Should Congress enact a general statute that waives the Nonintercourse Acts for Indian water marketing? Such an action would allow individual tribes to enter off-reservation leasing agreements without express congressional approval. Congress, however, could still make any such agreements subject to approval by the Secretary of the Interior (as is done with leases of subject to approval by the Secretary of the Interior (as is done with leases of land to non-Indians) and establish criteria for off-reservation leasing arrangements.<sup>44</sup>

An act generally allowing the off-reservation leasing of Indian water would give tribal governments the option to participate in the current era of water reallocation and marketing in the West. It would also be consistent with the Department of the Interior's December 16, 1988 policy statement in support of water marketing.<sup>45</sup> However, as demonstrated in the preceding sections, general congressional approval of off-reservation marketing would likely raise a number of controversies as well. These include concerns that many existing water users would lose their livelihood and that tribes would make unfair profits at the expense of non-Indian neighbors.

Each side of the arguments surrounding Indian water marketing reflects genuine concerns and emotions. Most parties perceive the marketing issue as ranging far beyond simple economics — extending to the very survival of their heritage. As such, few solutions will come easily in the months ahead. Will

44. In discussing the proper criteria for guiding off-reservation water marketing, parties would likely raise a variety of possible solutions and ideas, including:

- \* Granting existing off-reservation users of tribal waters the right-of-first-refusal to lease the water once a tribe decides to begin its marketing program;
- \* Prohibiting per capita payment of water marketing proceeds to individual tribal members;
- \* Allowing off-reservation marketing only in those circumstances where existing water uses will not be adversely affected;
- \* Coordinating efforts within each major river basin to ensure equal benefits to all basin tribes that choose to participate in regional water markets;
- \* Ensuring that lease arrangements do not result in the permanent loss of reserved water rights held by a tribe; and
- \* Requiring that off-reservation water marketing efforts be pursued by a tribal government only in the context of a comprehensive program for wisely managing the tribe's water resources.

45. WATER MARKET UPDATE, Jan. 1989, at 9.

tribal, state, and federal leaders be able to find answers through cooperation and displays of fairness? Or is this issue destined to create divisiveness in the West's water future? Only time—and congressional hearings—will tell.

