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Indian Water Rights: An Introduction to Indian Water Rights, Negotiating or Litigating, and Indian Leasing

Sarah Quinn

rently, the SEO does not require adjudication of CBM-produced water. Adjudication before the Wyoming Board of Control would provide the public with notice and an opportunity to participate in a hearing.

Because CBM-produced water continues to be a pertinent issue in the West, states will have to continue grappling with the determination of beneficial and non-beneficial use. Likewise, states must also continue to examine the relationship between the SEO and the CBM-water producers.

Danielle Sexton

INDIAN WATER RIGHTS: AN INTRODUCTION TO INDIAN WATER RIGHTS, NEGOTIATING OR LITIGATING, AND INDIAN WATER LEASING

Jeanne S. Whiteing, Esq., of Whiteing & Smith, Boulder, Colorado, and David L. Gover, Esq., of the Native American Rights Fund, Boulder, Colorado, gave a joint presentation on the unique characteristics of Indian water rights, specifically their inception and history, the process of litigation and negotiation, and water marketing. Mr. Gover began the discussion with an existential look at the question "what is water?" from an Indian perspective, drawing on the distinction that many native peoples have a spiritual relationship with water as it relates to their way of life. As such, water rights issues for Indian tribes are not merely about water as an economic resource, even though economics plays a large role in water decisions today.

After establishing the appropriate perspective with which to view Indian water rights, Mr. Gover then reviewed the legal history of Indian water law. While most water law issues are under the purview of state law, Indian water law generally falls outside of the state system under the Reserved Right Doctrine established by the seminal 1908 case of *Winters v. United States*. Mr. Gover asserted that in *Winters*, the federal government had entered into a treaty with Montana tribes to create Reservation lands for the people, but the treaty did not expressly grant any water rights to the tribe and a lawsuit resulted. Ultimately, the Supreme Court recognized that it must resolve treaty ambiguities in favor of the Indian people, and found that the parties must have intended to reserve water rights for the Reservation in order to fulfill the purpose of its inception. Mr. Gover pointed out that one of the important outgrowths of the *Winters* Doctrine is the recognition that Indian tribes cannot lose or forfeit their water rights due to nonuse. Furthermore, the courts have also recognized that tribes have the reserved right of in-stream and other non-consumptive uses for water, such as those related to hunting, fishing, and gathering.

Mr. Gover then discussed the evolution of Indian water law through attempts to reconcile the management of Indian water rights with state water law. In 1963, for the first time the government attempted to quantify an Indian water right, using what practitioners now refer to as the "practically irrigable acreage" ("PIA") standard. In

quantifying the right, Mr. Gover explained that, pursuant to *Arizona v. California*, the court must consider the amount of land capable of sustaining irrigation at a reasonable cost, to ensure that the right meets the water needs necessary to "fulfill the primary purpose of the Reservation." Then, in *In re General Adjudication of All Rights to Use Water in Gila River System & Source*, a 2001 Arizona case, the court recognized the need for flexibility in quantifying water rights in a modern world, where the tribe's water needs extend beyond agriculture and grazing. Thus, the Arizona Supreme Court declined to limit reserved Indian water rights to PIA, but instead held that the water was for all uses related to establishing a viable and "permanent homeland" for the tribe. As it stands now, Mr. Gover postulated it is unclear whether the PIA standard is still intact; but nonetheless, the case is important for establishing that tribes have the reserved right to an amount of water necessary for the growth and viability of the tribe, which may include domestic, municipal, casino and other commercial uses.

After reviewing the history of Indian water law, Mr. Gover next discussed the roles of litigation and negotiation in resolving tribal water disputes. Mr. Gover asserted that as populations continue to grow and climate change increases, water will become less and less available and regional planners and developers will have to consider how to secure enough water for the future. Major municipal areas have started to look to tribal water rights as sources, and have often relied upon water that is technically reserved for tribes, thereby creating a source of dispute over the water.

Mr. Gover expressed a number of concerns with the litigation process on tribal interests. First, the results of litigation are often very narrow, with a win-lose outcome for the tribe and the issuance of a paper right that may not meet the tribe's needs for the type and place of use. Additionally, it is economically risky for tribes to go into litigation, where they have to pay for attorneys, scientists, hydrologists, and publicity up front. On a more personal note, Mr. Gover cautioned that the processes of litigation can significantly affect tribal communities, creating animosity between the tribes, states, and local communities, and between different tribes and even members within a tribe.

Perhaps most importantly in recent years, litigation presents the problem of jurisdiction. Mr. Gover went on to explain that previously, reserved Indian water rights were exclusively under federal court jurisdiction because of the federal nature of the treaties that created the rights. However, over the last few decades state courts have obtained jurisdiction over federally reserved water rights issues following the McCarran Amendment, which authorizes the joining of the United States as a defendant in state water rights adjudications. Mr. Gover explained that, as a result, now a tribe must often litigate in state court, which may be less favorable for the tribe when the state has a stake in an outcome that conflicts with tribal interests.

Negotiated settlements are another way that tribes can resolve water disputes. Mr. Gover enumerated a number of advantages to the negotiation process over litigation. First, the tribe retains the decision-making power and can control its own destiny based on its own values. Second, negotiated settlements may result in a win-win situation for all parties if they can work together. Third, tribes can negotiate other things in exchange for the water transfer, including "wet water," land, management resources, and habitat protection. Finally, if negotiations fail, the parties can pursue litigation. However, Mr. Gover expressed a number of limitations with the negotiation process, namely that larger negotiations can take decades to complete and end up costing billions of dollars, such as the ongoing negotiations for the San Juan and Kalamath rivers.

Following Mr. Gover's discussion on the history of Indian water rights and the roles of litigation and negotiation in the current process, Ms. Whiteing presented information regarding water marketing. Previously, there was limited need to create a market for water when other sources of water remained unexploited. However, Ms. Whiteing gave a number of reasons why the marketing of Indian water rights may become increasingly more significant. First, the pressures of population growth and global warming are likely to create more scarcity and uncertainty of water resources. Likewise, tribes are increasing their own water consumption, resulting in less available water for downstream users. Water marketing also plays a role in environmental issues, such as the need for in-stream water to protect endangered species habitats and fisheries. Finally, many tribes are in critical need of sources for revenue creation, and water is one of the last untapped resources for the economic development of tribes.

In her experience, Ms. Whiteing has found that water settlements drive a large part of the water marketing transactions today. The advantages to negotiating water settlements instead of litigating are that the parties can determine a specific quantity of water, resolve water management and administration issues, allow for water marketing by the tribe, and most significantly, provide the tribe with the means to put the water to use. Furthermore, by settling the tribes can avoid potentially unfavorable state court jurisdiction. Currently, there are over twenty Indian water rights settlements, most of which include authorizations to market water, and most of which have Congressional approval. Therefore, Ms. Whiteing explained, tribes who have reached successful settlements that include such authorization are in a good position to start marketing water.

Previously, it was unclear whether the tribes had authority to market their reserved water rights. Ms. Whiteing stated that most people agree that the Nonintercourse Act implicitly prohibits tribes from conveying their reserved water rights without federal consent because those water rights relate directly to the land. Furthermore, it is the

federal government's position that there is no general or statutory consent to market water, and therefore tribes must have express Congressional consent for any sale, lease or transfer of those rights. Ms. Whiteing pointed out an exception to this rule, such as when there is already a statute governing the leasing of land. Many argue that such statutes impliedly permit the leasing of water for irrigation purposes, as long as the tribe leases the land and water together. Ms. Whiteing explained that leasing becomes more problematic, however, when tribes attempt to market water rights for use off the Reservation. Many view off-Reservation leasing as inconsistent with the concept of an Indian water right because the function of reserved water is to fulfill the purpose of the Reservation only.

After examining the role of consent in water marketing, Ms. Whiteing reviewed the nature of the authorizations. The authorizations to market water are extremely diverse because they arise from independent, fact-specific settlement negotiations, and there are no regulations that govern their application. Furthermore, the authorizations typically include very clear conditions, such as whether the tribe must receive approval for each transaction, limitations for on-Reservation use only, limitations on transfers to a specific entity or within a geographic area, or limitations on the water source to which the authorization applies.

Finally, Ms. Whiteing explored the differences between types of marketing arrangements. Most authorizations limit water marketing to storage sources. The advantage to dealing with storage rights is that the buyer can purchase from a stable source or, similarly, the tribe can receive water from an existing source. This type of agreement is generally a straightforward, contract-type of arrangement that delineates specific terms, such as amount, price, term of years, or seasonal limitations. On occasion marketing occurs from in-stream flow, such as an allocation for fisheries; however, some states do not permit this type of transaction unless the tribe first put the water to use for its original purpose. This type of transaction raises the additional issue of whether the tribe controls the water once it leaves the Reservation. In a deferral agreement situation, the tribe merely agrees to refrain from using a specific amount of water for a specific amount of time so that it will be available to others. Ms. Whiteing posited that deferral agreements will probably become more common, because there is no real transfer of water and therefore no issue regarding federal consent and authorization. Serving a similar purpose as a deferral agreement, a water exchange allows the tribe to take water from a different source than originally decreed or from storage, leaving water in-stream at the originally decreed diversion point for other users. Finally, some agreements require that water marketing off-Reservation must comply with state water law, though it is not clear how state substantive and procedural restrictions may apply to those rights.

In summary, Mr. Gover and Ms. Whiteing provided a thorough overview of Indian water rights so that attending practitioners may understand their inception, legal history, and cultural significance. Furthermore, they evaluated numerous issues arising from the modern administration of water, including the difficulties tribes face in litigation, negotiation, water settlements, and water marketing. Finally, they expressed the need for flexible and creative solutions to managing reserved Indian water rights in order for the tribes to remain culturally intact and economically solvent.

Sarah Quinn

SUPER DITCH COMPANY—USING ROTATION LAND FALLOWING TO CREATE A CROP OF WATER

Leo M. Eisel, Principle Engineer Brown and Caldwell, Golden, Colorado and Peter D. Nichols, Esq., Trout, Raley, Montano, Witwer, & Freeman, P.C., Denver, Colorado, presented on the Super Ditch Company. Eisel discussed five alternatives to "buy and dry," or the permanent transfer of water from agriculture use to municipal use that can dry the land, and their lack of success to date. He first described how the Arkansas River Basin Water Bank Program has not provided a workable alternative because it has limited buyers to Arkansas basin customers, which excluded the Front Range as a customer. The Water Bank program also creates an uncertainty of supply to buyers because water is stored for short periods.

The second alterative Eisel noted are proposals set forth by the Arkansas Basin Roundtable Water Transfer Committee, which ultimately are not that helpful because their objective limits transbasin diversions. The third alternative, the Super Ditch, is a collective approach led by the Arkansas Valley Water Conservancy District that involves seven ditch companies and fifty different water rights. This approach attempts to eliminate some of the historic competition between buyers and sellers by allowing the Lower Arkansas District to lease water from farmers on an interruptible yield basis and then enter into thirty-year contracts with buyers. Eisel felt that leasing is a viable alternative to buy and dry because it can provide a reliable income stream to farmers. His concern, however, is that the thirty-year contract was not long enough for cities and districts with water supply responsibilities and the location of sufficient customers and lessors is necessary.

Eisel then spoke of how the *Kansas v. Colorado* legislation looked at the feasibility of paying Kansas in water rather than dollars. This alterative determined it would be feasible to lease 30,000 acre-feet a year to transfer consumptive use over a ten-year period for repayment purposes; however, many farmers expressed more interest in selling their ditch shares rather than leasing. He concluded that buy and dry must remain an option for farmers who want to sell. The final alternative was the Colorado Water Trust's attempt to acquire water for instream