Water Law Review

Volume 2 | Issue 2 Article 9

1-1-1999

History Repeats Itself - A Response to Opponents of the Colorado Ute Indian Water Rights Settlement Act of 1988

Scott B. McElroy

HISTORY REPEATS ITSELF—A RESPONSE TO THE OPPONENTS OF THE COLORADO UTE INDIAN WATER RIGHTS SETTLEMENT ACT OF 1988‡

SCOTT B. McELROY‡‡

I. INTRODUCTION

In objecting to the taking of land belonging to the Tuscora Indian Nation for a power plant, Justice Black said: "Great Nations, like great men, should keep their word."[1] That message is lost on Alison Maynard and the parties she represents who seek to deny the Ute Mountain Ute and Southern Ute Indian Tribes ("Ute Tribes" or "Tribes") the principal benefit promised to them in the Colorado Ute Indian Water Rights Settlement Act of 1988,[2]—a reliable supply of water from the Animas River stored in an off-stream reservoir adjacent to the Southern Ute and Ute Mountain Ute Indian Reservations. Sadly, the script that Ms. Maynard follows in attacking the tribal water rights is one that could have been written in the 1880s. She seems to miss the tragic irony of the situation—the events on which she relies for her mistaken legal conclusion that the Ute Tribes do not have a

---

‡ This paper responds to arguments advanced by Ms. Alison Maynard during the course of hearings conducted by the Department of the Interior regarding the scope of the environmental compliance required to proceed with its proposal for settling the claims of the Southern Ute and Ute Mountain Ute Indian Tribes to use water from the Animas and La Plata Rivers in southwest Colorado. The author appreciates the assistance provided by Brett Lee Shelton and M. Catherine Condon, attorneys with Greene, Meyer & McElroy, P.C., in the preparation of this paper.

‡‡ Scott McElroy is an attorney with the law firm of Greene, Meyer & McElroy, P.C. of Boulder, Colorado. He received his J.D. from the University of Toledo College of Law in 1974. His practice is limited to the representation of Indian tribes and their members, concentrating on the litigation and negotiation of natural resource disputes. Mr. McElroy presently serves as special counsel for water rights to the Southern Ute Indian Tribe, the Navajo Nation, the Pueblo of Nambe, the Colorado River Indian Tribes, and the Walker River Paiute Tribe. Prior to his entry into private practice, Mr. McElroy practiced with the United States Department of Justice and the Department of the Interior, as well as the Native American Rights Fund. While at the Department of Justice, Mr. McElroy tried *Arizona v. California II*. While with the Native American Rights Fund, he represented the Southern Ute Indian Tribe during the negotiation of the Colorado Ute Indian Water Rights Settlement Agreement dated December 10, 1986. He has represented the Southern Ute Indian Tribe in water matters since that time.

1. Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

2. Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, 102 Stat. 2973 (1988).

senior water right occurred in one of the most shameful times in the history of the United States. Despite the unequivocal promises of earlier treaties and federal statutes, tribes and individual Indians lost nearly 90 million acres of Indian land during the period of allotment in the 1880s.[3]

Over a century later, the consequences of those earlier betrayals continue to haunt tribes and their neighbors, and raise the important policy question whether the underlying terms of a modern-day "treaty" among the Ute Tribes, the United States, the State of Colorado, and the affected water users should be reexamined long after Congress debated and approved the settlement of the tribal water rights through the construction of the Animas-La Plata Project ("ALP"). Even if there were cause to reopen the already resolved issue of the tribal entitlement to water, the long history of broken promises to the Indian tribes of this country provides ample justification for the United States, as a matter of good public policy, to keep its word to the Ute Tribes to provide them with a long term water supply rather than belatedly questioning the nature and extent of the Tribes' rights.

In any event, Ms. Maynard's arguments that the Ute Tribes are not entitled to an 1868 priority date for their reserved water rights are flat wrong. Whether by design or default, she badly misreads the existing case law governing nearly identical situations on other reservations where land was opened to non-Indian settlement but was not patented by homesteaders and was later restored to tribal trust status. On the Southern Ute Indian Reservation, the vast majority of the land now in trust status never left federal ownership and, thus, never lost the water rights reserved for the benefit of the Southern Ute Indian Tribe in 1868 when the original Ute Reservation was established. Under the principles established in *In re the General Adjudication of All Rights to Use Water in the Big Horn River System* ("Big Horn"),[4] and *United States v. Anderson*,[5] the priority date for tribal water rights appurtenant to land which was subject to, but not claimed for non-Indian homesteading, is the date the reservation was originally established.[6] In the case of the Southern Utes, the result is a priority date of 1868.[7]

The Ute Tribes' cases against the federal government for money damages to compensate for the misdeeds of the United States do not support a different conclusion.[8] Because the Ute Tribes never lost their 1868 water rights, they never sought compensation for the loss of such rights and those water rights were never an issue in any of the

3. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 138 (Rennard Stickland et al., eds., 1982).

4. In re General Adjudication of Rights to Use Water in the Big Horn River System, 753 P.2d 76 (Wyo. 1988), *aff'd without opinion by an equally divided court*, 492 U.S. 406 (1989).

5. United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984).

6. *Id.* at 1361.

7. *See Big Horn*, 753 P.2d at 112.

8. *See* United States v. Southern Ute Tribe or Band of Indians, 402 U.S. 159 (1971).

cases. Quoting language out of context from the various claims cases cannot change the fact that the suits by the Ute Tribes against the United States were for money damages for loss of title to lands, and have no bearing on the priority date for tribal water rights for lands that the United States continues to hold in trust for the benefit of the Southern Ute Indian Tribe.

At the end of the day, the arguments advanced against the Ute Tribes' senior water rights are part of a transparent political agenda aimed at stopping the construction of a storage facility on the Animas River. Now that it is clear that the Tribes will be the principal beneficiaries of such a project; that the environmental consequences of going forward with the substantially reduced project are virtually negligible; and that the project cannot be stopped under the federal environmental laws, the opponents of the project feel compelled to attack the validity of the tribal claims in a desperate effort to undermine the justification for the project.

Understanding the misguided nature of the attack on the Ute Tribes' rights requires an appreciation of (1) the nature of tribal water rights under federal law; (2) the history of the Southern Ute Indian Reservation; (3) the admirable effort of the Ute Tribes, local water users, and the State of Colorado to settle the tribal claims and avoid the costly and bitter litigation that has plagued other states dealing with tribal claims to scarce natural resources;[9] (4) the obstacles placed in the way of that settlement by opponents of the Animas-La Plata Project; and (5) the United States' tortured and ambiguous efforts to meet its trust responsibilities to the Ute Tribes while buffeted by a variety of political forces both for and against the construction of water projects.

II. THE NATURE OF TRIBAL WATER RIGHTS UNDER FEDERAL LAW

The Ute Tribes, like most tribes in the Western United States, once held domain over vast areas of land on which they hunted and gathered wild plants in order to survive. With the onslaught of Western settlement, the Utes were forced to reside on an ever shrinking reservation and to abide by a federally imposed policy to convert tribal members from their traditional ways to a new lifestyle based on agriculture. The Supreme Court has established that the creation of Indian reservations, whether by treaty, executive order, or statute, results in the reservation under federal law of that quantity of water needed to carry out the purposes of the reservation.[10]

---

9. *See, e.g.*, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 696 n.36 (1979) ("Except for some desegregation cases . . . , the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.") (citing Puget Sound Gillnetters' Ass'n v. United States Dist. Court, 573 F.2d 1123, 1126 (9th Cir. 1978)).

10. Arizona v. California, 373 U.S. 546, 598–600 (1963) [hereinafter *Arizona v. California I*]; United States v. Walker River Irrigation Dist., 104 F.2d 334, 336 (9th Cir.

In the seminal case of *Winters v. United States*,[11] the United States brought suit on behalf of the Gros Ventre and Assiniboine Indians of the Fort Belknap Indian Reservation to halt upstream diversions of the Milk River by non-Indians.[12] The Supreme Court found that the language of the Act of May 1, 1888,[13] which created the Fort Belknap Indian Reservation, was decisive.[14] That Act ratified the Gros Ventre and Assiniboine cession of "a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people."[15] In exchange for their cession, the tribes agreed to remain within the confines of the Fort Belknap Reservation and to give up their hunting and gathering lifestyle "and to become a pastoral and civilized people."[16] The treaty did not mention water rights. The Court held that the Indians did not cede their rights to water for use on the Reservation under the 1888 Act:

> The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? And, even regarding the allegation of the answer as true, that there are springs and streams on the reservation flowing about 2,900 inches of water, the inquiries are pertinent. If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the government or deceived by its negotiators. Neither view is possible. The government is asserting the rights of the Indians.[17]

In *Arizona v. California I*, the Supreme Court followed its holding in *Winters*, finding that the United States impliedly reserved water rights for the five Indian reservations along the lower Colorado River.

> Most of the land in these reservations is and always has been arid. If the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries. It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to

---

1939).

11. Winters v. United States, 207 U.S. 564 (1908).
12. *Id.* at 565.
13. Act of May 1, 1888, ch. 213, 25 Stat. 113.
14. *Winters*, 207 U.S. at 575.
15. *Id.* at 576.
16. *Id.*
17. *Id.*

> the life of the Indian people and to the animals they hunted and the crops they raised.[18]

The water so reserved "was intended to satisfy the future as well as the present needs of the Indian Reservations . . . ."[19] In other words, the United States reserved water "to make the reservation livable."[20] The Court agreed "with the Master's conclusion as to the quantity of water intended to be reserved,"noting that the Master had "found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations."[21] As a result, the Supreme Court recognized reserved water rights for the benefit of the tribes of nearly 1 million acre feet per year out of the approximately 7.5 million acre feet of water per year set aside for the states of California, Arizona, and Nevada from the Colorado River.[22]

Winters and *Arizona v. California* form the foundation for a potent federal law doctrine that entitles tribes to use substantial quantities of water to the detriment of surrounding non-Indian communities. The recognition of tribal water rights is likely to have a devastating effect on non-Indian water users who may have depended for generations on streams that are now subject to the senior rights of neighboring Indian tribes. In virtually every state in the West, the United States, tribes, states, and local water users are engaged in protracted litigation over the precise scope of the tribal claims, as well as the validity of competing claims to water under state law.[23] In numerous instances, the affected parties have sought to avoid the bitterness and turmoil associated with such lawsuits by settling the controversy, frequently through the use of developed water supplies that allow existing non-Indian water uses to continue while meeting tribal needs from "new" water supplies from federal or state water projects.[24]

III. THE COLORADO UTE INDIAN WATER RIGHTS SETTLEMENT ACT OF 1988

The issue of the reserved water rights on the Southern Ute Indian Reservation first arose in the context of the Pine River. In 1930, the United States brought suit against a variety of water users to establish water rights for Indian lands in the Pine River valley.[25] The final

---

18. *Arizona v. California I*, 373 U.S. at 598–99.

19. *Id.* at 600.

20. *Id.* at 599 (cited with approval in *Montana v. United States*, 450 U.S. 544, 566 n.15 (1981)).

21. *Id.* at 600.

22. Arizona v. California, 376 U.S. 340 (1964) (decree).

23. *See generally* Scott B. McElroy & Jeff J. Davis, *Revisiting* Colorado River Water Conservation District v. United States—*There Must be a Better Way*, 27 ARIZ. ST. L.J. 597 (1995).

24. *See generally* ELIZABETH CHECCHIO & BONNIE G. COLBY, INDIAN WATER RIGHTS: NEGOTIATING THE FUTURE (June 1993).

25. United States v. Morrison Consol. Ditch Co., No. 7736 at ¶ 3 (D. Colo. Feb. 14,

decree recognized the United States' "first and exclusive right, with a priority date [of] July 25, 1868" to divert water for use on "sixteen thousand nine hundred and sixty-six (16,966) acres of irrigable lands of the former Southern Ute Indian Reservation."[26] Apart from the Pine River, the United States failed to assert and protect tribal rights in the other streams crossing the two Ute Reservations. As a result, the local non-Indian farmers, ranchers, and communities developed economies that were highly dependent on water from streams in which the Ute Tribes had significant but unquantified rights to water.

Following the Supreme Court's decision in *Arizona v. California*, the issue of tribal water rights on the Reservation took on new significance. The initial skirmish was over the forum to resolve the nature and extent of the tribal rights.[27] The United States, supported by the Ute Tribes, wanted tribal rights adjudicated in federal court; the State and the local water users wanted the issues decided in state court. In *Colorado River Water Conservation District v. United States*,[28] the Supreme Court interpreted the McCarran Amendment[29] to require the federal court to defer to the comprehensive Colorado state court water adjudications intended to determine all the water rights in the eleven streams in which the Ute Tribes claimed water rights under federal law.

After the Supreme Court decided in *Colorado River* that the matter should be heard in state court, the parties began preparing for the lawsuit to ascertain the tribal rights. In 1985, the Ute Tribes, the United States, the State of Colorado, and the major water users in the area began the negotiations that resulted in the *Colorado Ute Indian Water Rights Final Settlement Agreement* ("1986 Agreement").[30] That agreement provided for a comprehensive settlement of the Ute Tribes' claims to all of the affected streams in southwest Colorado, and sought to resolve all anticipated issues between the parties.[31] The settlement of the tribal claims had essentially four parts: (1) provision of developed water supplies to the Tribes through the use of the Animas-La Plata and Dolores Federal Reclamation Projects; (2) recognition of the Tribes' legal entitlement to defined water rights in the other streams on their reservations; (3) state and federal endowment of tribal development funds; and (4) detailed provisions for the administration of tribal rights.[32]

The 1988 Settlement Act endorsed the 1986 Agreement, ratified the use of ALP and the Dolores Projects as contemplated by the 1986 Agreement, authorized the federal contribution to the development

---

1931).

26. *Id.*

27. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

28. *Id.*

29. McCarran Amendment, 43 U.S.C. § 666 (1988).

30. Colorado Ute Indian Water Rights Final Settlement Agreement (Dec. 10, 1986) [hereinafter *1986 Agreement*].

31. *Id.*

32. *Id.* at 31–34.

funds, and confirmed the administrative provisions to which the parties agreed.[33] The settlement became "final" upon entry of consent decrees in state court on December 31, 1991.[34] The only part of the 1986 Agreement and the 1988 Settlement Act that has not been implemented is the construction of ALP. The Tribes may revive their claims on the Animas and La Plata Rivers in the event that the facilities required to deliver water in accordance with the terms of the 1986 Agreement are not completed by the year 2000.[35] Under the 1986 Agreement, the Tribes must choose by the year 2005 to litigate their reserved rights or to accept whatever water is available from ALP.[36]

When Congress passed the 1988 legislation, it was clearly understood that the core of the tribal settlement was the Animas-La Plata Project—a federally authorized water project that would serve Indian and non-Indian needs in the area by storing water from the Animas River and transferring the developed supply into the La Plata basin to supplement the water supplies for currently irrigated lands, to provide for the irrigation of new lands, and to allow for the development of tribal natural resources, as well as provide water for municipal uses in New Mexico and Colorado.[37] Congress also thought that ALP had passed environmental muster and that environmental compliance for the project was complete. In the words of then Representative Campbell, "[a]ll environmental laws, the National Environmental Policy Act, and the Endangered Species Act have been complied with."[38]

IV. THE COMPROMISES BY THE PARTIES TO THE SETTLEMENT IN THEIR EFFORTS TO CONSTRUCT THE ALP

ALP has proven to be the most controversial part of the settlement. Despite the clear understanding at the time of the settlement that ALP should be built, widespread opposition to the project has continued. The supporters of the tribal settlement have found themselves in a difficult position. Many of the criticisms directed at the project were simply rehashed concerns that had been debated and supposedly resolved during the course of the original negotiations and the debate over the 1988 Act.[39] On the other hand, some of the concerns seemed

33. Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, 102 Stat. 2973 (1988).

34. *E.g.*, In the Matter of the Application for Water Rights of the United States of America (Bureau of Indian Affairs, Southern Ute and Ute Mountain Ute Indian Tribes) for Claims to the McElmo Creek in Water Division No. 7 (Dist. Ct., Water Div. No. 2, Colo. 1991) (No. W-1603-76G consent decree) [hereinafter *1991 Consent Decree*].

35. *1986 Agreement*, *supra* note 30, at 31-33.

36. *Id.*

37. *See, e.g.*, CONG. REC. H9346 (daily ed. Oct. 3, 1986) (statement of George Miller) ("We are buying a Bureau of Reclamation project.").

38. *Id.*

39. For example, the original settlement considered the issues of the costs of the project in comparison to the benefits. *See* Letter from Wayne Marchant, Acting Assistant Secretary, Department of Interior Morris K. Udall, Chairman, Committee on

to raise legitimate environmental issues that warranted further consideration and study to ensure that any adverse effects of proceeding with the project could be adequately mitigated.[40] At the same time, delay was the worst enemy of the settlement, given the ever-increasing cost of the project and the increasingly hostile attitude in Congress toward the federal financing of Western water projects in the difficult budget climate of the 1990s. The Indian and non-Indian parties to the settlement have shown an amazing willingness to compromise, so long as it is possible to maintain the core concept of the settlement to provide the Ute Tribes with a reliable water supply without taking water from their non-Indian neighbors. In contrast, the project opponents, as exemplified by Ms. Maynard's arguments, have been willing to go to any length to kill the project without regard to the benefits of the settlement to the Ute Tribes, and no matter how insignificant the environmental consequences of the now greatly reduced project.

A. THE ENDANGERED SPECIES ACT DEBACLE

The application of the Endangered Species Act,[41] to ALP has proven to be extremely painful and has resulted in reducing the project to one third of its original capacity. In 1979, the Fish and Wildlife Service ("FWS") concluded under § 7 of the Endangered Species Act,[42] that it was not necessary to preserve the population of Colorado River squawfish (now the "Pike minnow") in order to recover the species due to the existing populations in the Green and Upper Colorado River basins. Simultaneous with the reinitiation of consultation on ALP in 1991, the FWS changed its position with regard to the San Juan River, concluding that the population was necessary for the recovery of the species. As a result, a draft opinion was issued that found that construction of the project was likely to jeopardize the continued existence of the species.[43] Therefore, the Bureau of Reclamation refused to move forward with construction.[44] Project supporters, including the Ute Tribes, spent the next two years negotiating a "reasonable and prudent alternative" ("RPA") that would allow construction to proceed.[45] The RPA had numerous components

---

Interior and Insular Affairs, House of Representatives (October 1, 1987) reprinted in H.R. REP NO. 100–932, at 17 (1988).

40. As described in Part IV.A, the most significant of these concerns was the potential impact of ALP on the endangered fish in the San Juan River. In addition, concerns have been raised about the effect on water quality of irrigating new lands in the La Plata Basin. *See* Final Supplement to the Final Environmental Statement Animas-La Plata Project, 404(b)(1) Evaluation, § 10 (April 26, 1996).

41. Endangered Species Act, 16 U.S.C. §§ 1531–1544 (1994).

42. Endangered Species Act, 16 U.S.C. § 1536.

43. U.S. Fish & Wildlife Service, Draft Opinion (May 7, 1990).

44. *See* Final Biological Opinion for the Animas-La Plata Project, Colorado and New Mexico (Dept. of Interior Oct. 25, 1991).

45. Memorandum from U.S. Fish & Wildlife Service to Bureau of Reclamation 29 (Oct. 25, 1991) (citing Memorandum from Bureau of Reclamation to U.S. Fish and Wildlife Service (Mar. 4, 1991)).

but the most significant were: (1) the project depletion was limited to 57,100 acre feet per year; (2) Ridges Basin Reservoir would be constructed first and the water supply would be devoted to municipal and industrial uses; (3) a seven year study of the endangered fish would be conducted to determine the factors limiting the endangered fish; (4) a recovery program for the endangered fish would be initiated on the San Juan River; (5) Navajo Dam and Reservoir would be operated to mimic the natural hydrograph for the benefit of the endangered fish; and (6) at the end of the seven year study, a decision would be made as to whether the remainder of the project could be built.[46]

Following the determination of the RPA, the Bureau of Reclamation decided unilaterally in 1992 that a supplemental environmental impact statement ("SEIS") would have to be prepared. The final version of that document was completed in the spring of 1996, but the Environmental Protection Agency suggested that it was not adequate.[47] Reclamation has granted EPA continued extensions to comment on the document, a step that is required before a record of decision can be issued by the Commissioner of Reclamation.[48]

B. THE ROMER/SCHOETTLER PROCESS AND SENATE BILL 1771

In 1996, it became obvious that ALP and, hence, the 1988 Settlement Act was in trouble. The cost of the project had skyrocketed, in part because of inflation, but more significantly because of the added environmental costs and Reclamation's recalculation of costs and benefits.[49] As a result of that recalculation, it was clear that the cost of the municipal water from the project, for which the recipients must pay the capital costs as well as the operation and maintenance costs, would increase greatly. It appeared the cost of providing municipal and industrial water to the Southern Ute Indian Tribe might triple. Moreover, the project opponents in the environmental community were successful in enlisting fiscal conservatives in Congress to oppose the funding request for the project in the House of Representatives in 1996.[50] At the same time, Governor Romer indicated that he could not support the project as originally authorized.[51] In addition, the environmental problems associated with the impact of irrigation on water quality seemed to

46. Final Biological Opinion, *supra* note 44.

47. Sharyn Wizda, *Animas-La Plata Project Delayed Until Late August*, GRAND JUNCTION DAILY SENTINEL, May 4, 1996.

48. Mark Lewis, *Utes Sue Government Over Project Delays*, FARMINGTON DAILY TIMES, June 23, 1996.

49. Colorado State Representatives, Animas-La Plata Discussions Meeting Notes: Opening Remarks and Presentations 2 (Oct. 9, 1996).

50. Dan Morgan, *Water Project Funding Drained in House Bill*, WASHINGTON POST, July 26, 1996.

51. Bob Silbernagel, *Enough is Enough*, GRAND JUNCTION DAILY SENTINEL, June 23, 1996.

block further progress. Finally, the opponents seized on the fact that the depletion limits in the RPA would not allow Phase I of the project to be completed and, therefore, that the settlement was not assured.

With the encouragement of Secretary of the Interior Bruce Babbitt, the Romer/Schoettler process was initiated in the fall of 1996 to examine whether the project supporters and the project opponents could agree on a solution to resolve the controversy over ALP.[52] The project supporters viewed the process as an opportunity to clarify that storage was required to resolve the tribal claims, and to show their good faith in addressing the issues that had arisen and were impeding the construction of the project and, therefore, the completion of the tribal settlement. The process was not successful in reaching a common ground between project supporters and opponents. It was effective in demonstrating that a storage project could be developed that had no meaningful environmental problems and that there are no realistic alternatives to such an approach.

Project opponents put forward an alternative under which the Tribes would purchase water rights and lands from existing water right holders under state law, i.e., the other parties to the consent decrees on the other streams affected by the Settlement Agreement.[53] In addition, the opponents suggested that it might be possible to increase the storage capacity of existing reservoirs in order to provide the Tribes with water.[54] Both Tribal Councils (the Tribes' elected leadership) rejected that approach because of the uncertainty of the water supply that it would produce and the management nightmares that would be created if the Tribes were to obtain significant land and water rights that were not to be held in trust by the United States.[55]

The project supporters advanced the concept of a reduced project that was negotiated in the fall of 1996 and the spring of 1997, among the different groups who stood to benefit from the project.[56] The reduction in the project was intended to address the cost and environmental issues that had arisen over the project configuration to settle the tribal rights under the 1988 Settlement Act.[57] The down-sized project contemplated a depletion level of 57,100 acre feet per year in accordance with the prior ESA consultations.[58] In order to reduce cost and avoid the water quality problems that had troubled EPA, it included no irrigation facilities. However, it included a

52. Colorado State Representatives, *supra* note 49, 1-2.

53. Animas River Citizens Coalition Conceptual Alternative, Romer/Schoettler Discussions (Aug. 4, 1997).

54. *Id.*

55. Letter to Gail S. Schoettler, Lt. Gov. Colorado, from Marvin E. Cook, Vice Chairman Southern Ute Indian Tribe (Oct. 9, 1997).

56. *See, e.g.*, Letter from David W. Robbins, Attorney, Hill & Robbins, P.C. to Gail Schoettler, Lt. Gov. Colorado (July 8, 1997).

57. SAN JUAN WATER COMMISSION, SOME QUESTIONS AND ANSWERS ABOUT THE REVISED ANIMAS-LA PLATA PROJECT 2 (July 8, 1999).

58. Agreement in Concept, Attachment to letter from David W. Robbins, Attorney, Hill & Robbins, P.C. to Gail Schoettler, Lt. Gov. Colorado (July 8, 1997).

reservoir with a capacity in excess of that required to provide the 57,100 acre feet of depletion.[59] In addition, the proposal called for Congress to find that the existing environmental compliance was adequate to construct the project features required for settlement of the tribal rights, although additional work might be required when the water was actually used by the Tribes or others.[60] This proposal was dubbed "ALP lite" by the press.[61] The proposal reduced the water supply for the Tribes, all of which would be municipal and industrial water.[62] In return, the proposal called for a complete waiver of the tribal construction costs associated with the Project.[63]

After a false start in which the State of Colorado seemed to leave the choice of which proposal to accept up to the Department of the Interior, Governor Romer strongly endorsed the project supporters' proposal for a reduced project in the fall of 1997.[64] Senator Campbell and Congressman McInnis introduced legislation in Congress consistent with the proposal that summer.[65] The Administration ultimately opposed the legislation and it did not move forward in Congress.[66] The Administration was troubled by the size of the reservoir and the environmental compliance language.[67] There was also strong opposition in Congress centered on the notion that the oversized reservoir was just a ploy to allow a much larger project with irrigation in the future.[68] The Administration, in turn, was criticized for not having a proposal of its own to put forward and for showing no leadership on the issue.[69] Nevertheless, the legislation died in Congress.

C. THE ADMINISTRATION PROPOSAL

On August 11, 1998, Secretary Babbitt announced the Administration's proposal, frequently called "ALP ultra-lite," to address the problems with going forward with a settlement as included in the 1988 Settlement Act.[70] The Administration's proposal was premised on

---

59. *Id.*

60. Letter from Dan Israel, Attorney for the Ute Mountain Ute Tribe, to Dana Minerva, Environmental Protection Agency 1 (September 26, 1997).

61. *See* Bill Roberts, *Build A-LP Lite*, THE DURANGO HERALD, Nov. 23, 1997.

62. Agreement in Concept, *supra* note 58.

63. *Id.*

64. Ellen Miller, *Romer, Schoettler Endorse Scaled-Down Animas-La Plata*, DENVER POST, Nov. 19, 1997.

65. S. 1771, 105th Cong. (1997); H.R. 3478, 105th Cong. (1997).

66. *Hearings on S. 1771 Colorado Ute Settlement Act Amendments of 1998 Before the Senate Committee on Indian Affairs and the Senate Committee on Energy and Natural Resources* (June 24, 1998) (statement of Eluid Martinez, Commissioner, Bureau of Reclamation Department of Interior).

67. *Id.* at 4, 7.

68. 144 CONG. REC. H4931 (June 22, 1998) (statement of George Miller).

69. Letter from Clement Frost, Chairman, Southern Ute Indian Tribe, and Judy Knight Frank, Chairman, Ute Mountain Ute Indian Tribe to William J. Clinton, President, United States of America (July 8, 1998).

70. Administration Proposal for Final Implementation of the Colorado Ute

building a storage facility to provide the 57,100 acre feet of annual depletion previously approved by the FWS. Its chief features were: (1) over 19,000 acre feet of depletion for each Tribe; (2) a waiver of tribal construction costs; (3) a tribal water acquisition fund of $40 million to acquire additional water rights; (4) a reservoir with a storage capacity of 90,000 acre feet; (5) full environmental compliance, including an alternatives analysis, to be undertaken before construction; (6) no benefits at all for irrigation; and (7) deauthorization of those project features not required for the tribal settlement.[71] The result is a project that would provide nearly two–thirds of its water to the Ute Tribes and completely eliminate any benefits for irrigation. Moreover, the proposal made it crystal clear that all federal environmental laws would have to be satisfied before construction is started.[72]

Although criticized in the press, it is obvious that the Administration proposal was fair to the Tribes, while devastating to the other parties to the 1986 Settlement Agreement. Like the Tribes, those parties relied upon the benefits of the project as part of the deal which they negotiated. Since the announcement of the Administration's position, the attorneys for the project supporters have sought to find a middle ground between ALP lite and ultra lite that might be acceptable to the Administration and the parties to the settlement. Such a compromise appears feasible at this time.[73] In addition, the Department of the Interior has moved forward with environmental compliance for the Administration proposal.[74] The Administration has been particularly adamant that it will not compromise that process, even to advance the tribal settlement.[75]

Incredibly, the project opponents are aggressively hostile to the Administration proposal and appear unwilling to accept any storage facility, no matter how small, or who receives the benefits, or how minimal the impact. Over the years, project opponents have focused their opposition on the financial benefits that would accrue to the non-Indian irrigators, and the perceived environmental harm associated with the irrigation of additional lands in the La Plata basin. In addition, perhaps more understandably, they have sharply criticized any effort by the project supporters to short cut compliance with the federal environmental standards. The Administration proposal essentially adopts the opponents' position on these points and there is not the slightest indication that the Department of the Interior is

---

Settlement Act (Aug. 11, 1998).

71. *Id.* at 1, 4.

72. Administration Proposal for Final Implementation of the Colorado Ute Settlement Act, *supra* note 70.

73. Tom Sluis, *A-LP District Allows Changes*, DURANGO HERALD, June 8, 1999.

74. Notice of Intent to Prepare a Draft Supplemental Environmental Impact Statement to the 1996 Final Supplement to the Final Environmental Statement for the Animas-La Plata Project and Announcement of Public Scoping Meetings, 64 Fed. Reg. 1 (1999).

75. Administration Proposal for Final Implementation of the Colorado Ute Settlement Act, *supra* note 70, at 5 [hereinafter *IRA*].

willing to move away from these core points. Instead of declaring victory or turning their efforts to ensuring that the Administration does not lose its resolve on the points that are important to them, the project opponents have unleashed an attack on the Tribes who are now the primary beneficiary of the reduced ALP. As described below, that attack is wrong as well as misguided and belated.

V. THE SOUTHERN UTE INDIAN TRIBE IS ENTITLED TO AN 1868 PRIORITY DATE FOR ITS RESERVED WATER RIGHTS

The principal flaw in Ms. Maynard's attempt to besmirch the Southern Utes' water rights is her failure to understand the full history of the Southern Ute Indian Reservation and, in particular, that over 200,000 acres of unsettled land were restored to trust status as a result of the Indian Reorganization Act of 1934.[76] Under the precedent established in *Big Horn* and *United States v. Anderson*, the lands in question are entitled to an 1868 priority date for the water rights reserved under federal law because those lands never left federal ownership and the Tribe never received any compensation for their divestiture. As a result, the Tribe retains the water right reserved at the time the Reservation was created.

A. THE HISTORY OF THE SOUTHERN UTE INDIAN RESERVATION

To understand the present day Southern Ute Indian Reservation, it is necessary to understand the history of the Southern Ute Tribe and the treatment under federal law of the lands that now constitute the Southern Ute Indian Reservation. Ms. Maynard focuses on the Act of June 15, 1880,[77] but the effect of that Act cannot be ascertained in a vacuum. Rather, it is necessary to examine what happened to the lands subject to that legislation, and in particular, the treatment under subsequent federal enactments of that portion of the lands that were never patented to non-Indians. It is those lands that are at stake here. Examination of the complete history demonstrates that the Southern Ute Indian Tribe retains water rights for the lands which it never lost, and those lands restored to tribal trust status under the IRA.

1. 1868 to 1879

The Confederated Bands of Utes, which included the bands that today comprise the Southern Ute and Ute Mountain Ute Tribes, signed a comprehensive treaty with the United States in 1868.[78] The Treaty of 1868 purported to guarantee to the Utes approximately the western third of what is today the State of Colorado—nearly 15 million

76. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (1994)).

77. Act of June 15, 1880, ch. 223, 21 Stat. 199 (1880).

78. Treaty with the Ute Indians, 15 Stat. 619 (1868).

acres of land.[79] The land was "set apart for the absolute and undisturbed use and occupation of the Indians . . . ."[80]

The discovery of valuable minerals in the San Juan Mountains led to widespread trespass on the lands set apart under the 1868 Treaty.[81] As a result, the United States concluded another agreement with the Utes in 1873 that carved 3.7 million acres out of the middle of the Reservation.[82] The Brunot Cession almost completely separated the remaining northern and southern sections of the original 1868 reservation. The southern section was occupied by the Southern Utes, which consisted of the bands that became the modern day Southern Ute Tribe and Ute Mountain Ute Indian Tribes. The land occupied by the Southern Utes consisted of a narrow strip, 15 miles wide, that ran from 20 miles east of the Utah border to the eastern boundary of the Reservation near Pagosa Springs—about 110 miles.[83] In 1879, a bitter dispute between the Northern Utes and federal agents in Meeker, Colorado led to an insurrection in which twelve non-Indians were killed.[84] Outrage over the so-called "Meeker Massacre" spread from coast to coast, and intense political pressure was applied to remove the Utes from Colorado.[85]

2. 1880 and 1882 Treaties

In 1880, the Northern Ute bands were relocated to Utah under an Agreement dated March 6, 1880, ratified by the Act of June 15, 1880, ("1880 Act").[86] The Southern Ute bands were to "remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colorado . . . ."[87] The Utes agreed to open the remainder of the 1868 Reservation to non-Indian settlement.[88] This reservation treatment was consistent with the federal Indian policy of the era.[89] Reservation lands

79. United States v. Southern Ute Tribe or Band of Indians, 402 U.S. 159, 162 (1971).

80. 15 Stat. at 619, art. II.

81. *United States v. Southern Ute Tribe or Band of Indians*, 402 U.S. at 162.

82. Agreement of Sept. 13, 1873, ratified by Act of Apr. 29, 1874, ch. 136, 18 Stat. 36 (commonly referred to as the "Brunot Cession"). *See also* United States v. Southern Ute Tribe or Band of Indians, 423 F.2d 346 (Ct. Cl. 1970), *rev'd*, 402 U.S. 159 (1971).

83. *See United States v. Southern Ute Tribe or Band of Indians*, 402 U.S. at 162.

84. *Id.*

85. *Id.*

86. Act of June 15, 1880, ch. 223, 21 Stat. 199 (1880).

87. *Id.* at 200.

88. Confederated Bands of Ute Indians v. United States, 100 Ct. Cl. 413, 421 (1943).

89. The Department of the Interior has characterized the 1880 cession agreement as "set[ting] forth a plan of allotment and disposal of surplus lands which became stereotyped in later allotment acts." Restoration to Tribal Ownership—Ute Lands, 1 Dept. of Interior, Op. Solicitor 832, 835 (1938) [hereinafter *Kirgis Memo*]. The federal allotment policy was principally implemented by the General Allotment Act of 1887 (also known as the Dawes Act), ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. §§ 331–334, 339, 341, 342, 348, 349, 354, 381 (1983)). It sought to assimilate tribal members into the mainstream of society by converting Native Americans into farmers and eliminating tribal governments and other aspects of tribal sovereignty. The

which were not allotted to individual Indians were opened to non-Indian settlement. Large amounts of "surplus" reservation land thereby became available for sale or entry to homesteaders. By the time the allotment policy was repudiated in 1934 by the IRA, about 90 million acres of tribal land had passed from Indian ownership nationwide.[90]

Under the 1880 Act, the "surplus" lands of the Southern Ute Reservation were "deemed to be public lands of the United States."[91] The 1880 Act did not immediately divest the Indians of all rights to the land, however. Rather, the United States was obliged to dispose of the surplus land by "cash entry only" for the benefit of the Ute bands which were entitled to the proceeds from the sale of such lands.[92]

By 1882, the other bands of Utes had been removed from their aboriginal territory, but the Southern Utes remained in the southern strip, essentially the current Reservation.[93] The Act of July 28, 1882, ("1882 Act")[94] declared that former Ute lands north of the Reservation were public lands to be disposed of for the benefit of the Utes in accordance with the 1880 Act, and directed the Secretary of the Interior to "at the earliest practicable day, ascertain and establish the line between" the two areas.[95]

3. 1888 Act and Agreement

Subsequently, the Southern Utes sent a delegation to Congress to discuss the possibility of removal to another reservation.[96] In 1888, Congress enacted further legislation intended to effectuate removal of the Utes. The Act of May 1, 1888, ("1888 Act")[97] authorized the Secretary of the Interior to appoint a commission "with authority to negotiate with the band of Ute Indians of southern Colorado for such modification of their treaty and other rights, and such exchange of their reservation, as may be deemed desirable by said Indians and the Secretary . . . ."[98]

The Commission formed under the 1888 Act succeeded in negotiating an agreement, under which the Southern Utes would have removed to a reservation in San Juan County, Utah.[99] The agreement was not ratified by Congress, however. When the agreement was resubmitted to Congress in 1894, the House Committee rejected it and

---

allotments were inalienable and nontaxable for 25 years. COHEN, *supra* note 3, at 619 (citing § 5, 24 Stat. at 389 (codified as amended at 25 U.S.C. § 348) (1983)).

90. COHEN, *supra* note 3, at 138.

91. § 3, 21 Stat. at 203.

92. *Id.*

93. United States v. Southern Ute Tribe or Band of Indians, 402 U.S. 159, 168 (1971).

94. Act of July 28, 1882, ch. 357, 22 Stat. 178 (1882).

95. § 2, 22 Stat. at 178.

96. *United States v. Southern Ute Tribe or Band of Indians*, 402 U.S. at 169.

97. Act of May 1, 1888, ch. 113, 25 Stat. 113 (1888).

98. Act of February 20, 1895, ch. 113, § 4, 28 Stat. 677, 678 (1895).

99. *United States v. Southern Ute Tribe or Band of Indians*, 402 U.S. at 170.

instead recommended enactment of a bill that became the Act of February 20, 1895.[100]

4. 1895 Act and Allotment

In the 1895 legislation, Congress annulled the 1888 Act, ratified the 1880 Act, and directed the Secretary of the Interior to proceed with issuing allotments from reservation area to the Southern Utes as required under the 1880 Act.[101] Some of the Utes did not wish to receive allotments, however, and the 1895 Act set aside the western portion of the Reservation for those band members.[102] Today, the Ute Mountain Ute Indian Tribe occupies the western portion of the Reservation, which was not allotted. Those members of the Southern Ute bands favoring allotment were permitted to select tracts from lands on the eastern portion of the Reservation.

On April 13, 1899 President William McKinley announced the completion of the Southern Ute allotment process and the opening of the Southern Ute Indian Reservation to homesteading.[103] Non-Indian homesteading continued until passage of the IRA. By 1934, more than one-half of the surface area of the Southern Ute Indian Reservation was occupied by non-Indian homesteaders. However, the federal government had yet to distribute thousands of additional "surplus" acres which had never been settled by non-Indians.

5. Indian Reorganization Act and Interior Actions Restoring Lands to Trust Status

In 1934, the Indian Reorganization Act brought an end to the era of allotment. Under the IRA, the Secretary of the Interior was "authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal . . . ."[104] Initially, the Secretary of Interior withdrew from further sale or entry all of the remaining Ute lands ceded under the 1880 Agreement.[105] Then, by two orders issued in 1937, the Secretary attempted to restore all of the surplus lands in the southern portion of the former reservation.[106]

By 1938, over 3.5 million acres of the 7 million acres affected by

---

100. § 4, 28 Stat. at 677; *see United States v. Southern Ute Tribe or Band of Indians*, 402 U.S. at 171 (quoting 191 Ct. Cl. at 16, 423 F.2d at 354).

101. § 4, 28 Stat. at 677; *see United States v. Southern Ute Tribe or Band of Indians*, 402 U.S. at 171.

102. § 3, 28 Stat. at 677.

103. Presidential Proclamation No. 2, 31 Stat. 1947 (1899).

104. 25 U.S.C. § 463; *see also* 25 U.S.C. § 465 ("Title to any lands or rights acquired pursuant to section[] . . . 463 . . . of this title shall be taken in the name of the United States in trust for the Indian tribe . . . for which the land is acquired . . . .").

105. Restoration of Lands Formerly Indian to Tribal Ownership, 54 Interior Dec. 559, 563 (1934).

106. Order of Restoration—Southern Ute Indian Reservation, Colorado, 2 Fed. Reg. 1,348 (1937); Confederated Bands of the Ute Tribe of Indians, Colorado—Order of Restoration, 2 Fed. Reg. 2,563 (1937).

the 1880 Act had been sold or taken by the United States for its own purposes.[107] The Department of the Interior concluded that all of the remaining undisposed lands—nearly 4 million acres—were eligible for restoration under the IRA.[108] The Solicitor's Office examined the status of the Ute lands ceded in 1880, and concluded that the 1880 Act did not divest the Utes of all rights to the land.[109] Rather, the "United States [became] a trustee for the disposal of the land ceded .... [T]he result is that the Indians retain an equitable interest in the land until they have received the consideration bargained for, and the United States becomes a 'trustee in possession.'"[110] These lands were "not public lands in the full sense of the term as they [were] to be disposed of only in limited ways and upon certain conditions."[111] The Acting Solicitor concluded that the "[s]urplus lands are also properly designated as Indian lands in view of the interest of the Indians in the proceeds of any disposal of the lands.[112] In short, until the United States patented the surplus land to homesteaders and compensated the Utes, the Indians retained an interest in the land. As a result, the Solicitor concluded that the surplus lands were eligible to be restored to trust status under the terms of the IRA.[113]

Interior's attempts to restore the land to trust status raised local concern about the effect of restoration on local grazing districts.[114] That concern resulted in Senator Adams of Colorado writing an amendment to Section 6 of pending jurisdictional legislation that became the Act of June 28, 1938, ("1938 Act").[115] The amendment precluded the Secretary of the Interior from restoring any lands north of township 35 to the Utes; that is, lands north of the present Reservation were precluded from restoration.[116] By Order dated September 14, 1938, the "surplus" lands within the Southern Ute Indian Reservation were restored to ownership of the United States in trust for the Southern Ute Indian Tribe.[117] The boundaries of the restored lands, encompassing approximately 200,000 acres, were as follows:

> Townships 32, 33, and 34 North, Ranges 1½ to 13 West, inclusive, of the N.M.P.M., in Colorado, being that area lying between the north

---

107. *Kirgis memo, supra* note 89, at 832, 833, 837–38.

108. Southern Utes - Tribal Lands, 1 Dept. of Interior, Op. Solicitor 849, 850 (1938) [hereinafter *1938 Solicitor Opinion*].

109. *Id.*

110. *Kirgis memo, supra* note 89, at 836–37; *1938 Solicitor Opinion, supra* note 108, at 850.

111. *Kirgis memo, supra* note 89, at 837 (citation omitted).

112. *Id.*

113. *Id.*

114. *See* Confederated Bands of Ute Indians v. United States, 100 Ct. Cl. 413, 423–24 (1943).

115. Act of June 28, 1938, ch. 776, 52 Stat. 1209, 1210 (1938) (codified at 16 U.S.C. §§ 461-79 (1994)).

116. *See Confederated Bands of Ute Indians*, 100 Ct. Cl. at 424.

117. Southern Ute Indian Reservation, Colorado, 3 Fed. Reg. 1,425 (1938).

boundary of the old Southern Ute Reservation and the south boundary of the State of Colorado and extending west from the 107th Meridian to the east boundary of the present Southern Ute Reservation.[118]

6. The Modern Day Status of the Southern Ute Indian Reservation

The result of this complicated history is straightforward. On the present day Reservation there are three categories of land, with the restored land constituting the vast majority. The other lands are lands that never left trust status; that is to say, they were allotted to individual tribal members and remained in trust status either through inheritance or purchase by the Tribe. A small amount of land has been reacquired from non-Indians and returned to trust status. The status of the Reservation has been confirmed and its boundaries recognized by Congress.[119]

B. THE TRIBAL WATER RIGHTS ARE ENTITLED TO AN 1868 PRIORITY DATE

Contrary to Ms. Maynard's assertions, the Tribe retains a reserved water right with a priority date of 1868. The existing case law clearly establishes that a retained tribal interest in the land at issue is all that is required to maintain the reserved right for the benefit of the Tribe and its members. As is plain from the history recited above, the United States continued as trustee for the Tribe with regard to those lands that were opened to non-Indian settlement but never patented to non-Indians or taken by the United States for its own use and subsequently were restored to trust status under the Indian Reorganization Act. Because the Tribe never lost its interest in those lands, it retains a reserved water right under federal law with an 1868 priority date. And, of course, there is no contention that the allotted lands lost their senior priority date. Thus, only for reacquired land—a very small part of the Reservation—is there any question of the appropriate date for the tribal rights.

In any event, the key issue in determining the nature and extent of the tribal water rights is not the status of the Reservation or whether it was "extinguished" in 1880. Indeed, none of the cases cited by Ms. Maynard even remotely suggests that the nature and extent of tribal water rights is related to the continuing jurisdictional status of the land as part of a reservation. Reservation status, as opposed to trust status, is usually significant as to jurisdictional matters which are far different than the property right questions associated with water rights. Certainly, the establishment of a reservation is a critical event relative to the creation of reserved water rights, but once created those rights

118. *Id.*

119. Act of May 21, 1984, Pub. L. No. 98-290, 98 Stat 201(codified at 25 U.S.C. § 668).

are property rights unaffected by the continuing jurisdictional status of the lands.

1. The *Big Horn* and *Anderson* Cases Establish that the Southern Ute Indian Tribe is entitled to an 1868 Priority Date for the Restored Lands.

The priority date for water rights appurtenant to tribal land which was subject to, but not claimed for, either homesteading or allotment and returned to trust status was addressed in *Big Horn*[120] and *United States v. Anderson.*[121] In *Big Horn*, "ceded" lands were originally part of the Wind River Reservation, but through subsequent acts and treaties were relinquished by the Tribes on the Reservation to the United States for cash payment.[122] The remaining reservation lands came to be known as the "diminished reservation."[123] Some of the lands within the diminished reservation had passed into non-Indian ownership by a variety of means.[124] In 1934, the United States reserved the ceded lands which had not been disposed of to non-Indian settlers from further non-Indian settlement.[125] In 1940, the Secretary began a series of programs designed to reacquire, on behalf of the Tribes, both ceded lands and diminished lands that had passed out of Indian ownership.[126] In deciding the priority date for the water rights appurtenant to these lands, the *Big Horn* court held that "[b]ecause all the reacquired lands on the ceded portion of the reservation are reservation lands, the same as the lands on the diminished portion, the same reserved water rights apply. Thus, reacquired lands on both portions of the reservation are entitled to an 1868 priority date."[127]

Similarly, in *Anderson*, there was no challenge to the district court's holding that "lands reacquired by the tribe and returned to trust status, includ[ing] . . . lands opened to homesteading which were never claimed," should be "awarded a priority date as of the [original] reservation . . . ."[128]

In short, the only two cases that address the question of the nature and extent of tribal water rights associated with tribal lands opened to

120. In re the General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76 (Wyo. 1988), *aff'd without opinion by an equally divided court*, 492 U.S. 406 (1989).

121. United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984).

122. *Big Horn*, 753 P.2d at 84.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Big Horn*, 753 P.2d at 114.

128. United States v. Anderson, 736 F.2d 1358, 1361 (9th Cir. 1984). Water rights appurtenant to lands that had actually been homesteaded prior to reacquisition by the tribe had a priority date as determined under state law. If water rights associated with land that had been homesteaded and later reacquired by the tribe had not been perfected or had been lost, the priority date was the date of reacquisition. Water rights associated with land that was allotted and later sold to non-Indians, if not lost to non-use, carried a priority date of the creation of the original reservation. *Id.*

non-Indian homesteading but never settled, and thereafter restored to trust status, hold that such lands have reserved water rights with a priority date as of the date the reservation was established. The reasoning of those cases controls here. Because the restored lands on the Southern Ute Indian Reservation were never patented and no compensation was paid to the Southern Ute Indian Tribe, the Tribe never lost its interest in the restored lands. Hence, those lands retained the reserved water rights created at the time the Reservation was originally established in 1868.

2. The Claims Cases Do Not Stand for a Different Proposition.

The fact that the Southern Ute Indian Tribe was compensated for lands to which it actually lost title does not alter the conclusion that the Tribe retains an 1868 water right for lands which were not patented and eventually restored to trust status. Nor do any of the cases which address the question of the amount of compensation to which the Tribe was entitled on account of the federal government's misdeeds change the holdings of *Big Horn* and *Anderson.* Even a cursory reading of those cases reveals that they only dealt with lands to which the Tribe had actually lost title and not with the lands restored to trust status in 1938.

In 1909, Congress granted the Court of Claims special jurisdiction to hear the Utes' claims for certain lands taken under the 1880 Act.[129] Compensation was awarded for approximately 4.5 million acres actually taken under the cash entry provisions of the 1880 Act and for land taken by the United States for public reservations such as national forests, parks, and monuments.[130] Over 7 million acres of the 1868 reservation that were eligible for disposal under the 1880 Act remained undisposed at that time.[131]

In 1938, Congress again granted special jurisdiction for the Court of Claims to hear the Utes' claims for lost land (authorizing the Claims Court to "hear, determine, and render final judgment on all legal and equitable claims of whatsoever nature which the Ute Indians . . . may have against the United States, including . . . claims arising . . . by reason of any lands taken from them, without compensation.").[132] In 1941, a confederation of several Ute bands, including the Southern Utes, brought suit under this Act for compensation for lands sold since 1911 by the United States under the 1880 Act, and for lands taken north of the present Reservation.[133]

The Court of Claims issued the first decision in the suit in 1943.[134]

---

129. Act of March 3, 1909, 35 Stat. 781, 788–89 (codified at 25 U.S.C. § 320 (1994)).

130. *See* Ute Indians v. United States, 45 Ct. Cl. 440 (1910), *supplemented by* 46 Ct. Cl. 225 (1911).

131. Confederated Bands of Ute Indians v. United States, 100 Ct. Cl. 413, 422 (1943).

132. *Id.* at 414–15.

133. *See id.* at 422–23.

134. *Id.* at 413.

As an interlocutory matter, it held that the Utes were entitled under the 1938 Act to compensation for all lands in Colorado north of and including township 35, held by the United States for disposal under the 1880 Act.[135] The Court of Claims also confirmed the notion that the Utes retained an interest in the surplus lands.[136] The court held that even by ceding to the United States in 1880 all territory in Colorado then reserved for their use, the Southern Ute Indian Tribe did not relinquish all interest in such lands which the United States did not dispose.[137] Rather, such lands, "while they remained unsold, belonged to the Indians."[138]

Finally, in 1950, the parties reached an agreement regarding the value of the lands taken from the northern parcel and from within the Reservation. The Court of Claims entered a judgment giving effect to the stipulation agreement between the Utes and the United States.[139] The parties stipulated as follows:

> [A] judgment . . . shall be entered in this cause as full settlement and payment for the complete extinguishment of plaintiffs' right, title, interest, estate, claims and demands of whatsoever nature in and to the land and property in western Colorado ceded by plaintiffs to defendant by the Act of June 15, 1880 (21 Stat. 199), which (a) the United States sold for cash [between 1910 and 1938], (b) disposed of as free homesteads [between 1885 and 1938], and (c) set aside for public purposes [between 1910 and 1938] .... There is filed herewith and made a part of this stipulation Schedule 1, which contains the legal descriptions of approximately 1,523,236.95 acres, of which 1,361,993.22 acres were disposed of by defendant as free homesteads and the remaining 161,243.73 acres of which were set aside by the defendant for public purposes. So far as the parties with diligence have been able to determine these descriptions represent all the land so disposed of and set aside. However, the judgment to be entered in this case is res judicata, not only as to the land described in Schedule 1, but, whether included therein or not, also as to any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 (21 Stat. 199), and by the defendant during the aforesaid periods of time sold for cash, disposed of as free homesteads and set aside for public purposes.[140]

In 1951, the Southern Ute Tribe brought a claim before the Indian Claims Commission, pursuant to the Indian Claims Commission Act,[141] asserting that the United States had violated its fiduciary duty to the Tribe by disposing of 220,000 acres of land as free homesteads and by failing to account for the proceeds of an additional 82,000 acres,

135. *Id.* at 432–33. *See also* Confederated Bands of Ute Indians v. United States, 112 Ct. Cl. 123 (1948).
136. *Id.* at 429–30.
137. *Confederated Bands of Ute Indians*, 100 Ct. Cl. at 432.
138. *Id.* at 428.
139. Confederated Bands of Ute Indians v. United States, 117 Ct. Cl. 433 (1950).
140. *Id.* at 436–37 (emphasis added).
141. Indian Claims Commission Act, 25 U.S.C. § 70a.

although the 1880 Act had explicitly stated that lands were to be opened to "cash entry only" and the United States was to hold the proceeds from the lands for the benefit of the Tribe.[142] The Tribe had argued that the lands in question were not listed on Schedule 1 attached to the 1950 consent decree, and they were ceded in 1895 rather than 1880.[143] Therefore, the Tribe contended that the 1950 consent judgment should not preclude the claim based on the lands in question.[144] The United States defended on the basis that the 1950 consent judgment foreclosed any claim to the land in question, and therefore the suit was barred by *res judicata.*[145]

The Indian Claims Commission twice rejected the United States' defense.[146] The Court of Claims affirmed.[147] Both courts based their decisions on the ground that the claim concerning the lands in the action was not compromised by the 1950 consent judgment because the lands were not among the lands ceded by the 1880 Act.[148] However, the Supreme Court reversed, allowing the federal government's *res judicata* defense.[149] The Court first examined the language of the 1950 consent judgment, and concluded that the plain meaning indicated that the present claim was barred.[150] Next, the Court considered the history of the relations between the Southern Utes and the United States from the 1880 Act to the 1895 Act, including the 1882 and 1888 Acts.[151] The Court concluded that the lands in question were ceded under the 1880 Act.[152]

In short, the various claims cases all dealt with misdeeds by the United States for lands to which the Tribe's title had been divested either by actual sale of the land, appropriation of the land for the federal government's own purposes, or the 1938 Act's taking of the retained tribal interest in the lands north of the current reservation. The underscored language in the 1950 stipulation makes it crystal clear that the compensation paid to the Tribe was for lands in which the Tribe had lost its interest. Those are not the lands at issue here and no principled reading of the cases could conclude otherwise. The Supreme Court case on which Ms. Maynard places such great weight

142. Southern Ute Tribe or Band of Indians v. United States, 17 Ind. Cl. Comm. 28 (1966); *see also* United States v. Southern Ute Tribe or Band of Indians, 402 U.S. 159, 159–60 (1971).

143. United States v. Southern Ute Tribe or Band of Indians, 423 F.2d 346, 347 (Ct. Cl. 1970), *rev'd*, 402 U.S. 159 (1971).

144. Southern Ute Tribe or Band of Indians v. United States, 17 Ind. Cl. Comm. 28 (1966).

145. *United States v. Southern Ute Tribe or Band of Indians*, 402 U.S. at 159–60.

146. *See* Southern Ute Tribe or Band of Indians v. United States, 7 Ind. Cl. Comm. 28; Southern Ute Tribe or Band of Indians v. United States, 21 Ind. Cl. Comm. 268 (1969).

147. *United States v. Southern Ute Tribe or Band of Indians*, 423 F.2d at 346.

148. *United States v. Southern Ute Tribe or Band of Indians*, 402 U.S. at 161.

149. *Id.* at 174.

150. *Id.* at 164.

151. *Id.* at 164–71.

152. *Id.* at 174.

holds only that any the loss of tribal title occurred by virtue of the 1880 Act and not the 1895 Act. That has no bearing on the question of the nature and extent of tribal water rights for lands which were not lost.

VI. CONCLUSION

When viewed in context, the arguments that the Southern Ute Indian Tribe is not entitled to a reserved water right with an 1868 priority date do not withstand scrutiny. Instead, those contentions are revealed as a desperate and erroneous effort by those opposed to the development of additional water supplies in southwest Colorado to stop the United States from implementing its promises to the Ute Tribes to provide them with a long term water supply from the Animas River. Only if the tribal water rights do not exist can the greatly reduced project proposed by the Administration be halted. The law should not be distorted in the fashion advocated by Ms. Maynard for such blatantly political purposes.