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ERODING THE *WINTERS* RIGHT: NON-INDIAN WATER USERS' ATTEMPT TO LIMIT THE SCOPE OF THE INDIAN SUPERIOR ENTITLEMENT TO WESTERN WATER TO PREVENT TRIBES FROM WATER BROKERING*

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INTRODUCTION

In the western states, access to water is power. Indian tribes currently are entitled to enough water to tie up all the unallocated water of the west.[1] Transfer of Indian water rights for on or off-reservation uses, such as mining and natural resources development, could put tribes in a position of "brokering" much of the nation's western water supply.[2] States and non-Indian water users are concerned that the legal possibility exists that large quantities of water will be consumptively used or leased by Indians to the exclusion of junior appropriators in the state appropriations system.[3] Yet, there exists an immediate market

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1. Telephone interview with Craig Bell, Executive Director, Western States Water Resources Council regarding new study of western water management (unpublished report) (Feb. 6, 1997).

2. Indian water rights may well exceed seventy-five percent of the flows in the Missouri River. *Hearings on Transfer of Reclamation Facilities Before the Water and Power Subcommittee of the House Committee on Resources,* 104th Cong., 1st Sess. 40-90 (1995) (testimony of Susan M. Williams, Counsel for Mni-Sose Intertribal Water Rights Coalition); "There is enough irrigable land on the Ute Reservation to dry up all of the non-Indian irrigation on the Mancos Valley." *Hearings on Energy and Water Appropriations Before the Subcommittee on Energy and Water Development of the Committee on Appropriations,* 103d Cong., 1st Sess. 635-37 (1994) (testimony of Fred V. Kroeger); The *Winters* claims of the Navajo nation alone could arguably dry up the San Juan River Basin. Telephone Interview with Mr. John Leeper, Navajo Department of Water Resources (Feb. 13, 1997).

3. In the 1980s, there was a large demand for Missouri River water for coal slurry pipelines. At one time the tribes were offered $3.6 million for 20,000 acre feet annually. States efforts to prevent unregulated tribal water marketing is based on the fear tribes will "sell to the highest bidder." Since tribal water rights are not subject to the state system, states are also concerned about the "harm" that will come to downstream

for tribal water both on and off reservation.[4] However, tribes have yet to receive the congressional authorization necessary to allow them to capitalize on this opportunity for economic development through leasing their entitlement to water, despite the fact that tribes have the full legal right pursuant to the *Winters* doctrine to utilize their water entitlement in any way the tribe chooses.[5]

Tribes' superior right to water is threatened. History has shown that tribes cannot always rely on the government or the courts to protect vested rights to tribal property or natural resources, especially when those rights affect the economic development of the country.[6] States are attempting to limit tribal water rights by casting doubt on the actual intent behind the *Winters* right and by asking courts to limit the scope of the entitlement when making water allocation decisions. The Wyoming *Big Horn* cases, the most recent full adjudication of tribal water rights, provide a good example of the fact that courts may be willing to ignore principles of tribal sovereignty, the Supremacy Clause, canons of treaty construction, the *Winters* doctrine, and case precedents to limit tribal water interests in favor of non-Indian water users in the western states, where access to water is the key to economic development and growth.[7]

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users when Indians start taking their share. *Hearings on HR 5098 Before House of Representatives Natural Resources Oversight Investigations,* 103d Cong., 2d Sess. (1994) (statement of Congressman Pat Williams).

4. Water-short states are beginning to admit that paying for unused tribal water is sometimes the only way to obtain enough water for growing municipalities. States like California and Nevada are fast approaching limitations allocated by Congress in the 1929 settlement agreement allocating water of the Colorado River among states. Such states are currently investigating leasing water from tribes. Telephone Interview with Sammy Maynes, Attorney for the Southern Ute Tribe (Mar. 19, 1997).

5. The long-standing rule has been that tribes could decide how to use their water entitlement. The *Big Horn III* case, discussed below, upset this precedent. *In re* The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, 835 P.2d 273 (Wyo. 1992).

6. Joseph R. Membrino, *Indian Reserved Water Rights, Federalism and the Trust Responsibility,* 27 LAND & WATER L. REV. 1, 12 (1992). Membrino notes that the turn of the 20th century was marked by massive expropriation of Indian lands and the turn of the 21st century is the era when the Indian tribes risk the same fate for their water resources.

7. The adjudication of all the water rights in the Big Horn River system consisted of a series of three cases and fifteen years of litigation: *In re* The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, 753 P.2d 76 (Wyo. 1988) ("Big Horn I") (involving Indian reserved water rights for the Shoshone and Northern Arapaho Tribes of the Wind River Indian Reservation); *In re* The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, 803 P.2d 61 (Wyo. 1990) ("Big Horn II") (dealing with claims of non-Indian successors to allotments on the Wind River reservation); and *In re* The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, 835 P.2d 273 (Wyo. 1992) ("Big Horn III") (regarding the regulation and administration of the reserved rights awarded in *Big Horn I*). The *Big Horn III* decision is most germane to this paper—erosion of the *Winters* right. In *Big Horn III,* the Wyoming Supreme Court held that tribes could not determine for themselves new uses of their quantified water rights and that a change of use was subject to state regulation. *Big Horn III* provides an example of state courts protecting state water rights at the expense of tribes and in so doing threatens tribes that seek quantification of water

This article maintains that tribes should assert their full entitlement to water throughout the West while the law remains in their favor. If exercised properly, tribal reserved water rights could mean political power and economic gain for Indians and provide a last chance for them to maintain authority and control of a valuable resource to which they have vested title.[8] Private, natural resources developers would find access to substantial Indian water rights attractive and would be willing to pay a premium price for securing the rights necessary to implement complex resource development projects.[9]

WINTERS RIGHTS

Indian reserved water rights are federally created under *Winters v. United States,*[10] in which the Supreme Court held that Indian water rights were impliedly reserved for the benefit of the Indians at the time of the reservation's creation in sufficient quantity to fulfill the purpose of the reservation.[11] Over the next sixty years, the Supreme Court expanded the scope of the reserved rights doctrine to include non-Indian federal lands. *Arizona v. California, ("Arizona I"),*[12] while dealing

rights in court by casting a cloud of uncertainty over the previously secure *Winters* right.

8. During the 19th century, Indian and non-Indian controversies revolved around land-related issues. In this century, water issues are of fundamental importance to tribes. Tribal governments are asserting their rights to water to protect their futures. Steven J. Shupe, *Indian Tribes In The Water Marketing Arena,* INDIAN WATER 1 (1989).

9. The primary fear regarding Indian entitlement to western water is that private industry could afford to purchase superior and substantial quantities of water for developing natural resources and generating electrical power apart from the States' regulatory systems. The concern is that municipalities will have difficulty obtaining adequate water supplies if forced to bid for tribal water against private natural resources developers. Telephone Interview with Attorney Tom Schipp (Mar. 18, 1997). Also significant is the fact that contract renewal for major power generating plants are now subject to § 107 review of the Endangered Species Act, 16 U.S.C. §107 (1973), which can become complex and expensive, making obtaining tribal water an attractive alternative to compliance with the Endangered Species Act requirements. Telephone Interview with Sammy Maynes, Attorney for the Southern Ute Tribe (Mar. 19, 1997).

10. Winters v. United States, 207 U.S. 564 (1908). Winters and other non-Indian settlers sought to dam the Milk River upstream of the Fort Belknap Indian Reservation. The United States argued on behalf of the Indians that Winter's actions interfered with irrigating reservation lands. The Supreme Court held that, although the treaty establishing the reservation was silent on the matter, it had impliedly reserved a sufficient quantity of water for the Indians to irrigate their land. Establishing the priority date at the time the reservation was created effectively granted tribes a reserved right superior to most non-Indian interests that were established pursuant to the state system. There are a few tribes that claim aboriginal water rights, and, when upheld, these rights displace *Winters* rights in priority. The claims to entitlement differ in that the *Winters* right is based upon a grant of water from the United States to tribes and the aboriginal title is a right reserved by tribes, predating and existing apart from the *Winters* right. Jessica Bacal, *The Shadow of Lone Wolf: Native Americans Confront Risks of Quantification of Their Reserved Water Rights,* 12 U. BRIDGEPORT L. REV. 1, 21 (1991).

11. *Id.*

12. Arizona v. California, 373 U.S. 546 (1963). The case began as a dispute among

primarily with non-Indian federal lands, proved significant for three reasons, because it reaffirmed the Court's earlier interpretation of the *Winters* right, quantified it as "enough to irrigate all the practicably irrigable acreage on the reservations"[13] and, most importantly, implied that the right was expandable as it was "intended to satisfy the present and future needs of the reservation."[14]

In making a determination of reserved water rights, courts must first consider the purposes of the reservation[15] and then reserve enough water for fulfilling those intended purposes. The real battle between the tribes, non-Indian users, and states revolves around this determination of the "purposes" of reservations. Since each reservation was the result of a separate negotiation, courts must evaluate each treaty separately in making these decisions,[16] and the canons of treaty construction mandate that courts make these conclusions in a light most favorable to tribes.[17]

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several western states over each state's share of the waters of the Colorado River. Exercising its trust responsibility, the United States intervened on behalf of the five Indian tribes having claims to the waters of the Colorado River. The Court upheld the *Winters* doctrine, reaffirming that Congress intended to reserve enough water to satisfy the future as well as the present needs of the Indian Reservations—enough to irrigate all practicably irrigable acres. The Court rejected the state's arguments that the measure should be made according to the number of Indians living on the reservation, stating that estimating future Indian populations and needs would be wholly speculative.

13. The *Arizona* Court established the "practicably irrigable acreage" standard ("PIA") used to quantify the Indian water right. PIA is calculated by first measuring the arable land on the reservation and determining if the land is irrigable from a purely engineering standpoint. Then the currently available technology is assessed to determine if the land could be farmed. Finally, the economic feasibility of the process is assessed. If the annual benefits exceed costs, the land is considered practicably irrigable. In adopting the PIA standard, the Court explicitly rejected Arizona's proposal that it adopt a "reasonably foreseeable needs" standard which would have been based upon the number of Indians living on the reservation. *Arizona*, 373 U.S. 546, 599. The PIA standard was later upheld by the Supreme Court in *Wyoming v. United States*, 488 U.S. 1040 (1989).

14. *Arizona*, 373 U.S. at 599. For full discussion of the controversy surrounding the practicality of the PIA standard, *see* Martha C. Franks, *The Uses Of The Practicably Irrigable Acreage Standard In The Quantification of Reserved Water Rights*, 31 NAT. RESOURCES J. 549, (1991).

15. *Arizona*, 373 U.S. at 594. While the purpose of the reservation varied over time, the pervasive and persistent theme in Indian policy has been the development of economic viability of the reservation. Jessica Bacal, *supra* note 10, at 21.

16. Each treaty is examined in the context of the situation at the time it was established in an effort to establish the intent of the parties at the time. These are crucial decisions because the court's determination of "purpose" is directly related to the size of the tribe's entitlement. *See Arizona*, 373 U.S. at 594. States are attempting to limit tribal water uses by asking courts to hold that allocations of water pursuant to the *Winters* doctrine may only be used on the reservation and only for those uses that fulfill the "purposes of the reservation." *But, see, Big Horn III*, 835 P.2d 273 (court holding tribes could not convert their agricultural water to instream flow because instream flow could not have been contemplated by the treaty establishing the reservation).

17. Canons of treaty construction govern the interpretation of Indian treaties state: First, ambiguities must be resolved in favor of the Indians; second, Indian treaties must be interpreted as the Indians would have understood them; and third, Indian treaties must be construed liberally in favor of the Indians. STEVEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES, THE BASIC ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS (2d ed.1992)

Narrowly interpreted, use of reserved water would be limited to the boundaries of the reservation,[18] but this could limit tribes to an agrarian lifestyle on reservation land much of which is not suitable for agriculture.[19] On the other hand, broadly interpreted, Indian entitlement means enough water to fulfill the economic development of the tribe,[20] including any use that could promote progress and economic development.[21] Since most treaties contain language suggesting the United States intended reservations to become a permanent homeland for tribes and that tribes should become self-sufficient, the door is left open for courts to allocate water for all uses that promote economic development of tribes.[22] Opponents of such broad interpretation argue it is too open-ended—that Congress could not possibly have envisioned such an expansive right.[23] Others believe that limiting reserved water use to the reservation is equivalent to preventing tribes from using its entitlement at all.[24] Forcing tribes to rely on completion of federally funded water delivery systems in order to put their water entitlement to use means non-Indian users continue to utilize water that belongs to the tribes.

The uncertainty of the *Winters* right is incompatible with the western doctrine of prior appropriations which governs water allocation in most of the western states.[25] In the prior appropriations system the application of water to a beneficial use perfects the right, sets its priority date and quantifies its amount.[26] A user's right can be lost through

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at 40.

18. *Big Horn I*, 753 P.2d at 119 (Thomas, J., dissenting).

19. Wyoming's argument in attempting to limit the scope of the *Winters* right in *Big Horn III*, 835 P.2d 273 (Wyo. 1992).

20. Broad interpretation includes all uses of water required for a "permanent homeland." United States v. Adair, 723 F.2d 1394, 1410 (9th Cir. 1984), *cert. denied*, 460 U.S. 1015 (1983). This interpretation is consistent with Indian policy that supports tribal autonomy and self-sufficiency of Indian tribes.

21. District Judge Hanscum would allow other uses including the sale of water off the reservation where the activity contributed to the progress and development of the Indian homeland. *Big Horn III*, 835 P.2d 273 (Hanscum, J., dissenting).

22. This line of reasoning was used in United States v. Washington, 506 F. Supp. 187 (W.D.Wash. 1980). Here the court found an intent to "civilize" the tribe and determined that fishing was crucial to meeting the needs of the tribe. A broad interpretation of the treaty gave Indians a superior right to take a greater share of the fish at the expense of non-Indian commercial fishermen. *See* Eric Eisenstadt, *Fish Out of Water: Setting a Single Standard for Allocation of Treaty Resources* 17 AM. INDIAN L. REV., 209 (1992).

23. *Supra* note 19.

24. Membrino, *supra* note 6, at 28. Membrino and others argue that tribes are forced to forego the full entitlement of their water rights when they are not allowed to utilize their water off-reservation. When limited to on-reservation use only, tribes must wait for federal water delivery projects which often are promised but never delivered or delivered many years after the fact, resulting in foregone profits for tribes on water that is rightfully theirs.

25. A prior appropriation is granted when a person applies a particular quantity of water to a beneficial use, and those rights continue so long as the beneficial use is maintained. DAVID H. GETCHES, WATER LAW, WEST NUTSHELL SERIES 97-104 (2d ed. 1990).

26. *Id.* at 97.

nonuse or abandonment.[27] Pursuant to *Winters*, a right to water exists with the date of the establishment of the reservation as its priority date and continues to exist regardless of whether it is presently being used or not,[28] meaning it is generally superior to those non-Indians who settled and obtained their water rights through the state allocation system after most reservations were established. The effect of *Winters* in the West is that non-Indian water entitlements remain subject to future assertion of a superior Indian reserved right. Because the *Winters* right exists apart from the state system and because the right can be asserted by tribes at any time, the *Winters* right usurps the predictability of the "first in time, first in right" notion of western water use. Where an unquantified Indian entitlement remains, the amount of water to which tribes have a legal right remains questionable. The state system of allocating unappropriated water is forced to operate under the uncertainty of these "uncalculated" quantities without knowing when, if ever, they will be put to use. In the meantime, the risk is high for non-Indian investment in water development that may be discontinued once a tribe decides to assert its right to its water entitlement. When the tribal water right is quantified, the state can better calculate how much of the river remains available for allocation to new or different beneficial uses.[29]

EROSION OF THE WINTERS DOCTRINE

The *Winters* Doctrine is being attacked by states and non-Indian water users. Water-short western states are attempting to protect water rights of non-Indian users by asking courts to limit the scope of the right: (1) by advocating that courts should balance the Indian entitlement with that of the non-Indian user; (2) by placing limits on the right[30] by being "sensitive" to the surrounding water rights which will be impacted; and (3) by attacking the feasibility of proposed tribal water uses to diminish the amount of the entitlement.[31] The fact that

27. *Id.* at 90.

28. *Winters*, 207 U.S. at 564.

29. As long as tribal claims to western rivers remain unquantified, states will continue to overappropriate the rivers. The result is that water-short states continue to use for free the water tribes have a legal claim to and from which tribes receive no benefit. For example, California's uses are expected to go beyond 5.2 maf for 1996, exceeding its 4.4 maf per year entitlement to the Colorado River by some 800,000 acre-feet. California is able to get that water largely because of the Indian entitlement that goes unused—but at no cost to California and with no benefit to the tribes. Secretary of the Interior, Bruce Babbitt, Address at the *Colorado River Water Users Association* (Dec. 19, 1996) (on file with author).

30. For example, bills have been introduced in the Congress that would stipulate a short period of years in which tribes must exercise their reserved rights and insisting that water use outside the reservation be subject to state regulation. Susan D. Brienza, *Wet Water vs. Paper Rights: Indian and Non-Indian Negotiated Settlements and Their Effects*, 11 STAN. ENVTL. L. J. 151 (1992).

31. In Reynolds v. Lewis, 545 P.2d 1014, 1015 (1976), the district court rejected the

courts are entertaining these types of arguments aimed toward restricting the *Winters* right poses huge risks to tribes which have not yet quantified their reserved rights.[32]

In *Big Horn III*, the State of Wyoming unsuccessfully argued that the *Winters* doctrine is a mere court "fiction" in an effort to convince the court that the doctrine was not a universal right of entitlement to water for all Indians and that the doctrine should not be applied equally to all reservations.[33] Wyoming asserted Congress had different ideas in mind when the Wind River Reservation was established and the legislative history of the reservation suggests Congress intended it should obtain its water rights through the state appropriation system, and, therefore, the *Winters* entitlement was not applicable.[34]

Opponents also argue that federal reserved water rights should be determined with "sensitivity" to the surrounding water rights which will be impacted, a balancing that would have the effect of minimizing reserved rights to a "minimum amount possible to support reservation purposes." States rely on the following three Supreme Court cases to support the "sensitivity" argument: *Cappaert v. United States*;[35] *United States v. New Mexico*;[36] and *Washington v. Washington State Commercial Passenger Fishing Vessel Association*.[37]

States quote the *Cappaert* statement that the reserved rights doctrine "reserves only that amount of water necessary to fulfill the purpose of the reservation, no more" to support the argument that tribal reserved rights should be quantified to a "minimal need" standard.[38] In *United States v. New Mexico*, the Court carefully considered a federal agency's asserted water right and the specific purposes for which the land was reserved, implying that the federally reserved water right should be applied with sensitivity to its impact on those who have ob-

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tribe's claims on the grounds that they failed to prove the economic feasibility of the proposed irrigation projects and instead awarded the tribe a population-based award with no award for future agriculture—contrary to the *Winters* promise of enough water for future uses and despite the Supreme Court's express rejection of a "population based" standard in *Arizona I*.

32. Tribes that engage in litigation of *Winters* claims can no longer be certain of what standard courts will use to measure the entitlement or how broad or how narrow the purpose of their reservations will be interpreted by courts. Depending on the court, tribes could win a full *Winters* award or they could be awarded "enough to meet minimum needs." It should be noted that the tribes on the Wind River Reservation in Wyoming chose not to appeal the *Big Horn III* decision because of these concerns. Interview with James Merrill, Attorney for the State of Wyoming in *Big Horn III* (Feb. 6, 1997).

33. *Big Horn III*, 835 P.2d at 273; Interview with James Merrill, Attorney for the State of Wyoming in *Big Horn III* (Feb. 6, 1997).

34. Interview with James Merrill, *supra* note 33.

35. Cappaert v. United States, 426 U.S. 128 (1979) (Court considering the federal reservation of water rights for a national monument).

36. United States v. New Mexico, 438 U.S. 696 (1978) (involving water rights for national forests).

37. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (Court applying a "need based" analysis for quantifying the measure of the Indians' entitlement to take fish both on and off the reservation).

38. *Cappaert*, 426 U.S. 128, 141 (1976).

tained water under state permits.[39] In *Washington*, the Court required that Indians show a "need" for the full amount requested,[40] opening the door to arguments that the Supreme Court sanctions placing a "need based" ceiling on the allocation of a scarce resource between Indian and non-Indians.[41]

It is important to note that none of the three cases that states use to erode the *Winters* right address the issue of Indian reserved water rights. Both *Cappaert* and *New Mexico* deal with water reserved for non-Indian, federal reservations, and the *Washington* case deals with allocation of fish, making practicably irrigable acreage ("PIA") inapplicable. Therefore, tribes should argue that the PIA standard continues to govern quantification of the *Winters* right, pointing out that it was upheld in the *Big Horn* adjudication, the most recent Supreme Court decision with respect to quantification of Indian water rights.[42]

THE BIG HORN CASES

The Wyoming *Big Horn* cases are significant because they represent a change in what had been a well established trend of courts broadly interpreting the *Winters* right when determining the purpose of reservations, favoring allocating water for uses that would economically advance tribes and where the particular use plays a central and crucial role in the life and economy of the tribes.[43] In *Big Horn I*, the Wyoming Supreme Court disagreed with the Special Master's Report, accepted in part by the district court, that the Wind River Reservation had a "homeland" purpose which typically includes agriculture.[44] The

39. *New Mexico*, 438 U.S. 696, 700-03 (1978). The case was the first to establish the notion that water should only be reserved for the "primary" purposes of the reservation. Water for all other "secondary" uses should be obtained through the state system when the Court stated that "agencies administering federal reservations have recognized Congress' intent to acquire under state law any water not essential to the specific (primary) purposes of the reservation." This dictum has been used to limit the amount of water reserved for federal reservations and to suggest that the Supreme Court supports a "balancing" of competing interests with regard to the implied reservation of water.

40. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

41. This need based approach could be used to tie resource allocation to population of the reservation which would be significantly less than the PIA allocation. The measure of the right could also be diminished by decrease in population on the reservation but the measure once quantified would not be subject to increase. This method of measuring the reserved right cannot legally be applied to tribal reserved water rights as it ignores the principles of the *Winters* doctrine which governs Indian water rights.

42. *Big Horn I*, 753 P.2d 76 (Wyo. 1988).

43. Colville Confederated Tribe v. Walton, 752 F.2d 397 (9th Cir. 1981) (court determining creation of reservation impliedly reserved enough water for maintaining man-made trout lake where tribe relied upon fishing and irrigation for survival).

44. *Big Horn I*, 753 P.2d 76 (Wyo. 1988), *cert. granted in part*, 488 U.S. 1040, 109 S.Ct. 863, 102 L.Ed.2d 987 *cert. denied in part*, 492 U.S. 926, 109 S.Ct. 3265, 106 L.Ed. 610 (1989), *affirmed*, Wyoming v. United States (Big Horn II) 492 U.S. 406, 109 S.Ct. 2994,

Master applied a PIA standard, considered the tribes' proposed irrigation projects and their economic feasibility, and recommended an award to the Shoshone and Arapaho Tribes of the Wind River Reservation totaling 477,292 acre-feet per year as well as some smaller reserved awards for non-agricultural uses.[45] The Wyoming Supreme Court refused the "homeland" purpose in favor of "agricultural," thereby eliminating the Master's allocation of reserved rights for uses other than agricultural.[46] The court severely restricted the *Winters* rights by imposing state regulation on tribal water and placing a prohibition of the export of water off the reservation.[47] Significantly, the court refused to find a reservation of water for mineral and industrial development. The overall effect was deterrence of natural resource development through elimination of large quantities of water that could be available for mineral development projects.[48] Affirmed by the U.S. Supreme Court, *Big Horn I* essentially sanctioned a trend toward "shrinking" the *Winters* right, thereby placing tribes on notice that adjudication for their legal entitlement to western water was risky at best.[49]

The *Big Horn III* case proved devastating to tribes when the Wyoming Supreme Court limited the *Winters* right further by stating that Indians could not change their future water right without regard to state water law.[50] Limiting use in this way means tribes are not free to reallocate water previously used for agriculture to other uses such as instream flow or for natural resources development projects that might prove better for tribes economically. The *Big Horn III* decision represents an unprecedented state intrusion on tribal sovereignty in the water arena, serving again to put tribes on notice of just how desperate states are to prevent Indians from gaining any control in the western water market.[51]

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106 L.Ed.2d 342 (1989). *Big Horn I* was on appeal from the district court's acceptance of the Special Master's Report that recognized the much broader "homeland" purpose and awarded Indians water for irrigation, stock watering, fisheries, wildlife and aesthetics, mineral and industrial, and domestic, commercial, and municipal uses.

45. Special Master's Report, (Dec. 25, 1981), Supplemental and Final Special Master's Report, (June 1, 1984) (Wyo. 1977).

46. *Big Horn I*, 753 P.2d 76, 96 (1988). The Wyoming Supreme Court ignored the language of the *Winters* Court where *Winters* implied that the "arts of civilization" were among the intended purposes of the Indian reservation. Regarding what standard to use to measure the right, the Court decided that *Cappaert, New Mexico,* and *Washington* had implemented a "needs based" test but that these cases had not overruled the PIA standard.

47. *Id.* By determining that Congress had no other purpose in mind but to convert Indians to agrarian people, the Wyoming Supreme Court upheld limiting water to on-reservation agricultural uses. No case law exists to support such limitations on use of the quantified reserved right.

48. Some argue states are protecting sources of water for municipal use by asking courts to limit the tribes entitlement in this way. Telephone interview with David Getches, Professor, University of Colorado, Boulder, Co. (Apr. 3, 1997).

49. *Big Horn I*, 492 U.S. 406, *rehearing denied*, 492 U.S. 938.

50. *Big Horn III*, 835 P.2d 273, 282 (1992).

51. Despite the fact that tribes' *Winters* rights were trammeled by the *Big Horn III* decision, the Wind River Indians chose not to appeal this decision to a U.S. Supreme Court that did not appear to be any more sympathetic to their cause than the Court

QUANTIFICATION

Today, quantification of tribal water rights is desirable for both tribes and for states. From the tribal perspective, once reserved rights are quantified, tribes can move toward beneficially utilizing their fair share of the waters traversing their reservations.[52] Quantification transforms the *Winters* right from a "notion" of an entitlement to a contract for a specified amount of water which tribes can use for their benefit or as a tool for negotiation with states and other interested users.[53] Once quantified, it is less likely that the U.S. government can neglect to consider tribal allocations when considering federal water projects for non-Indian uses.[54] For non-Indian interests, unquantified Indian reserved rights means more water remains available for allocation by states for new and different uses and in many instances non-Indians continue to use the Indian entitlement for free.[55]

Some risks exist for tribes considering quantification: (1) tribes are wary of state enthusiasm for removing the cloud of the Winters rights;[56] (2) quantification places limits on that ability to increase the amount of water claimed;[57] and (3) once quantified, the Supreme Court held

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that affirmed the *Big Horn I* decision. Therefore, *Big Horn III* does not have binding effect on courts outside Wyoming, but that does not diminish its damaging impact on Indian water negotiations.

52. For California alone, each year tribal water rights went unquantified meant 300 billion more gallons of water for the state. Susan D. Brienza, *supra* note 30, at 178.

53. Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981) (permitting Indians to determine how to use reserved water is consistent with the general purpose of the creation of an Indian reservation); once quantified, tribal "paper" rights become tools for negotiating with water-short cities. For example, California cities have been willing to pay for the tribal allocations in federal projects not yet in use. Tribes have also been allowed to trade their unused allocations in federal projects not yet deliverable to tribes for cash. Peter W. Sly, *Urban and Interstate Perspectives on Off-Reservation Tribal Water Leases*, 10 WTR. NAT. RESOURCES & ENV'T 43, 45 (1996).

54. During the major water development era in the West pursuant to the Reclamation Act of 1902, 43 U.S.C. §391, Indian entitlements to water were essentially ignored. U.S. National Water Commission, Water Policies for the Future-Final Report to the President and Congress of the United States at 474 (1973). The result of the federal government's failure to protect tribal water is that most rivers in the West have been overappropriated.

55. Non-Indian ranchers and farmers rely on availability of unused tribal water for irrigation for agriculture. Cities and municipalities surrounding reservations typically utilize water that is actually allocated but unused by tribes. *Hearings Before the Subcommittee on Energy and Water Development Committee on Appropriations*, 103d Cong., 2d Sess. 2307-23 (1994) (statement of Ron Pettigrew, President, and Steve Harris, Secretary, Board of Directors of Animas-La Plata Water Conservancy District).

56. Bacal, *supra* note 10, at 3. This urgency on the part of states to settle water rights issues is viewed by some Indians as another attempt at usurpation by non-Indians of Indian resources.

57. Pevar, *supra* note 17, at 218. The *Winters* right allows tribes to utilize as much water as is necessary to support the purpose of the reservation for now and into the future. The amount of the *Winters* entitlement may increase over time if the needs of the reservation increase. However, once quantified, tribes may not increase their entitlement.

that tribes may not ask that those cases be revisited.[58]

The extraordinary cost of quantification of water rights has been a major hindrance to tribes. In the past, it made little sense for tribes to spend the money litigating the quantification issue only to win an award of water having little value to tribes which lacked capital to develop the right. The federal government's history of uncompleted water storage and delivery systems served as a disincentive for quantification.[59] However, today, with nearly every river in the West overappropriated[60] and the value of available water in the market rising, quantification of reserved rights makes economic sense for tribes that may want to establish themselves as a broker in the western water market.[61]

WATER BROKERING

Since tribes have strong legal claims to an enormous share of the waters of the West,[62] tribal water leasing could have a significant economic impact on non-Indian uses.[63] Indian claims to water in the West

58. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983).

59. Fulfillment of the reserved rights of the five tribes with water interests in the Colorado River Basin is based upon completion of the Animas–LaPlata Project which has been delayed since its authorization in 1968. Tribes continue to wait for the federal government to fulfill a promise ratified by Congress in 1988.

60. For example, the Colorado River system is overappropriated. The Compact apportionment was made in 1922, when only 16 years of record were available to determine the amount of annual flow—unfortunately these were relatively high flow years. Compact negotiators believed they were dealing with an annual average supply in excess of 17 maf. The result was an apportionment of Colorado River water totaling 16 maf, when actual average annual flow is now estimated at 15 maf or less. *Hearings on Current Management Issues in the Lower Basin of the Colorado River Before The Water And Power Subcommittee Of The Senate Energy And Natural Resources Committee,* 103d Cong., 2d Sess. 15-30 (1994) (statement of Elizabeth Ann Reike, Assistant Secretary-Water Science Department of the Interior).

61. For the first time ever, in 1996, the demand for water in the Lower Basin of the Colorado River exceeded the Basin's basic apportionment. Demand is expected to continue to regularly exceed available unallocated water as consumption in each of the lower basin states has been growing. These lower basin states are looking for available unused water for purchase to meet their growing needs. California is meeting short term deficits through voluntary agreements by farmers to forego use of river water during periods of shortage. These same opportunities are available for tribes once they know how much water is legally available to them. Secretary of the Interior, Bruce Babbitt, *supra* note 29.

62. *Hearings Before Subcommittee On Water and Power Committee on Energy and Natural Resources,* 103d Cong., 2d Sess. 176 (1994) (testimony of David H. Getches that only about one million acre-feet of the tribes' entitlement to the Colorado River had been quantified through adjudication).

63. The *Winters* claims of the Navajo Nation alone could dry up most of the west. The Navajos unquantified claims include: Little Colorado River (water negotiations continue); San Juan River (major Navajo claims remain unadjudicated); Mainstem Colorado River(The Navajo Nation has yet to submit a claim on the Colorado River (mainstem) and its water rights remain unquantified); Rio San Jose and Zuni Rivers (adjudications pending). *Navajo Nation Drought Contingency Planning Study, Phase I,* De-

have enormous potential to disrupt existing uses. If just the Navajo rights alone were ever fully adjudicated, courts could award the Navajos an estimated two million acre feet of water per year.[64] The mere threat of the existence of such an enormous consumptive right interferes with full development of a state's water resources and conflicts with huge capital investments made by non-Indians in the same water supply. Obtaining enough available water for non-Indian uses could pose a significant challenge. On the San Juan River alone, the major stakeholders and those that would be impacted most are coal, natural gas, and power generators.[65]

Tribes base their claims that they have the legal right to decide for themselves how to utilize their entitlement on principles of treaty construction which indicate that *Winters* awards should not be restricted by federal or state regulation unless the right is expressly abrogated by Congress.[66] Congress has not abrogated tribal authority over regulation of water use, therefore, states should have no authority over how tribes utilize their water entitlement.[67]

Clearly, tribes have the right to lease unused water rights to non-Indian users on the reservation.[68] Courts have interpreted the general statute authorizing Indians to lease reservation land to include the authority to lease water on-reservation.[69] Authorizing tribes to market

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partment of Water Resources Management, Division of Natural Resources, Navajo Nation U.S. Bureau of Reclamation, Lower Colorado Region, Grand Canyon Area Office, (1996). The Colorado Ute Tribes agreed to forego *Winters* claims on many of the streams that cross the reservations in exchange for storage in the Animas–LaPlata Project to be built by the federal government, *supra* note 59. Without this agreement, tribes will be forced to assert the full *Winters* rights. On just the La Plata River alone, the tribes have a decree for over 60,000 acre-feet while the annual flow of the river is only 39,000 acre-feet per year. Tribes have refused to accept money in lieu of water as settlement of their water rights. Litigation over these claims will bankrupt the states, the tribes, and the federal government. Telephone Interview with Mr. John Leepers, Navajo Department of Water Resources (Feb. 13, 1997); testimony of Fred V. Kroeger, *supra* note 2.

64. Telephone Interview with Mr. John Leeper, Navajo Department of Water Resources (Feb. 13, 1997).

65. *Contingency Planning Study*, Appendix A, *supra* note 63.

66. United States v. Winans, 198 U.S. 371, 381 (1905). For full discussion of implication of treaty construction rules on *Winters* doctrine *see* Susan M. Williams, *Indian Winters Water Rights Administration: Averting New War*, 11 PUB. LAND L. REV. 53 (1990).

67. Tribes argue that they have the right to utilize, manage, and control their own water resources—including the authority to market the water to whomever they choose. Indians assert that this is the key to tribal autonomy and self determination for Indians in the western states. *Oversight Hearing On The Lower Colorado River Before the Subcommittee on Water and Power*, 103d Cong., 2d Sess., 160 (1994) (testimony of the Honorable Daniel Eddy, Jr. Tribal Chairman of the Colorado River Indian Tribes).

68. Colville Confederated Tribes v. Walton, 647 F.2d 42, 48, (held "when a tribe has a vested property right in reserved water, it may be used in any lawful manner"); *but, see Big Horn III*, 835 P.2d 273 (Wyo. 1992) (Wyoming Supreme Court refusing to allow tribes to dedicate a portion of their reserved right to instream flow).

69. 25 U.S.C. §415 (1955) has been interpreted as pertaining to tribal water marketing. It expressly addresses tribal lands, giving tribes broad authority to lease their lands with the prior approval of the Secretary of the Department of the Interior. No court has decided whether this statute also governs leasing water separately from the land. *Id.* The Department of the Interior has invoked §415 as providing congressional

water provides opportunity for Indians to gain financial advantage from their *Winters* rights without impacting the federal budget, while providing convenient access to much needed water for more economic resource development.[70] A few tribes have bargained with states under compacts or settlement agreements to market water outside the reservation, but most states remain opposed to tribes becoming involved in water marketing, especially interstate.[71] Since Congress allows leasing of Indian lands for farming, mining, and oil and gas exploration it seems only logical that leasing of water rights should also be authorized.[72] By refusing to allow Indian water leasing, Congress is limiting its availability to those who would utilize it for natural resource development projects that would benefit both Indians and non-Indians. Refusing the necessary authorization for marketing water also limits or dictates its use contrary to western water use principles which encourage seeking the most beneficial use for water.

The issues regarding off-reservation leasing and interstate marketing involve different and separate concerns. Some non-Indian interests support allowing off-reservation leasing as long as the water cannot be transferred out of state, and most states accept off-reservation marketing contingent upon the benefits of the ultimate water use accruing to the state economy. However, states are much more jealous of allowing tribes to market water out-of-state where states are afforded no regulation authority.

The federal government and the Department of the Interior favor Indian water marketing as promoting more efficient use of western water, but no general statutory authority exists to allow all tribes to en-

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consent necessary for off-reservation use of tribal water. Pursuant to §415, the Navajo and Hopi tribes lease several thousand acre feet annually off-reservation to the Peabody Coal Company for a slurry pipeline. Telephone Interview with Sammy Maynes, Attorney for the Southern Ute Tribe (Mar. 19, 1997).

70. The Carter, Reagan and Bush administrations endorsed marketing of Indian water rights as a means to fund Indian water settlements. Peter W. Sly, *supra* note 53, at 44. With the days of easy money for federal water projects over and with the increasing complexity of environmental compliance making development of new water supplies too costly or impractical, some argue water marketing is the most feasible option for delivering Indian water entitlement. Steven J. Shupe, *supra* note 8, at 2.

71. Congress has authorized off-reservation marketing for all of the Colorado Basin Indian settlements approved since 1982. However, authorized off-reservation marketing remains subject to state regulation. Peter W. Sly, *supra* note 53, at 46. Most states were bitterly opposed to even a hint that tribes should have the power to market their water interstate in the 1980s when most of the compacts were approved by Congress. Since that time, some water-short western states have had a change of heart—California and Nevada currently favor authorizing tribes to market water interstate. Colorado and Arizona, however remain opposed—fearing California and Nevada will win the bidding war for lower basin water. Telephone Interview with Sammy Maynes, Attorney for the Southern Ute Tribe (March 19, 1997).

72. Testimony of David Getches *supra* note 62; *See also,* Lee Herold Storey, *Leasing Indian Water Off The Reservation: A Use Consistent With The Reservation's Purpose,* 76 CALIF. L. REV. 179, 206 (1988). Storey argues that leasing of Indian reserved water rights is a new pursuit consistent with the progress of civilization since the nation's market for buying and selling water rights has increased over the years.

gage in marketing unexercised reserved water rights.[73] The Department of the Interior's policy report states that water marketing should be a cooperative effort among federal, state, and tribal governments, but that "marketing initiatives have to be in accord with federal law."[74] The National Water Commission recommended that the government lease water from Indians to stabilize non-Indian water uses.[75] Yet Congress has refused to approve settlements of Indian water rights disputes which included even the possibility of interstate water transfers.[76] Although some settlements have included leasing of tribal water rights on and off reservation,[77] the issue of whether the scope of the *Winters* right includes the legal right to market a tribes' water off-reservation remains unclear.[78] Opponents to off-reservation leasing may acquiesce to specific instances of marketing established by settlement agreement, but they strongly object to admitting that the *Winters* right establishes precedent for authorizing the right.

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73. The Non-Intercourse Act could provide a legal barrier to Indian water marketing. The Act requires congressional approval of any "purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation . . . ." 25 U.S.C. §177 (1955). The argument has been made that the Act prohibits the leasing of Indian water rights, and that a specific act of Congress granting approval for such leasing agreements is necessary. David Getches and others suggest that Congress is under obligation to act pursuant to the trust responsibility owed tribes, and that water markets are a means for tribes to realize material benefits from their rights now rather than forcing tribes to wait for the completion of federally funded water projects. *See,* Testimony of David H. Getches, *supra* note 62. A general statute enacted by Congress that waives the Nonintercourse Acts for Indian water marketing would allow individual tribes to enter off-reservation leasing agreements without express congressional approval. Congress could still delegate approval authority to the Secretary of the Interior as is done with leases of land to non-Indians.

74. To date, all settlement agreements authorizing off-reservation leasing strictly adhere to state regulation of interstate water transactions which shows that tribes are willing to work cooperatively with states recognizing interstate agreements. Secretary of the Interior, Bruce Babbitt, *supra* note 29.

75. Joseph R. Membrino, *supra* note 6, at n.14; *see, also* Storey, *supra* note 72, at 214, stating that states should realize that transferring Indian water rights in water short areas would serve both the Indians' and the other regional users' economic interest.

76. David H. Getches, *supra* note 62, at 4.

77. Several tribes are operating under congressionally authorized settlement agreements. Each agreement varies slightly from the next but all have a common thread—tribes are required to make major concessions in these settlement agreements. Telephone Interview with John Leepers, Navajo Department of Water Resources (February 13, 1997). For example, in the 1985 Compact to settle the Assiniboine and Sioux tribes' water rights in Montana, the Navajo tribe was forced to waive all Indian water rights claims against the U.S. government and agree to protect the irrigation rights of approximately 32,500 acres of non-Indian landowners by agreeing not to market their water entitlement from the Missouri River. The Western Area Power Administration estimated that if the tribes marketed 50,000 acre feet out of the basin, downstream power production would diminish by $395,009,000 to $4,000,000,000 annually. Statement of Congressman Pat Williams, *supra* note 3.

78. By asking courts to limit the scope of the *Winters* right to prohibit change of use for off-reservation leasing, states can avoid altogether the battle over interstate marketing. If the *Winters* right is limited in scope to include only on-reservation use, and in-state off-reservation use, the question of whether tribes may allocate their *Winters* entitlement to interstate marketing will no longer be an issue.

Tribes recognize the importance of water markets.[79] Water marketing gives value to Indian water rights,[80] as a means of raising capital for long-term growth and to augment money available from the federal budget. Water marketing is becoming increasingly important to tribes as western economies are experiencing growth while at the same time many western water basins are at or near full appropriation. Environmental and financial constraints are making development of new water supplies politically unpopular, and tribes are being asked to pay the price for increasingly stringent environmental regulations by foregoing water projects simply because their projects were last in priority for completion.[81] Therefore, facilitating water transfers is becoming increasingly appealing for meeting growing demands for water.[82]

Indians have taken a proactive position toward developing and protecting tribal water resources by forming partnerships of tribes having water claims in a common river basin.[83] These tribes believe that

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79. This is not to indicate that all Indians or all tribes are generally in favor of marketing their water. In fact, there are many tribal members who view water marketing as a violation of their religious and cultural values. RICKY SHEPHERD TORREY, MARK TILDEN, AND DWAYNE FOWLES, TRIBAL WATER MARKETING,10 n.26 (1995); Steven J. Shupe, *supra* note 8, at 8.

80. By the application of water obtained by settlement agreement, the Ak-Chin Tribe in central Arizona expanded the tribe's irrigated acreage by over 10,000 acres, replacing governmental and social services once provided to members with services funded from tribal income from the profitable farming enterprise and off-reservation pumping. Reid Peyton Chambers and John E. Echohawk, *Implementing The* Winters *Doctrine of Indian Reserved Water Rights: Producing Indian Water And Economic Development Without Injuring Non-Indian Water Users?* 27 GONZ. L. REV. 447, 456.

81. Since the 1970s, money for federal water projects has become increasingly difficult to obtain. The current movement opposing federal expenditures on such projects provides an example of the difficulties tribes encounter. U.S. Senator Russ Feingold, D-Wis., along with twenty-three environmental groups released the "Green Scissors '97 Report," February 3, 1997. The Report identifies federal programs that members consider waste billions in tax dollars as well as damage the environment. Included in the report is an amendment proposal terminating funding for the Animas–LaPlata federal water project in Colorado, *see* n.59. Although the Animas–LaPlata Project would benefit Indian and non-Indian water users, the project is the last unfinished step in meeting all the terms of the Colorado Compact Agreement which settled all the water claims to the Colorado River of the Southern Ute Tribe and the Ute Mountain Ute Tribe. *Government Press Releases, Media Advisory*, February 3, 1997, *available in* WESTLAW, ALLNEWS Database.

82. *Supra* note 29, at 7. Secretary of the Interior, Bruce Babbitt emphasized his belief that water marketing is an important tool in bringing California's long term need to bring its demand in line with available supply. There is also a growing contingency that believes that authorizing tribal water marketing could become a vehicle for solving constraints and impediments of the environmental regulations and difficulty in raising money for water development for tribes—water marketing rights could be used as a trade-off for the constraints placed on the utilization of tribal water by restrictive environmental compliance. Telephone Interview with Stanley Pollack, Navajo Nation Department of Justice (Mar. 4, 1997).

83. *Hearings on the Lower Colorado River Before The Subcommittee On Water And Power Of The Senate Energy And Natural Resource Committee*, 103d Cong., 2d Sess., 170-75 (1994) (testimony of George Arthur, President Colorado River Basin Tribes Partnership); *see*, Attachment A: *Position Paper of the Ten Tribes With Water Rights In The Colorado River Basin* (1994) (stating that the primary purpose of the partnership is to maximize on-reservation use of tribal water, although tribes are willing to explore off-reservation use

intrastate and interstate water marketing is consistent with the Commerce Clause,[84] and can be structured so as not to undermine compact allocations.[85] For example, the Colorado River Basin Tribes Partnership proposed that: (1) each tribe should quantify, with the cooperation of the States, an available supply of unused tribal water; (2) tribes and water-short states would determine among themselves how much water, and under what terms, they would lease from the tribes; and (3) leases would be subject to approval by the basin states, the tribal partnership and the Secretary of the Interior.[86]

Non-Indian opposition to Indian water marketing is primarily based upon the following arguments: (1) that the *Winters* right did not contemplate water leasing in any form, thus reserved rights are not intended to be marketable;[87] (2) tribes will sell to the highest bidder to the disadvantage of existing users;[88] (3) tribal marketing disrupts already settled interstate allocations of water;[89] (4) transfer of Indian water rights should be governed by the same principles of state water law controlling that particular region.[90]

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of tribal water).

84. *Id.* at 14. The Colorado River Basin Tribes Partnership stated that present discussions among the States are troubling to the tribes. "California's concept of an escrow account envisions that substantial quantities of presently unused water will be utilized by California with compensation paid to other Basin States—much of the water California wished to use is allocated to the tribes, yet there is no provision for compensating tribes." The Partnership proposes to work cooperatively with states to provide the water California needs while compensating tribes.

85. Sporhase v. Nebraska, 458 U.S. 941 (1982). Tribes are relying on Interstate Commerce Clause prohibitions on state control over allocation of water rights that cross state boundaries.

86. This proposal is representative of the position most tribes take regarding the issue of water leasing. Tribes show a willingness to work cooperatively with states to provide water to those water-short areas within a basin, but they wish to maintain authority to negotiate separate agreements with purchasers pursuant to principles of tribal sovereignty and federal Indian policy of promoting tribal independence.

87. This argument rests on the belief that the *Winters* right should be narrowly defined to provide water for tribal use on the reservation only, and only for the original purposes of the reservation none of which expressly mention water marketing. Joseph R. Membrino, *supra* note 6. The Governor of Arizona is currently advocating a prohibition against all tribal water marketing, even on the reservation. Telephone Interview with John Leepers, Navajo Department of Water Resources (Feb. 13, 1997).

88. An example of this is the Fort Peck Reservation in Montana. Several downstream states successfully sued to stop the ETSI pipeline which would have delivered 20,000 acre feet a year out of the Oahe Reservoir in South Dakota for slurrying coal to the southeast. Tribes have been forced to trade these out-of-basin water marketing opportunities in order to get Congressional approval of their negotiated settlement agreements. *Hearings on HR 5098 Before the Committee on Natural Resources Oversight and Investigations,* 103d Cong., 2d Sess. (1994) (testimony of Caleb Shields, Chairman Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation). These are instances where Getches, the Navajo Tribe, and others argue the federal government has breached its trust responsibility to tribes.

89. Many western states have implemented area-of-origin protections, restricting transfers to the basin of origin. States with negotiated agreements allowing tribal leasing maintain these protective provisions. Torrey, Tilden & Fowles, *supra* note 79, at 28.

90. Out-of-basin marketing becomes extremely political. The Fort Peck Reservation Tribes in Montana calculated the price of trading their out-of-basin marketing options as: 50,000 acre feet of the Tribe's water remaining in the Basin was worth at

THE TRUST RESPONSIBILITY

Tribes should argue that the government violates its trust responsibility by neglecting to assist tribes in capitalizing on opportunities for economic development through leasing their entitlement to water.[91] This trust relationship is a result of tribal agreements ceding land to the federal government in exchange for promises of protection and the creation of a permanent homeland for Indians.[92] The Supreme Court has held that such promises created a "duty of protection" on the part of the federal government toward Indians that extends to federal statutes, agreements, and executive orders.[93] The commitments may be implied and the responsibility imposes an independent obligation on the federal government to remain loyal to the Indians to advance their interests—including the encouragement of tribal independence.[94]

The Supreme Court has held that the federal government is the "fiduciary" of tribal resources.[95] A Senate Commission expressed the obligation as: ". . . to ensure the survival and welfare on Indian tribes and people . . . this includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government . . ."[96] Generally, the trust responsibility extends to all reservation trust assets including water and agency duties for water project management.[97]

The federal government has not upheld its obligations to tribes in the past. For example, when the Newlands Project, which serves the Carson River watershed in Nevada, was originally planned, the United States persuaded the Indians to exchange their 160-acre allotments within the project area for 10-acre parcels which the United .States. promised would receive water from the Newlands Project when it was completed.[98] This promise was broken, the allotments proved not to be irrigable, and project water was not delivered to them.[99] Congress later promised to add land to the reservation and bring 1800 acres un-

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least $4 million per year in terms of federal hydropower revenues downstream. Another measure of the value of relinquished water marketing authority is to consider the value established by the ETSI proposal—$180 per acre foot per year, or $9 million per year for 50,000 acre feet. Statement of Caleb Shields, *supra* note 88.

91. The Supreme Court recognized this trust responsibility in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

92. *Cherokee Nation*, 30 U.S. at 27.

93. *Id.*

94. *Id.*

95. American Policy Review Commission, *Final Report*, 130 (Washington, D.C.: Government Printing Office, 1977).

96. *Id.*

97. The trust responsibility is imposed on the administrative agency entrusted with the authority and responsibilities over Indian affairs. The Bureau of Indian Affairs is responsible for management of federal irrigation projects, therefore, the BIA owes a fiduciary duty to tribes to protect *Winters* rights.

98. Chambers and Echohawk, *supra* note 80, at 463.

99. *Id.* at 461.

der cultivation, but this too was never accomplished.[100] In the San Juan region, the Governor of New Mexico petitioned the Navajo Nation to waive all their *Winters* rights in exchange for construction of NIIP, a project that has never been built. Another example of delayed or broken promises is the Animas–LaPlata which was to provide for the settlement of the Colorado Ute Indian tribes' reserved water rights claims.[101] These tribes have been waiting since 1988 for the Animas–LaPlata Reclamation Project to be built to fulfill promises made by the government in that Compact,[102] but the federal government is the only remaining party to the agreement that has yet to fulfill its obligations under the Compact.[103] Without the construction of the project, the tribe's alternative would be to reopen litigation, jeopardizing the water rights of non-Indian irrigators and municipalities, including owners of water on the La Plata and Animas rivers and their tributaries.[104] Failure to complete the project would violate the government's trust responsibility to the tribes.

CONCLUSION

Tribes have the legal authority to assert their claim to an enormous share of water in the West. Most Indians believe that water marketing in water-short basins can benefit both Indians and non-Indians and tribes have expressed their willingness to work cooperatively with states to provide water to those willing to lease unused tribal water rights. Through water marketing, tribes hope to become self-supporting, independent of most federal government services. Water marketing may provide a last opportunity for tribes to maximize the value of a resource to assist Indians.

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100. *Id.*

101. The Animas–LaPlata Project will deliver water committed by the federal government under the 1988 Colorado Ute Indian Water Rights Final Settlement Act. The agreement settled the Southern Ute and the Ute Mountain Ute Indian Tribes' *Winters* water rights claims. The project has been delayed since its authorization in 1968 for numerous reasons and is currently under attack by the Feingold "Green Scissors" movement, *see* n.59.

102. The Southern Ute Tribe expects the United States to keep its work to the tribe. Telephone Interview with Mr. Leonard Burch, retired Tribal Chairman, Southern Ute Tribe (Feb. 5, 1997).

103. The construction of Animas–LaPlata is the only uncompleted component of the settlement. The State of Colorado has already built the Towaoc pipeline which delivers drinking water to the Ute Mountain Ute Reservation from the Dolores Project. The State has also met its obligation to escrow funds—now sixty million—for the construction of ALP. *Id.*

104. Statement of Ron Pettigrew, President, and Steve Harris, Secretary, Board of Directors Animas–LaPlata Water Conservancy District, *supra* note 55.