Issues in Determining Indian Water Rights

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Charles W. Howe and Harvey O. Banks have discussed the growing conflicts over the use of present water supplies, over future water development, and over water policy and the institutional framework for policy execution. Perhaps the area of greatest potential conflict over water in the West is the area of Indian water claims, virtually all of which remain unadjudicated. In a recent decision of the U.S. Supreme Court, Justice Brennan described Indian claims as "ubiquitous." I will attempt to explain the nature of their ubiquity and to discuss briefly the fundamental issues involved' in the determination of Indian water rights.

In order to understand why there is so much antagonism between Indian claims of water rights and non-Indian water rights, the history of water-rights law in the West is important.

During the middle 1800s, title to most of the land in the western United States had been ceded to the country by various foreign powers, and until the latter part of the century, it remained in the public domain. That is, it was unencumbered, federally owned property, subject to sale or other disposition and not reserved or held back for any special governmental or public purpose. There were no private rights in the federally owned land—miners and others drawn to the West simply took up residence where they saw fit, acquiring at best incomplete, possessory interests. While water was being diverted for mining, agricultural, and domestic uses, there was no federal law governing its use. The United States simply acquiesced in the incipient development of local water law. The territories and fledgling

states created their own water laws.

During the twenty-five-year period following the Gold Rush—1850 to 1875—the doctrine of prior appropriation was recognized by state or territorial statute or court decision in Arizona, California, Colorado, Montana, Nevada, New Mexico, and Wyoming. The doctrine was practiced in Utah, but not officially sanctioned. Between 1875 and 1900 the doctrine was officially expressed in the present areas of Idaho, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, and Washington.

The doctrine itself was the natural legal consequence of water utilization in the arid and semi-arid part of the country where it was understood that there would not be enough to go around. Based upon the fact that the water supply could not meet the rapidly growing demands of industry and agriculture with the water storage facilities then available, the first appropriator of water for some beneficial purpose was recognized as having the better right to the extent of actual use. Accordingly, under state law many rivers and streams in the West became fully appropriated by the end of the nineteenth century. In times of shortage, the more recent appropriators suffered. Economically, the doctrine made good sense.

The only federal activity in western water law was manifested in the federal government's acquiescence in local state law. The Act of 1866 gave formal sanction to appropriations of water on public land, whether made before or after the act, provided they conformed to state or territorial laws. The Act of 1870 provided that all federal land patents, as well as preemption or homestead rights, would be granted subject to water rights accrued and vested under state law. Finally, the Desert Land Act of 1877 made all nonnavigable waters of the public domain public in nature, subject to the plenary control of the states, with the right in each state to fashion for itself the system of law under which water rights might be perfected. In combination, the Acts of 1866, 1870, and 1877 effected a complete cessation of the government's control over all of the nonnavigable waters arising on the public domain to the western states.

While this arrangement seemed sensible to everyone involved, the hidden implication was that there was no water left for the

government with which to operate its various enclaves, which had been or might be carved out of the public domain. In 1908 the U.S. Supreme Court confronted the problem in the case of *Winters* v. *United States.* In that case the United States had reserved lands from the public domain to establish the Fort Belknap Indian Reservation. U.S. Indian policy at the time was one of assimilation—Indians were to be placed on reservations in order to be schooled in the ways of the Europeans, and ultimately when they became competitive (usually in farming) their trust lands were to have been individually allotted. In creating the Fort Belknap Reservation, however, with the planned Indian irrigation of nearly 5,000 acres, nothing was said about water, and the Indians had no right under Montana law. As a consequence, the Supreme Court held that when the United States withdrew the lands from the public domain to establish the Fort Belknap Indian Reservation, it also implied withdrawal from the then unappropriated waters of the Milk River sufficient waters to satisfy the purposes of the Indian reservation.

Because the federal government was recognized to have retained rights in "unappropriated" western waters, there appeared to be no conflict between non-Indian rights vested under state law and Indian rights under the Winters Doctrine. However, the doctrine stands for the proposition that the implied water right, with a priority as of the date of the reservation, is sufficient to satisfy the future as well as the 'contemporary needs of the Indians. In other words, if in 1980 an Indian tribe were to erect a paper mill, which consumes large amounts of public water, the tribe would arguably have a right to all the water needed with a priority of 1867 or whenever their reservation was created. To give you a concrete example of the present-day conflict, the Mescalero Apache tribe is located on a mountaintop reservation at the headwaters of the Ruidoso River in New Mexico, a tributary to the Pecos River. Along the Ruidoso—from the reservation at the top to Robert O. Anderson's ranch in the foothills west of Roswell—there are 2,164 acres of irrigation predicated upon water rights vested under New Mexico water law, with priorities ranging from 1867 to 1886. The average annual flow of the Ruidoso in its upper reaches is 9,640 acre-feet. This is not enough to satisfy the agricultural, industrial, and municipal

needs of the non-Indians who settled there, which, as you'll recall, is why the doctrine of prior appropriation was developed. Now, however, in pending litigation to determine the nature and extent of the Mescalero Indian rights, the Indians are claiming a Winters right to over 17,000 acre-feet annually with a priority no later than 1873. If the Indian claims are sanctioned by the court, the non-Indian economy could be obliterated, at worst, and, at best, substantially affected.

The undecided issues in the determination of Indian claims tells you how large the conflict looms. They relate to priority of right, quantity of right, and the use and administration of water vis-8-vis non-Indian rights.

With the popularism and recent growth in Indian legal representation, Indian rights are being championed with considerable zeal and vigor. The Indians urge, for instance, that at least with respect to treaty reservations as opposed to executive order reservations, Winters rights are not federal water rights, but Indian water rights—that is, rights whose legal origins are aboriginal in nature. This is important in determining priority. If the Mescaleros, for instance, were determined to have an aboriginal priority instead of the date of their reservation, the doctrinal restriction to a right in unappropriated water would become meaningless. In other words, all non-Indian water rights on the Ruidoso would be subject to defeasance; to the extent Indian rights were needed beyond the annual supply, non-Indians would have to shut down.

Quantity is a major issue. Winters provides water sufficient to satisfy the purposes of the reservation. Non-Indian lawyers maintain that you must conceptualize the purposes contemporaneously, i.e., to satisfy comparatively modest needs. Historically, Indian reservations were to have been temporary. Today, however, the Indians uniformly assert that Winters provides them with enough water to maintain "a permanent tribal homeland," a concept that recently emerged from the Office of the Solicitor of the Interior and is being asserted by Justice Department lawyers in western water rights litigation. The Indians maintain that modern development objectives should form part of the basis of the determination—recreational lakes are as much within the right as traditional domestic requirements. The

rights, according to the Indians, are not limited to agricultural needs, assuming the reservation was created to teach farming, but include claims for "fish and aquatic life, irrigation, recreation, domestic, municipal, and industrial uses," as the Jicarilla Apache tribe put it in another lawsuit in New Mexico. If the land was expressly reserved for sheep grazing, which requires no appreciable water, it would make no difference according to the Indians. In the words of the Jicarillas, they have a right "to impound and/or divert the use . . . the entire virgin flow run-off" of the Navajo River, "from both surface and underground sources."

The remaining issues derive from conflicts of position regarding use and administration. In *Arizona* v. *California,* in order to get around the problem of indeterminable population growth, the Supreme Court adjudicated to the Colorado River Indians the water needed to irrigate all of the practicably irrigable acreage on the reservations. The non-Indian lawyers urge that, if rights are to be quantified in such large quantities, the Indians should not be able to avail themselves of their rights until they actually need them. The Indians, on the other hand, wish to lease their rights to their non-Indian competitors in the interim—or forever, for that matter. On the Ruidoso, for example, the water conflict would be solved by the Indians leasing to the non-Indian settlers the same rights that were undone by the assertion of the Indian claims. In other words, the non-Indian economy could continue as long as the water users were considered licensees of the Indians. Similarly, it has been suggested by the Colorado River Indians that the City of Los Angeles and the other major users of Colorado River water will someday have to pay the Indians for the water that is really theirs.

While it is apparent that the potential conflicts between Indian claims and non-Indian water rights may have profound local effects, they may also have profound regional effects. Just as the federal government was negligently silent respecting water for Indian reservations, most interstate water compacts expressly disclaim any effect on the water right obligations of the United States to its Indian wards. In the Colorado River Basin there are about thirty Indian reservations consisting of about 26,000,000 acres, and yet it is apparent from the nego-

tiating minutes of the Colorado River Commission that Indian water needs were thought to have been negligible. Modern claims mock that view. New Mexico's entitlement under the Upper Colorado River Basin Compact, for instance, is 11.25 percent of the Upper Basin's share after the deduction of 50,000 acre-feet for Arizona; assuming a full supply, New Mexico is entitled to deplete 838,125 acre-feet annually. Pursuant to the compact, any rights ultimately adjudicated to New Mexico Indians will be accounted against New Mexico's share. The combined claims of the Navajos, the Ute Mountain Utes, and the Jicarilla Apaches, however, will likely total in the millions of acre-feet. The absurd result is that the Indians would own many times New Mexico's share of San Juan River water. The non-Indians would go begging.

In conclusion, there are probably few more patent examples of the failure of government to deal with a major problem in the 200-year history of the United States. The basis of Indian water right claims derives from governmental indifference and is rooted in legal fiction—the tacit and implicit reservation of public waters. To top it off, however, the government does not appear to be changing its role. In the early phases of President Carter's formulation of a new national water policy, federal reserved water rights for all federal enclaves, including Indian reservations, were to have been treated in the same way, the primary objective being quantification at the earliest possible date to end the current uncertainty over federal claims. At the urging of Indian interests, however, Indian water rights are receiving separate treatment, which helps to perpetuate the ubiquity of Indian claims by disassociating those claims from the limitations placed on the Winters Doctrine in numerous non-Indian federal reserved right cases. The water policy concentrates on Indian water resource development instead of legislative treatment of the emerging conflicts. Historically, Congress *forgot* to address the issue. Today, the potato's gotten so hot Congress wouldn't touch it with a ten-foot pole.