

The National Agricultural  
Law Center



University of Arkansas  
System Division of Agriculture

NatAgLaw@uark.edu • (479) 575-7646

## An Agricultural Law Research Article

**Promises of a Viable Homeland, Reality of Selective Reclamation: A  
Study of the Relationship Between the *Winters* Doctrine and  
Federal Water Development in the Western United States**

by

Monique C. Shay

Originally published in ECOLOGY LAW QUARTERLY  
19-3 ECOLOGY L.Q. 547 (1992)

[www.NationalAgLawCenter.org](http://www.NationalAgLawCenter.org)

# Promises of a Viable Homeland, Reality of Selective Reclamation: A Study of the Relationship Between the *Winters* Doctrine and Federal Water Development in the Western United States

*Monique C. Shay\**

## CONTENTS

Introduction .....	548
I. Settlement of the West and Non-Indian Water Development .....	549
A. Free Land for Farmers — The Homestead Acts .....	549
B. Reclamation — Where There's a Will, There's Federal Financing .....	550
C. State Water Law — Prior Appropriation .....	552
II. Water for the Reservations .....	555
A. Assimilation Through Allotment .....	555
B. Development of Water Resources — Indian Irrigation Projects .....	557
C. A Pastoral and Civilized People .....	562
D. The <i>Winters</i> Doctrine .....	565
E. Selective Reclamation .....	570
III. Battle in the Courthouse .....	574
A. Incompatibility of Reserved Rights with Prior Appropriation .....	574
B. <i>Arizona v. California</i> .....	575
C. Use of the <i>Winters</i> Water — Where, How, and by Whom .....	579
D. The State Court Arena .....	583
Conclusion .....	586

---

Copyright © 1992 by ECOLOGY LAW QUARTERLY.

\* J.D. 1992, School of Law (Boalt Hall), University of California at Berkeley; B.A. 1989, University of California at Los Angeles. The author would like to thank Brett Moffatt and Pat Gordon for their advice and suggestions regarding this comment.

## INTRODUCTION

Indian water rights are currently a source of vigorous debate and controversy. Conflicting water rights claims are being heard in courts throughout the Western United States. The stakes have been estimated at 45 million acre-feet of water per year in sixty western water basins. The affected parties include over 100 Indian tribes and the non-Indian rural and urban communities currently using the water which the reservation communities claim.<sup>1</sup> Indigenous Americans<sup>2</sup> generally claim the right to water for their reservations under the aegis of a 1908 Supreme Court case,<sup>3</sup> while non-Indians defend their right under state water laws. As a result, "Indian water rights cases are typically as complex as major antitrust actions."<sup>4</sup>

The goal of this comment is to put the current water claims in their historical context, in the hope that knowledge of the past will provide a guide for the future. The history of these claims involves the interrelationship between the United States government, Indian tribes, and western water development.<sup>5</sup> This comment is divided into three sections. The first looks at the "settlement" of the West and the dispersal of water and water rights to non-Indians. The second section considers the nature of Indian water rights and reviews the "development" of water for Indian use. The final section examines the contemporary "water battleground" in the courts and the legal positions put forward by the competing interests.

---

1. Michael R. Moore, *Native American Water Rights: Efficiency and Fairness*, 29 NAT. RESOURCES J. 763, 766 (1989). See also JOHN A. FOLK-WILLIAMS, *WHAT INDIAN WATER MEANS TO THE WEST* (1982) for a thorough description of existing Indian water claims. For a discussion of the status of recent Indian water suits and/or negotiations as of April, 1990, see LLOYD BURTON, *AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF LAW* 48-58 (1991).

2. Although the terms "Indians" and "Indigenous Americans" are used interchangeably in this comment, the latter is, of course, more historically accurate. "Indian. The label is ours [non-Indian's], not his. He has been an Indian for only 500 years. For as many as twenty-five *thousand* years, he has been Ottawa, Dakota, Shoshone, Cherokee — or one of several hundred distinct people [who] controlled this continent." CITIZENS' ADVOCACY CENTER, *OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA* vii (Edgar S. Cahn ed., 1969) [hereinafter CAHN].

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

4. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 9 (1987) [hereinafter TIME AND LAW].

5. "Water development" here means the harnessing of water in order to grow crops, mine for minerals, cool machinery in a factory, or even create lush golf courses in the desert. "In the American West water almost always must be stored and diverted before it is useful for economic development." DANIEL MCCOOL, *COMMAND OF THE WATERS: IRON TRIANGLES, FEDERAL WATER DEVELOPMENT, AND INDIAN WATER* 4 (1987).

## I

SETTLEMENT OF THE WEST AND NON-INDIAN WATER  
DEVELOPMENT

In order to explain the current status of Indian versus non-Indian water rights, it is important to trace the historical roots of the controversy. This first section traces, in a very general way, the history of the West in the 19th and 20th centuries. During this time, the West was "settled,"<sup>6</sup> and the foundations of American water law and development policy were established.

A. *Free Land for Farmers — the Homestead Acts*

In the second decade of the 19th century an American explorer of the West labeled the whole territory between the Mississippi River and the Rocky Mountains "the Great American Desert," a phrase and image that held for almost half a century.<sup>7</sup> While the West, with its gold and animal pelts, beckoned to a certain type of frontiersman, "the life of a trapper, a hunter, a fortune seeker . . . was not what the vast majority of Americans sought."<sup>8</sup> The average American wanted to climb to prosperity in the tamer, more traditional fashion of owning land and farming. The Federal Government, sharing this ideal, decided the whole continent should be settled by reliable citizens.<sup>9</sup> Amidst settlers' self-interested claims<sup>10</sup> that the Great American Desert really was not a desert,<sup>11</sup> the government began to pass laws which gave away land in the West to those who would settle upon it and begin to farm.

6. "Settled" is placed in quotation marks because the use of the word in describing the arrival of Europeans "vaguely implies that pre-existing populations did not classify as humanity, for it is not used to apply to Indians; only Europeans 'settle.'" FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* 32 (1975).

7. MARC REISNER, *CADILLAC DESERT* 19-20 (1987). Reisner details how awed, and even horrified, various explorers were by the West's vast space and dryness. *Id.*

8. *Id.* at 25. In the 1830's, some Americans believed "that the Louisiana Purchase had been a waste of \$15 billion — that the whole billion acres would remain as empty as . . . the Sahara." *Id.*

9. The Federal Government still needed to secure its territory, safe from the threat of a European attempt to acquire or settle it. See MARIAN CLAWSON, *AMERICA'S LAND AND ITS USES* 25 (1972). Clawson notes, for example, that Russia occupied Fort Ross, about one hundred miles north of San Francisco as late as 1841. *Id.*

10. REISNER, *supra* note 7, at 46, suggests that the greatest opportunity offered by the homestead legislation was the possibility of earning a little honest graft. By conservative estimates, 95% of the final proofs under the Desert Land Act were fraudulent. *Id.* See also *infra* note 17 and accompanying text.

11. For a number of years after 1865, a long humid cycle brought uninterrupted above-average rainfall to the plains. REISNER, *supra* note 7, at 37. The coincidence of this rain with the headlong advance of western settlement led noted climatologists to conclude that "rain follows the plow"; as population increases, the moisture will increase since God wants these people "to occupy a wild continent." *Id.*

Federal public land policy<sup>12</sup> for 150 years aimed at giving "the pioneer, the small farmer seeking a new life on the frontier . . . cheap or free land, there to develop communities, commerce, and other attributes of civilization."<sup>12</sup> The Homestead Act of 1862,<sup>13</sup> for example, gave a settler up to 160 acres of land in return for his residence on the property for five years, some improvements, and payment of very modest fees.<sup>14</sup> However, Congress' land dispersal plans did not unfold entirely smoothly because most of the West is extremely arid. While lands east of the hundredth meridian<sup>15</sup> were claimed quickly, those west of it were much less attractive; such land was too dry to farm without expensive irrigation systems.<sup>16</sup> In response, Congress passed the Desert Land Act,<sup>17</sup> permitting settlers to claim larger tracts of land (640 acres) "at 25 cents an acre, with a patent to follow upon proof that the settler had irrigated the land."<sup>18</sup> It was hoped that irrigation farming on these larger tracts could be profitable.

### B. Reclamation — *Where There's a Will, There's Federal Financing*

"Reclamation" of the West, however, proved to be more difficult and expensive than had been imagined.<sup>19</sup> It was soon apparent that "small farmers needed more than a legal doctrine to get water to their fields"; they needed money to build storage dams, canals, and laterals for transporting the water.<sup>20</sup> The Desert Land Act resulted in irrigation of

12. GEORGE C. COGGINS & CHARLES F. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 86 (2d ed. 1987). The authors conclude that the official policy succeeded in that millions were able to build new lives, the country was developed and unified, and the nation rapidly rose to pinnacles of wealth and power. *Id.* at 86-87.

13. Ch. 75, § 2, 12 Stat. 392 (1862), *repealed by* Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-84 (1988).

14. See CLAWSON, *supra* note 9, at 23.

15. The hundredth meridian is the mark of longitude that runs through the middle of North and South Dakota and through Nebraska, Kansas, Oklahoma, and Texas. "The hundredth meridian roughly corresponds to a key north-south rainfall line. In most of the country west of the line, annual precipitation is less than twenty inches per year." Charles F. Wilkinson, *Perspectives on Water and Energy in the American West and Indian Country*, 26 S.D. L. Rev. 393, 395 (1981) [hereinafter *Perspectives*].

16. COGGINS & WILKINSON, *supra* note 12, at 92-93.

17. Ch. 107, 19 Stat. 377 (1877) (codified as amended at 43 U.S.C. §§ 321-39 (1988)).

18. See JOSEPH L. SAX ET AL., *LEGAL CONTROL OF WATER RESOURCES* 342 (2d ed. 1991) [hereinafter SAX].

19. For an overview of early private irrigation efforts, see REISNER, *supra* note 7, at 108-14. See SAX, *supra* note 18, at 644-46 for an overview of the federal reclamation program. "[T]he Reclamation Act of 1902 [32 Stat. 388] provided that the Federal Government would build storage facilities in places it considered promising, deliver the water to irrigators under contract, and recover its costs through payments that the irrigators would make over time from the profits of their newly irrigated land." *Id.*

20. Charles F. Wilkinson, *Western Water Law in Transition*, 56 U. COLO. L. REV. 317, 320 (1985) [hereinafter *Western Water*]. Water had to be transported since "[p]otentially fertile farming areas often were located far from the rivers or on benchlands high above steep canyon walls." *Id.*

only "the best farmland in the West," leaving a good deal of marginal land unreclaimed.<sup>21</sup> Private capital to irrigate these marginal lands was not forthcoming; even the most patriotic investor would not undertake projects that were economic losers. In short, "massive projects . . . were needed to complete the goal [of reclaiming the arid west] and these were beyond the means of private companies and the States."<sup>22</sup>

The belief that the Federal Government should facilitate, and even finance, irrigation projects for citizens of Western States has been the unifying force of a political movement that was born in the 1870's and is still in existence today.<sup>23</sup> In 1878, John Wesley Powell, who did not support federal funding, argued in his Arid Lands report that federal regulation must be passed, since "the redemption of . . . these lands will require extensive and comprehensive plans, for the execution of which aggregated capital or coöperative labor will be necessary."<sup>24</sup> In 1902 the federal Reclamation Act was passed,<sup>25</sup> culminating a twenty-five year struggle by "a formidable, well-financed lobby" of Eastern and Western businessmen.<sup>26</sup>

Time has vindicated the private financiers who refused to invest in irrigation equipment; much of the land was irrigated only with the help of federal funds.<sup>27</sup> Farmers using water from federally-funded projects have always pronounced their inability to pay for such projects;<sup>28</sup> the money the government spent to "reclaim the West" has never been repaid. Reclamation has been a continual federal subsidy to western water users.<sup>29</sup> Even at its inception in 1902, the Reclamation Act provided for subsidies in the form of interest free loans amounting to about 39% of project costs.<sup>30</sup> Congress passed numerous statutes between 1910 and 1930 to give project beneficiaries longer payback periods.<sup>31</sup> Construction charges have been extended for an average of fifty years, and sometimes

---

21. MCCOOL, *supra* note 5, at 62. It was these marginal lands which the Reclamation Service eventually tried to irrigate. *Id.* McCool adds that these marginal lands were precisely where most Indian reservations were established. *Id.*

22. *California v. United States*, 438 U.S. 645, 663 (1978).

23. For details of the powerful political lobby supporting federally funded reclamation, see generally, MCCOOL, *supra* note 5, at 25-26.

24. JOHN WESLEY POWELL, REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES WITH A MORE DETAILED ACCOUNT OF THE LANDS OF UTAH viii (2d ed. 1879).

25. 43 U.S.C. §§ 371-600e (1988). Also known as the Newlands Act, or National Irrigation Act, this statute established the Reclamation Service, which later became the Bureau of Reclamation. See also *supra* note 19.

26. MCCOOL, *supra* note 5, at 14, 25.

27. See RICHARD W. WAHL, MARKETS FOR FEDERAL WATER: SUBSIDIES, PROPERTY RIGHTS, AND THE BUREAU OF RECLAMATION 44-46 (1989).

28. See MCCOOL, *supra* note 5, at 68-71; WAHL, *supra* note 27, at 45-46.

29. See MCCOOL, *supra* note 5, at 70-71; WAHL, *supra* note 27, at 27.

30. See MCCOOL, *supra* note 5, at 68.

31. *Id.* at 68-70.

for as long as one hundred years.<sup>32</sup> As a result, the "various revisions to the 1902 act [have] created a substantial subsidy to project farmers . . . . A study in 1980 by the Interior Department's Office of Policy Analysis found that per-acre subsidies ranged from 57 to 97 percent."<sup>33</sup>

The money spent on water development and never recovered by the Federal Government amounts to an immense sum and represents the success of a powerful "iron triangle."<sup>34</sup> By 1974, the Bureau of Reclamation had invested six billion dollars in completed project facilities.<sup>35</sup> The Army Corps of Engineers also entered into western water development.<sup>36</sup> By 1976, after 170 years of "congressional generosity," the Corps had constructed over 4,000 projects with a real property investment of \$88 billion.<sup>37</sup> The two agencies implemented a classic distributive policy with concentrated benefits and costs "spread so thin as to be nearly invisible"<sup>38</sup> Water development has allowed Western Congressmen to appear heroic in the eyes of their constituents, for whom low-cost water was almost like free money.<sup>39</sup> Simultaneously it enabled the Army Corps of Engineers, like the Bureau of Reclamation, to become "a rich, powerful, and influential federal agency."<sup>40</sup> This dynamic iron triangle spent vast amounts of money, developed almost all the water in the West,<sup>41</sup> and has withstood criticism from nearly every President.<sup>42</sup>

### C. State Water Law — State Control and Rights Under Prior Appropriation System

With reclamation, many Westerners wanted federal funds for water development free from federal control and such an unfettered gift is what

32. *Id.* at 70.

33. *Id.* at 70-71 (citation omitted). For a detailed account of the extensions and how they increased the value of the interest subsidies, see generally, WAHL, *supra* note 27.

34. An "iron triangle" is "an informal political alliance that forms to influence specific public policy to its advantage," and is generally composed of congressional committees and subcommittees, administrative agencies, and interest groups. MCCOOL, *supra* note 5, at 5.

35. *Id.* at 86.

36. "[T]hroughout the Corps' 183-year history Congress has incrementally added new functions and responsibilities, nearly always accompanied by increased funding." *Id.* at 93. For example, the Corps' "mission" has expanded beyond building bridges and overseeing navigation to include hydroelectric power development, flood control, irrigation, hurricane protection, and pollution control. For a listing of the Corps' functions, see *id.* at 93-95.

37. MCCOOL, *supra* note 5, at 91-92.

38. BARBARA T. ANDREWS & MARIE SANSONE, WHO RUNS THE RIVERS? DAMS AND DECISIONS IN THE NEW WEST 250 (1983) (examining in detail federal western water development and the roles played therein by Congress, the agencies, and the President).

39. Because of "logrolling," Congressmen from the East also became involved in water development, so that virtually no one in Congress opposed these public works. MCCOOL, *supra* note 5, at 97.

40. *Id.* at 93.

41. HELEN INGRAM, WATER POLITICS: CONTINUITY AND CHANGE I (1990).

42. MCCOOL, *supra* note 5, at 102; see also REISNER, *supra* note 7, at 325-43 (discussing President Carter's hit list of wasteful projects).

Congress and the courts eventually delivered.<sup>43</sup> The Supreme Court interpreted the Desert Land Act as recognizing Western States' authority to administer water rights,<sup>44</sup> and ruled that the Reclamation Act did not take that power from the states.<sup>45</sup> Thus, although the Federal Government paid to make this new water available, it gave control of the distribution of the water to the states.<sup>46</sup> Congress' long term deference to states may reflect Congressional concern about the "legal confusion that would arise if federal water law and state water law reigned side by side in the same locality."<sup>47</sup> However, a more probable explanation is that Congress had no single "federal water law" in mind at all. Each representative considered only the benefit of a given reclamation project to his or her constituents and avoided the problem of extensive federal intervention in state water law.<sup>48</sup>

In the early days of this county the Eastern States adopted the riparianism system of water rights from the English common law. Appropriate for a humid climate, riparianism gives rights in the water body to those *owning land* riparian to it, that is, land touching or straddling the waterway;<sup>49</sup> the riparian owner is entitled to the natural flow of a stream across or along the border of his or her land.<sup>50</sup> Traditional riparianism restricts the use of the water to the riparian tract, though later developments in some states began to permit some off-tract use.<sup>51</sup> Riparian owners' rights exist whether or not they are exercised; at any time a riparian can institute a new use, limited by what the jurisdiction considers permissible riparian use.<sup>52</sup>

---

43. McCool, *supra* note 5, at 15-16.

44. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-64 (1935). "[F]ollowing the Act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those created since out of the territories . . . with the right in each to determine for itself to what extent the rule of appropriation or the common law rule of riparianism should obtain." *Id.*

45. *Id.* at 162. The Reclamation Act, ch. 1093, 32 Stat. 388, §§ 5, 8 (1902) (codified as amended in scattered sections of 43 U.S.C.), did contain a few limitations on state distribution of reclamation water, in that it imposed certain requirements which had to be met in order for a person to secure a right in reclamation water: the right was to be appurtenant to the land first irrigated, governed by beneficial use, and available only upon tracts of not more than 160 acres. Farmers, however, found ingenious ways to circumvent the acreage limitation. SAX, *supra* note 18, at 646; WAHL, *supra* note 27, at 71-77.

46. 43 U.S.C. § 383 (1988) ("Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws . . .").

47. California v. United States, 438 U.S. 645, 669 (1978).

48. See REISNER, *supra* note 7, at 15.

49. *Id.* at 19.

50. See *id.* at 37-39.

51. *Id.* at 42.

52. See *id.* at 43-45.



In the late 1840's and early 1850's gold was discovered in California. Mining that gold required a great deal of water.<sup>53</sup> Under the riparian doctrine, few miners had any rights to water. Mere trespassers on the public domain, miners owned no land and, hence, lacked riparianism's one qualification for rights in a water body.<sup>54</sup> Moreover, miners' interest was *gold*, not preserving the "natural flow" of rivers. The miners wanted to remove the water from its natural watercourse and put it to work where it was needed, perhaps quite far from the river. Thus, "miners developed their own customs. Just as the first miner to stake a claim was accorded the right to work the area, so too was the first user of water considered to have absolute right of priority."<sup>55</sup> In response, courts in the Western United States created the doctrine of prior appropriation, based on the notion of first in time, first in right.

The Supreme Court of California first approved of the miners' rule in *Irwin v. Phillips*.<sup>56</sup> The case involved a water dispute between two miners, and the court found for the miner who had taken the water first, dismissing the common law claim that a water course must be allowed to flow in its "natural channel."<sup>57</sup> Rather, since "courts are bound to take notice of the political and social condition of the country which they judicially rule," it affirmed and protected "the rights of those [miners] who by prior appropriation, have taken waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers . . ."<sup>58</sup> Congress followed this reasoning with its enactment of the water rights protection rule in Section 9 of the Mining Act of 1866.<sup>59</sup>

Today, prior appropriation is the water law of the West, though the doctrine has been modified somewhat from the original miners' custom.<sup>60</sup>

---

53. See *Western Water*, *supra* note 20, at 318. "Water was the linchpin of the miners' operations, whether they were washing river gravel away from the gold dust and nuggets with pans, sluices, or long toms; slashing away at hillsides with high power hydraulic hoses used to blast out placer deposits; or transporting water twenty miles or more to remote mining towns such as Mokelumne Hill or Columbia by means of the serpentine canals that still wind across the gold country." *Id.*

54. *SAX*, *supra* note 18, 322.

55. *Western Water*, *supra* note 20, at 319.

56. 5 Cal. 140 (1855).

57. *Id.* at 145.

58. *Id.* at 146.

59. Act of July 26, 1866, ch. 262, 14 Stat. 251, 253 (codified as amended at 30 U.S.C. § 51 (1988) and 43 U.S.C. § 661 (1988)). While "the Mining Act of 1866 was not itself a grant of water rights pursuant to federal law . . . Congress intended 'to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition.'" *California v. United States*, 438 U.S. 645, 656 (1978) (quoting *Basey v. Gallagher*, 87 U.S. (20 Wall.) 670, 684 (1875)).

60. See *SAX*, *supra* note 18, at 149. "There are nine pure appropriation doctrine states . . . [.] Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. California, Oklahoma, and to some extent Nebraska have mixed systems with both riparianism and appropriation side by side. Six other states did have riparian systems, but then

Generally, the doctrine provides that an appropriator acquires a right to the water she takes out of the river and puts to a beneficial use. If she stops using the water, she loses the right. The earliest person to appropriate on a river is the most senior appropriator (#1), the next person is appropriator #2 and so on. In case of a shortage, the most junior appropriator is cut off first. There is no sharing of water, and those owning lands riparian to a river are not guaranteed it will continue to run by their property.<sup>61</sup>

Appropriation law is no longer as simple as it was in the 19th century. In order to make a new appropriation, not only must there be unappropriated water which the appropriator will put to beneficial use, but appropriators must also apply for a permit from the state in which the water is located.<sup>62</sup> Nevertheless, appropriation's key feature has not changed — the oldest rights are still the most valuable; “[i]n western water law, age is not coextensive with obsolescence.”<sup>63</sup>

## II

### WATER FOR THE RESERVATIONS

While non-Indian settlers in the West received practically free land and water under the homestead acts and the Reclamation Act, Indian people were treated entirely differently. The Federal Government took vast amounts of Indian land and did not help the Indians irrigate their remaining land.

#### A. Assimilation Through Allotment

In the late 1700's, the Federal Government adopted the notion that it should attempt to transform Indians into farmers.<sup>64</sup> All of the present United States was once “Indian country.” Yet gradually, as the United States spread across the continent, Indian country came to mean the lands which tribes, after negotiations with the Federal Government, retained and on which their people were to live. Indian country was theoretically free from state control and interference and from settlement by

---

switched to appropriation: Kansas, North Dakota, Oregon, South Dakota, Texas, and Washington. In these states, riparian uses existing at the time of the changeover are recognized, but all rights acquired since that time, and presently, are appropriative rights.” *Id.*

61. *Western Water*, *supra* note 20, at 319. “A stream or lake can be drained low or dried up entirely, as has occurred with hundreds of western rivers and streams, even the lower Colorado.” *Id.*

62. *SAX*, *supra* note 18, at 245. In 1890, Wyoming became the first state to institute a permit system; “[t]oday every prior appropriation state except Colorado provides for the acquisition of water rights through an administrative permit system.” *Id.*

63. *Id.* at 143.

64. See R. DOUGLAS HURT, *INDIAN AGRICULTURE IN AMERICA: PREHISTORY TO THE PRESENT* 92 (1987). American Indians were, in fact, the first farmers in the Western Hemisphere and have an agricultural tradition dating back to 7000 B.C. *Id.* at 1-2.

non-Indians.<sup>65</sup> As discussed above, the Desert Land Act was primarily aimed at lands west of the hundredth meridian, where, currently, over half (55%) of Indian lands are located.<sup>66</sup> Ten years after the Desert Land Act was passed for the benefit of non-Indians, the Federal Government passed the General Allotment Act,<sup>67</sup> also known as the Dawes Act, supposedly for the benefit of Indian people.<sup>68</sup>

While the ostensible purpose of the Dawes Act was to benefit Indians by allowing them to live like "white yeoman farmers," the act actually furnished the Federal Government with an opportunity to give away vast tracts of purportedly surplus Indian land.<sup>69</sup> The act enabled the President, upon determining that an Indian reservation was suitable for agriculture, to allot 160 acres to each head of a household on the reservation.<sup>70</sup> Congress required that such land be held in trust for a period of twenty-five years, at the end of which (or upon a finding by the Secretary of the Interior that the allottee was "competent and capable of managing his or her affairs") the Secretary issued a fee patent to the allottee.<sup>71</sup> In addition, the Act provided that whatever lands were not allotted to an Indian could be purchased from the tribe by the Secretary of the Interior to be made available to non-Indian homesteaders.<sup>72</sup>

This surplus provision of the Act renders specious any claim that the grants of private property were for the Indians' benefit. As a minority report on an earlier proposed allotment bill recognized:

The real aim of this bill is to get at the Indian lands and open them up to settlement. The provisions for this apparent benefit of the Indian are but the pretext to get at his lands and occupy them . . . . If this were done in

---

65. See, e.g., CHARLES F. WILKINSON, *THE EAGLE BIRD: MAPPING A NEW WEST* 29 (1992). "The treaties and other forms of agreements with Indian tribes . . . did not somehow 'give' land or governmental authority to the tribes. Indian governments possessed both real property and sovereignty before the treaties. Treaties were contracts, memorialized as the supreme law of the land, in which tribal representatives relinquished vast domains in exchange for solemn promises that their remaining land and sovereignty would be protected by the United States forever." *Id.*

66. HURT, *supra* note 64, at 214. Approximately 75% of Indian people remaining on reservations live west of the hundredth meridian. *Id.*

67. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified in scattered sections of 25 U.S.C.).

68. HURT, *supra* note 64, at 136-38.

69. See *id.* "The General Allotment Act of 1887 . . . designated huge amounts of Indian land as 'surplus.' This was a euphemism for simply stripping the tribe of its title and transferring it to federal ownership. Most of it was then opened to homesteading by non-Indians." WILKINSON, *supra* note 65, at 31.

70. 25 U.S.C. § 331 (1988). "Single men over the age of eighteen were to receive 80 acres, while children under eighteen were allotted 40 acres. Where lands were unsuitable for cultivation, allotments were to be doubled to permit grazing and the development of a livestock industry." HURT, *supra* note 64, at 137. These numbers seem unreasonably small in light of the decision ten years earlier in the Desert Land Act that at least 640 acres were needed for profitable irrigation farming. See *supra* text accompanying note 18.

71. 25 U.S.C. §§ 348-49 (1988).

72. *Id.* § 348.

the name of Greed, it would be bad enough; but to do it in the name of Humanity, and under the cloak of an ardent desire to promote the Indian's welfare by making him like ourselves, whether he will or not, is infinitely worse.<sup>73</sup>

Allotment lasted from 1887 to 1934 and was either a dismal failure or a brilliant success, depending on one's perspective. The Act resulted in the Indians losing "90 million acres between 1887 and 1934," or about two-thirds of their land.<sup>74</sup>

### B. Development of Water Resources — Indian Irrigation Projects

Once the settlement of the West was underway, Indians on reservations were in the unenviable position of competing with non-Indians not only for land, but also for water development. While the Federal Reclamation Act of 1902 successfully subsidized water development for non-Indian agriculture, there has never been equivalent legislation for the development of Indian agriculture in the West.<sup>75</sup> The few irrigation projects initiated by the Bureau of Indian Affairs (BIA) are largely unfinished,<sup>76</sup> primarily because of a lack of funds.<sup>77</sup>

Congress has never pressed for the development of Indian water projects even though the need for such projects has been apparent. The Bureau of Reclamation came into existence because of the great capital expense involved in irrigating marginal western lands. Much of the reservation land in the West is similarly marginal.<sup>78</sup> It is clear that if non-

---

73. COMMITTEE ON INDIAN AFFAIRS, LANDS IN SEVERALTY TO INDIANS, H.R. REP. No. 1576, 46th Cong., 2d Sess. 10 (1880).

74. David H. Getches, *Water Rights on Indian Allotments*, 26 S.D. L. REV. 405, 414-15 (1981). See also PHILIP L. FRADKIN, *A RIVER NO MORE: THE COLORADO RIVER AND THE WEST* 161 (1981). Fradkin writes that in 1887 "there were almost 2 billion acres of land under Indian control. By 1924 this had shrunk to 150 million acres." He adds that President Franklin Roosevelt launched "a policy of self-determination . . . Still, the Indian land base kept diminishing; in 1975 it amounted to 50 million acres." *Id.*

75. See *BIA Management and Operation of Indian Irrigation Projects: Hearing Before the Select Comm. on Indian Affairs of the United States Senate*, 101st Cong., 2d Sess. 3 (1990) [hereinafter *Hearings, July 1990*] (statement of John McCain, U.S. Senator from Arizona, Vice Chairman, Select Committee on Indian Affairs). Senator McCain commented upon "the absence of a coherent federal policy in support of Indian agriculture . . . There is not an adequate statutory or regulatory basis for [the Indian] irrigation program." *Id.*

76. *Id.* at 1-2 (statement of Daniel K. Inouye, U.S. Senator from Hawaii, Chairman, Select Committee on Indian Affairs) ("Of the 125 Indian irrigation projects authorized by the Congress over the last 90 years, I am sad to report that not one — not a single one — has been completed."). See generally MCCOOL, *supra* note 5, at 112 ("We [BIA] began our first irrigation project in 1867 and we've never finished one yet."). That first irrigation construction project for Indians was a project on the Colorado River Indian Reservation, authorized by the Act of March 2, 1867, ch. 173, § 1, 14 Stat. 492. William H. Veeder, *Water Rights in the Coal Fields of the Yellowstone River Basin*, 40 LAW & CONTEMP. PROBS. 77, 90 n.89 (1976).

77. MCCOOL, *supra* note 5, at 125. After examining BIA reports to Congress, McCool concludes that funding is so inadequate that the BIA has not been able to maintain those parts of facilities they built years ago, much less expand them to completion. *Id.*

78. See *supra* note 21.

Indian settlers needed a construction agency, expertise, and large subsidies for irrigation, Indians would require similar support to irrigate the reservations. Yet, Congress has never framed the question this way. Instead, Congress failed to take action despite repeated reports that the BIA "lacked the expertise necessary to build and operate irrigation facilities."<sup>79</sup> Congress has never heeded stern recommendations that the Bureau of Reclamation should take over and build water projects to benefit the reservations.<sup>80</sup> Likewise, Congress has given the BIA remarkably little money for Indian water projects, causing one critic to state that "[t]he record of federal capital investment in irrigation illustrates the importance that the Federal Government placed on non-Indian water resource development relative to Indian development."<sup>81</sup> As the following chart indicates, federal investment in Indian irrigation projects has comprised only a small portion of the total federal spending for water projects (Table 1).

TABLE 1<sup>82</sup>  
FEDERAL INVESTMENT IN IRRIGATION  
(thousands of historical dollars)

	Pre- 1920	1920- 1939	1940- 1959	1960- 1978
Bureau of Reclamation	129,510	120,736	1,206,483	2,156,419
Bureau of Indian Affairs	14,851	33,569	28,733	36,743

The money that was spent to develop water for use on the reservations has not substantially benefited Indian people.<sup>83</sup> One commentator has observed that the special projects funded by the BIA, "the so-called Indian irrigation projects, have often been focused on allottees and have tended to promote the alienation of allotment lands . . . [therefore] benefiting mostly the non-Indian successors to allottees, rather than the tribes."<sup>84</sup>

79. MCCOOL, *supra* note 5, at 149; *Survey of Conditions of the Indians in the United States: Hearings Before a Subcomm. of the Senate Comm. on Indian Affairs*, 71st Cong., 2d Sess. 2227-28 (1930) (report of Porter J. Preston & C.A. Engle).

80. MCCOOL, *supra* note 5, at 154.

81. Moore, *supra* note 1, at 773.

82. *Id.* (relying on figures from DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, CENSUS OF AGRICULTURE: CENSUS OF IRRIGATION ORGANIZATIONS, CENSUS YEARS 1950, 1959, 1969, 1978). The Bureau of Indian Affairs figure for 1940-59 is exaggerated because the Census reported the figure as an aggregation with other expenditures by minor irrigation organizations. *Id.*

83. Statement of Richard B. Collins, in INDIAN WATER POLICY IN A CHANGING ENVIRONMENT 84 (1982) (published by The American Indian Lawyer Training Program, Inc.) [hereinafter *Indian Water*].

84. *Id.* at 84-85.

In addition to allottees, the BIA has long pursued "an aggressive policy of leasing Indian lands to non-Indian farmers."<sup>85</sup> This leasing program has resulted in the best Indian lands being permanently farmed by and occasionally sold to non-Indians at extremely low rates.<sup>86</sup> By 1984, a relatively small portion of the irrigable land on Indian reservations had been irrigated.<sup>87</sup> Non-Indian farmers were particularly prevalent on irrigated lands and "the largest percentage of non-Indian holdings [were] found in the largest irrigation projects."<sup>88</sup>

The Congressional policy for reimbursing BIA projects also differed from the non-Indian analogue. Prior to 1914 the tribes or the Federal Government funded the Indian irrigation projects, but "the Act of August 1, 1914 changed this policy and required that project beneficiaries pay both construction and maintenance costs"; the charges were made retroactive.<sup>89</sup> This requirement increased the Indians' indebtedness<sup>90</sup> and was not altered until 1932 when the Leavitt Act was passed. Thereafter the Secretary of Interior could modify, defer, or cancel the Indians' liability for construction costs. Indians were still obliged to repay maintenance costs, according to their ability to pay.<sup>91</sup>

Indians lacked the political clout in Congress to secure the benefit of additional water development. As discussed previously, an iron triangle developed promoting federal reclamation programs.<sup>92</sup> However, the Indian water triangle is a much weaker symbiotic political alliance, consist-

85. MCCOOL, *supra* note 5, at 120. McCool explains that the BIA, believing that Indians themselves were "slow in making the quantum leap from their traditional life-style to that of farmer," decided that a leasing policy was "a wise one," that "the lessees would prepare the land for farming and then at the end of the lease period would return the land to the Indians 'in a condition that will allow the Indian to take up the occupation of farming with prospects of making a success.'" *Id.* at 120 (quoting BUREAU OF INDIAN AFFAIRS, ANNUAL REPORT 3 (1918)). Of course, it did not turn out that way. *Id.*

86. *Id.* at 120. "[I]n 1969 non-Indians grossed \$109.3 million from farming activity on Indian land but paid only \$13.8 million in rent, which was well below market prices . . . [A 1972] study concluded that Indians receive only one-third of the gross earnings from agricultural production on Indian lands; the other two-thirds went to non-Indian lessees." *Id.*; see also U.S. COMMISSION OF CIVIL RIGHTS, STAFF REPORT NO. 2, FEDERAL POLICIES AND PROGRAMS FOR AMERICAN INDIANS (1972).

87. By 1984, only 7% of irrigable land on Indian reservations was being irrigated. MCCOOL, *supra* note 5, at 159.

88. In 1974, 71% of farming on irrigated Indian land was done by non-Indians. *Id.* at 122; Getches, *supra* note 74, at 415 n.74. McCool explains that "most of the larger BIA irrigation projects also provide water for non-Indian lands, including the Indian land sold to settlers after reservation allotment. This explains in part why such a large percentage of Indian irrigation projects are farmed by non-Indians." MCCOOL, *supra* note 5, at 140.

89. MCCOOL, *supra* note 5, at 269 n.5 (referring to the Act of August 1, 1914, ch. 222, § 1, 38 Stat. 583).

90. Act of July 1, 1932, ch. 369, 47 Stat. 564 (codified at 25 U.S.C. § 386a (1988)); see also MCCOOL, *supra* note 5, at 269.

91. 25 U.S.C. § 386a (1988).

92. See *supra* notes 34 to 42 and accompanying text.

ing of 1) Congressional committees, 2) the BIA, and 3) interest groups.<sup>93</sup> Moreover, rather than developing Indian resources (such as land, water, minerals, etc.) for tribal benefit, the triangle has often operated to transfer these resources to non-Indians and to compensate the tribes with government welfare benefits.<sup>94</sup> Commonly a Senator with a place on the Committee on Indian Affairs, which was created in 1821, could "have practically whatever [Indian resources] he ask[ed] for in his own State."<sup>95</sup> This was "pork barrel [politics], the source of the goods being Indian reservations rather than the federal treasury."<sup>96</sup> In contrast to the Bureau of Reclamation or the Corps of Engineers and their programs, the BIA "tended to operate as a welfare agency rather than a construction and development agency."<sup>97</sup>

The dearth of funding for BIA irrigation projects is the unfortunate result of the weakness of the Indians' water resources triangle. As a result of the influence of the Committee of Indian Affairs, composed largely of Western Senators whose constituents compete with the tribes for water, and the weakness of the BIA, Congress ignores the Indians' need for water development.<sup>98</sup> The BIA water projects were denied the funding which was lavished on non-Indian water projects. A former Assistant Commissioner of Indian Affairs has stated that his most difficult task was "getting appropriations for Indian irrigation projects," because the Congressional appropriations committees and the Office of Management and Budget "could find dozens of reasons for denying money to the BIA for Indian irrigation projects, while endorsing gigantic sums to finance reclamation projects with much worse cost-benefit ratios in the districts of influential Congressmen."<sup>99</sup>

The only Indian water projects authorized in the last forty years were not exclusively Indian projects. The Fort Hall-Michaud project was authorized in 1956 as part of a larger Bureau of Reclamation project, and the Navajo Indian Irrigation Project was authorized in 1962 simultaneously with the San Juan-Chama Project that would serve the city of Albuquerque and other non-Indians.<sup>100</sup> McCool writes that "the resistance to Indian projects was so intense that authorization was often possible only if non-Indian recipients were included."<sup>101</sup>

---

93. McCool, *supra* note 5, at 146.

94. *Id.* at 133-34.

95. FRANCIS E. LEUPP, *THE INDIAN AND HIS PROBLEMS* 211-12 (1910).

96. McCool, *supra* note 5, at 133.

97. *Id.* at 147.

98. *Id.* at 134, 142.

99. *Id.* at 140 (quoting James Officer).

100. *Id.*

101. *Id.*

The Navajo Indian Irrigation Project (NIIP), "the only significant [BIA] project to be initiated in the past half-century,"<sup>102</sup> illustrates the lengths tribes have been forced to go to secure water development. Under the NIIP, the Navajo tribe had to sacrifice its large reserved water rights<sup>103</sup> for a guarantee of much less water and federal funding.<sup>104</sup> Even then the appropriations for the Navajo portion were not readily forthcoming; the non-Indian segment of the 1962 dual authorization "was completed ahead of schedule, but the Navajo portion was only 17 percent complete eighteen years after the project was authorized, . . . and by 1975 not a single acre of Navajo land was irrigated."<sup>105</sup> When the Bureau of Reclamation later determined that a less water-intensive form of irrigation (an "all-sprinkler" system, as opposed to a gravity flow system) *could* be used, the Bureau suggested that the Navajo allotment be cut by approximately 27%.<sup>106</sup> The Department of Interior issued an opinion which followed the Bureau's recommendation, but provided that a significant consumptive use savings be made available to the Navajos.<sup>107</sup> The Navajo entitlement was reduced from 508,000 to 333,000 acre-feet.<sup>108</sup> Yet "the sprinkler system was far more appropriate to large scale agribusiness than to the small family farms first envisioned for NIIP." Although the Bureau of Reclamation considered the all-sprinkler system to be preferable, "[t]here was no study . . . of the management structure the Navajo people would prefer, and of whether or not the sprinkler technology served that preference."<sup>109</sup> Thus, while the Navajos were forced to adopt a more efficient system to which they had not agreed, non-Indian irrigators in the region continued using Navajo water at "the amazingly high inefficiency rate of 20 percent of water diverted actually being consumed by crops."<sup>110</sup>

Many commentators have agreed that rich Westerners with influence over Congressmen received federally funded water projects and grew wealthier, while the tribes received almost no federal assistance in bringing water from the rivers to their lands.<sup>111</sup>

---

102. *Id.* at 142.

103. See discussion *infra* part II.D. for an explanation of *Winters* rights.

104. MCCOOL, *supra* note 5, at 183-84.

105. *Id.* at 140-41.

106. Charles DuMars & Helen Ingram, *Congressional Quantification of Indian Reserved Rights: A Definitive Solution or a Mirage?*, 20 NAT. RESOURCES J. 17, 20 (1980).

107. *Id.* at 20-21.

108. PHILIP RENO, *MOTHER EARTH, FATHER SKY, AND ECONOMIC DEVELOPMENT: NAVAJO RESOURCES AND THEIR USE* 54, 61 (1981).

109. *Id.*

110. FRADKIN, *supra* note 74, at 171.

111. See, e.g., INGRAM, *supra* note 41, at 12. "Only a few people were able to play the federal water project game to their advantage and many [Indians and other poor rural people] were left out . . . . Even when projects for the disadvantaged were authorized [for example, the Navajo Indian Irrigation Project], their funding and construction typically lagged far behind projects for the economically advantaged . . . . The conclusion of a number of authorities is



### C. A "Pastoral and Civilized People"

In light of Congressional decisions not to develop water resources for Indian people, one might ask why any BIA projects were begun at all. The best explanation is that early on the Federal Government remembered its promises and knew that the tribes expected that Indian people would farm on their reservations and need costly irrigation;<sup>112</sup> promises and expectations that the Federal Government soon forgot.

A review of the treaties which created the western reservations indicates that both the Federal Government and the Indians assumed that the tribes would sustain themselves with agriculture.<sup>113</sup> Presumably agriculture appealed to the tribes as a matter of survival because game no longer roamed the now-settled lands. The government's desire to assimilate the Indians into the American mainstream by the means of agriculture is well known.<sup>114</sup> An organization of fifty-four tribes, the Intertribal Agriculture Council has concluded that these treaty commitments which created the reservations in the West,

form the basis for the trust responsibility of the United States toward Indian people and Tribes, and establish the ward/trustee relationship . . . . [Because of the location of the reservations], [w]ithout irrigation it is not possible for Indian people to be self-supporting on these lands, nor for the United States to fulfill its obligations of advancing agriculture to support the self-sufficiency and well being of Indian people.<sup>115</sup>

Hence, the failure to develop irrigation facilities for the use of Indian people on the reservations violated not only any semblance of equal treat-

that while the expertise and financial power of the Federal Government was harnessed to serve local elites in the West during the reclamation era, nothing like the same treatment was afforded to Indians during the development period." *Id.*

Each Western State would have "its share of Congressmen and Senators on key committees to watch out for its water interests. The Indians had no such protectors. True, a smattering of legislators, mostly from the East, would make occasional noises about Indians sharing in the West's water; but they would be outside the mainstream of those powerful western institutions that decided where water projects went and how fast they were completed . . . . When it has come to distributing water in the West, it has been the *politically strong* and aggressive who get it." (emphasis added). FRADKIN, *supra* note 74, at 155.

112. Note again the ostensible "purpose" of the Dawes Act, to transform Indians into agriculturalists, which is impossible in the arid West without irrigation facilities.

113. See Robert S. Pelcyger, *The Winters Doctrine and the Greening of the Reservations*, 4 J. OF CONTEMP. L. 19, 25 (1977) ("Agriculture was one of the purposes for the establishment of most, if not all, Indian reservations in the arid West."); *Hearings, July 1990, supra* note 75, at 187 (statement of Intertribal Agriculture Council) (suggesting that the development of agriculture on reservations located in arid or semi-arid regions was a primary commitment of the United States in the treaties that establish the relationship between the tribal governments and the United States government and which resulted in the reservations).

114. Norris Hundley, Jr., *The "Winters" Decision and Indian Water Rights: A Mystery Reexamined*, 8 W. HIST. Q. 17, 38 (1982) (describing a prevalent belief among Americans in the late 19th and 20th centuries that "the plow offered the major route to civilization for Native Americans").

115. *Hearings, July 1990, supra* note 75, at 187 (statement of Intertribal Agriculture Council).

ment towards Indians and non-Indians but also the Federal Government's sacred trust responsibility to Indian people.<sup>116</sup> Two agreements, the 1868 treaty between the United States and the Navajo Indians<sup>117</sup> and the 1887 agreement between the United States and the Gros Ventres and Assiniboines, establishing the Fort Belknap Reservation in Montana,<sup>118</sup> illustrate the assumptions underlying many Indian treaties creating western reservations.

The Navajo treaty clearly demonstrates that all signatories assumed that agriculture was to sustain the tribe. The Navajo tribe negotiated a "peace treaty" with the United States government after their resistance was broken by the military efforts of Kit Carson and 700 troops and after the Navajos were forced onto the gruesome 300 mile "Long Walk" to Fort Sumner in southeastern New Mexico.<sup>119</sup> The treaty designated "a reservation on part of their homeland to which they could return."<sup>120</sup> Because "most of the articles [in the treaty] . . . reflect the understanding that the Navajos would henceforward be primarily engaged in agricultural pursuits," commentators have concluded that "the United States treaty with the Navajos . . . contemplated that the Navajos would become an agricultural, pastoral people."<sup>121</sup> Over fifty years later, in 1920, recognizing the unmistakable fact that farming could not occur on the land without irrigation water, the BIA proceeded "to look into the feasibility of an irrigation project" for the reservation.<sup>122</sup> However, Indian water projects were not deemed economically feasible until they were modified to provide large amounts of water benefitting non-Indians.<sup>123</sup>

---

116. For a general explanation of this responsibility, see STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES: THE BASIC ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS* 26-36 (2d ed. 1992).

117. Treaty between the United States and the Navajo Tribe of Indians, June 1, 1868, 15 Stat. 667.

118. An Act to Ratify and Confirm an Agreement with the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians in Montana, and for Other Purposes, ch. 213, 25 Stat. 113 (1888) [hereinafter Ratification Act].

119. See generally FRADKIN, *supra* note 74, at 166-67.

120. *Id.*

121. DuMars & Ingram, *supra* note 106, at 28 & n.45.

122. FRADKIN, *supra* note 74, at 167.

123. See Fradkin's description of how the NIIP *alone* was "just too much precious water to go solely to Indians," and "[t]hus was born the hermaphroditic concept of the [NIIP] and the San Juan-Chama Project existing under a single umbrella. Each sheltered the other, but the latter definitely rode to authorization on the coattails of the former." *Id.* Fradkin notes how the politicians whose non-Indian constituents would benefit from the water project showed an unprecedented interest in Indians gaining water, the likes of which was not to be heard of again. *Id.* at 168. One state governor said, "the project would alleviate the 'severe and chronic economic distress' of the Indians," while "a New Mexico congressman, citing Article V of the peace treaty, said there was an obligation to make the reservation 'a fruitful land.'" *Id.* Apparently the Navajos agreed, "such development is necessary for our very survival." *San Juan-Chama Reclamation and Navajo Irrigation Project, Hearings on H.R. 2552, H.R. 6541, and S.1077 Before the Subcomm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs, 87th Cong., 1st Sess. 33 (1961) (statement of J. Maurice*

The modifications weren't made until 1962, a century after the treaty was signed.<sup>124</sup>

The Fort Belknap agreement also illustrates that both the Federal Government and the tribes expected farming to be the Indians' mainstay. Occupied by the Gros Ventre and Assiniboine<sup>125</sup> tribes, the Fort Belknap Indian reservation in northern central Montana was established by act of Congress on May 1, 1888, ratifying an agreement of January 21, 1887.<sup>126</sup> The tribes reserved to themselves 600,000 acres, a small fraction of their original holdings.<sup>127</sup> One analyst has surmised that the tribes gave up so much land because "the promise of houses, stoves, livestock, clothing, medical care, and *farming and mechanical implements* proved compelling to a people on the verge of starvation."<sup>128</sup> The agreement also promised financial assistance to "promote their civilization, comfort, and improvement."<sup>129</sup>

Agriculture was central to the agreement. Hence, it can be inferred that irrigation facilities were intended to be constructed, although specific plans were not included in the agreement. The United States agreed to pay the tribes for the land it had taken, and the tribes were expected to use this money to purchase livestock, agricultural equipment, and the necessary irrigation facilities.<sup>130</sup> Although only a modest sum was to be paid to the Indians,<sup>131</sup> \$115,000 annually for a period of ten years,<sup>132</sup> it could have sustained the tribes since the reservation, bordering on the Milk River, was "well watered and susceptible of irrigation at a small

---

McCabe, executive secretary, Navajo Tribe).

124. FRADKIN, *supra* note 74, at 167.

125. See *Hearings, July 1990, supra* note 75, at 93 (statement of Donovan Archambault, Chairman of Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community).

126. Ratification Act, *supra* note 118, at 124-28 (1888).

127. Hundley, *supra* note 114, at 20. In 1855 a vast Indian territory had been set aside as the Great Blackfeet Reservation. In the later 1880's, however, U.S. commissioners "[i]n separate agreements with several different tribal groups . . . negotiated for the surrender of over 17,500,000 acres," reducing the Indian land to three smaller reservations: Fort Peck, Blackfeet, and Fort Belknap. *Id.* The Commissioners told the Indians that with white people emigrating to the United States the demand for land for the government's "white children" was increasing every day and "[t]he time has come when Indians can not hold vast bodies of land as heretofore." *Id.* (quoting Charles F. Larrabee); REDUCTION OF INDIAN RESERVATIONS, H.R. EXEC. DOC. NO. 63, 50th Cong., 1st Sess. 26 (1888).

128. Hundley, *supra* note 114, at 20 (emphasis added).

129. Ratification Act, *supra* note 118, at 114.

130. See *Hearings, July 1990, supra* note 75, at 95 (statement of Donovan Archambault, Chairman of Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community). "[T]he Fort Belknap tribes never had the opportunity of the U.S. government's financial support for the construction of their irrigation project. Instead, the tribes used their exchanged lands for money to build their irrigation project." *Id.*

131. Hundley, *supra* note 114, at 21. The statute requires that "preference shall be given to Indians who endeavor by honest labor to support themselves, and especially to those who in good faith undertake the cultivation of the soil, or engage in pastoral pursuits as a means of obtaining a livelihood . . ." Ratification Act, *supra* note 118, at 113-15.

132. Ratification Act, *supra* note 118, at 114.

cost."<sup>133</sup> And in 1889 "agency officials installed pumps, pipes, ditches and lift devices to divert 1,000 miner's inches of Milk River water" for irrigation farming.<sup>134</sup>

However the Indians never received the water they were promised. Instead the water went to non-Indians who settled around the reservation on former Indian land.<sup>135</sup> In 1910 Hawk Feather, an Assiniboine, told an Indian inspector visiting the reservation,

We are dying off nearly every day, and the cause of it is that we are starving to death. And you say, you have travelled all over this Milk River Valley and you ought to know and see that you can't find anything that we [could] make our living on.<sup>136</sup>

The problem was not that the tribes did not want to farm and grow crops; rather, there was no water left for them during peak irrigation times due to diversions made by non-Indians.<sup>137</sup> Another Assiniboine, Eyes-in-the-Water, said to the inspector, "This year all these ditches are dry and we will not raise anything, and I think we will starve off this winter. I wish you would help us and take all these words in for us."<sup>138</sup> After a century of waiting and many concessions, the Navajos were finally included in a federally funded irrigation project.<sup>139</sup> The Fort Belknap Indian Irrigation Project, however, was never adopted by the Bureau of Reclamation. Instead, as with the overwhelming majority of Indian irrigation projects, it has never been completed, and its antiquated structures suffer from disrepair and decay.<sup>140</sup>

#### D. *The Winters Decision*

Soon after the Indian versus non-Indian water conflict became apparent on the Fort Belknap reservation, the Federal Government brought suit on behalf of the Indians, resulting in the *Winters v. United*

133. Hundley, *supra* note 114, at 21 (quoting letter from John V. Wright, Jared W. Daniels, and Charles F. Larrabee, U.S. Commissioners, to J.D.C. Atkins, Commissioner of Indian Affairs (Feb. 11, 1887) (file 6581-1887, Records of the Office of the Secretary of the Interior, Indian Division, Letters Received, RG 48)). The negotiators added that the Indians "must be encouraged in stock-raising [and] in agricultural pursuits. They can never become self-supporting in any other way." *Id.*

134. *Hearings, July 1990, supra* note 75, at 93-94 (statement of Donovan Archambault, Chairman of Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community).

135. Hundley, *supra* note 114, at 40-41.

136. McCool, *supra* note 5, at 65. The reason the inspector was there, McCool explains, was "to see if he could convince the Indians to give up one-fourth of their land." The Indians refused. *Id.*

137. See Hundley, *supra* note 114, at 20.

138. McCool, *supra* note 5, at 65 (quoting letter from the Secretary of the Interior (June 23, 1910) in S. Doc. No. 805, 61st Cong., 3d Sess. 8 (1911)).

139. See *supra* notes 102-11 and accompanying text.

140. See *Hearings, July 1990, supra* note 75, at 97-98 (statement of Donovan Archambault, Chairman of Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community).

States decision.<sup>141</sup> In June of 1905, the government-appointed Reservation Superintendent of Fort Belknap wrote to the Commissioner of Indian Affairs to protest water diversions above the reservation. "The Indians have planted large crops and a great deal of grain. All this will be lost unless some *radical action* is taken at once to make the settlers above the Reservation respect our rights."<sup>142</sup>

The radical action taken was that the United States brought suit on behalf of the tribes. The United States sought an injunction to stop the settlers from appropriating water on the Milk River, claiming that "all of the waters of the river [were] necessary for . . . the purposes for which the reservation was created."<sup>143</sup> The district court judge said "In my judgment, . . . when the Indians made the treaty granting rights to the United States, they reserved the right to the use of the waters of the Milk River, at least to an extent reasonably necessary to irrigate their lands."<sup>144</sup>

As a local newspaper at the time recognized,

[T]here would be nothing to prevent [the Indians] from increasing the 5,000 inches [they were already using] to an amount that would irrigate all of the reservation, and that in preference to and regardless of the farmers who have invested their money and time in reclaiming the valley and building a prosperous community of homes.<sup>145</sup>

The newspaper did not envision the *tribes* "reclaiming the valley" or "building a prosperous community of homes," though that was, in effect, what they were promised in the treaty of 1887. The settlers pointed out that the treaty did not specifically mention water<sup>146</sup> and that they had begun diverting the water a short time before the Indians (which gave them the superior right under prior appropriation).<sup>147</sup> However, the district court judge found the settlers' arguments unpersuasive and observed that the climatic conditions of northern Montana "tell us that water for irrigation is indispensable in successful farming," and that the *treaty*, which was made before the settlers arrived, contained "provisions providing the Indians with livestock and agricultural equipment that would enable them 'to become self-supporting.'" He concluded that the Indi-

---

141. 207 U.S. 564 (1908).

142. Hundley, *supra* note 114, at 20 (quoting letter from William R. Logan, Superintendent of Fort Belknap Reservation, to Francis E. Leupp, Commissioner of Indian Affairs (June 3, 1905) (Fort Belknap Indian Agency Papers, Box 20, Records of the Bureau of Indian Affairs, RG 75, Federal Archives and Records Center, Seattle)) (emphasis added). The Commissioner explained, "To the Indians it either means good crops this fall, or starvation this winter." *Id.*

143. 207 U.S. at 567. The United States argued that the water was needed to further and advance "the civilization and improvement of the Indians, and to encourage habits of industry and thrift among them." *Id.*

144. Hundley, *supra* note 114, at 26 (quoting Memorandum Order, *United States v. Mose Anderson et al.* (9th Cir., August 7, 1905)).

145. Hundley, *supra* note 114, at 32.

146. *Id.* at 26.

147. *Id.* at 26-27.

ans, in effect, were there first and entitled to the water.<sup>148</sup> He granted the Indians an open-ended allocation which was subject to change as their needs changed.<sup>149</sup> The Supreme Court upheld the order "by refusing either to place a ceiling on the Indian right or to establish a specific and permanent volume for that right."<sup>150</sup>

In dismissing the settlers' claims, the *Winters* decision established the principle that if the reservation is established *before* appropriations are made, the earlier right is the superior one and must be recognized when Indians make a call on the water. The *Winters* defendants argued to the Supreme Court that their lives and *their* "civilized communities" depended on the water, and

if the claim of the United States and the Indians be maintained, the lands of the defendants and the other settlers will be rendered valueless, the said communities will be broken up and the purpose and object of the Government in opening said lands for settlement will be wholly defeated.<sup>151</sup>

In light of the limited amount of water in the Milk River, the defendants' point was not without merit. The lesson of *Winters* was that the settlers' demands were secondary to the rights of the Indians, who had relied on the promise of a viable home and the promise of water. Despite the obvious "conflict of implications" for the United States, the Court held "that which makes for the retention of the waters [by the tribes] is of greater force than that which makes for their cession."<sup>152</sup> "The Indians had command of the lands and the waters — command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization"; the Indians did *not* "reduce the area of their occupation and give up the waters which made it valuable or adequate."<sup>153</sup>

The *Winters* doctrine has not secured the Fort Belknap tribes the water they need for the kind of viable homeland they had been promised. Contrary to the predictions of the outraged defendants in *Winters*, Indian calls on the Milk River, as on most Western rivers, have not shut down

---

148. *Id.* (quoting the Memorandum Order; see *supra* note 144).

149. *Id.* at 36.

150. *Id.*; see also 207 U.S. 564, 577-78.

151. 207 U.S. at 570.

152. *Id.* at 576.

153. *Id.* This illustrates the rule of fairness that "was not an ad hoc rule created for the *Winters* case," but a well established (even by 1908) principle that Indian laws and treaties should be construed favorably to the Indians. Richard B. Collins, *The Future Course of the Winters Doctrine*, 56 U. COLO. L. REV. 481, 482 (1985) (citations omitted). Collins explains that "[t]reaties and laws will be construed on the assumption that Congress intended to deal honorably with the Indian nations, even when evidence suggests baser motives of some members. Both will be construed to sustain the Indians' reasonable expectations at the time the laws or treaties were made." *Id.* at 482-83; see, e.g., *Skeem v. United States*, 273 F. 93, 95 (9th Cir. 1921).

any white settler's headgates. The *Winters* rights have gone largely unused. The BIA repeatedly asked the Attorney General to do something about the continued "interference by white people with Indian water rights of the Fort Belknap Reservation."<sup>154</sup> However, no further suits were brought. In fact, the Bureau of Reclamation constructed "several irrigation projects, both upstream and downstream of the Fort Belknap Indian Irrigation Project," with the developed water going to non-Indians.<sup>155</sup>

The *Winters* doctrine has not been overruled and is, technically, good law.<sup>156</sup> Each time the issue of water for the reservations has been brought before the courts, the *Winters* right has been upheld.<sup>157</sup> Although "Congress has been called upon repeatedly to declare a general policy on these rights," it has continually avoided such an action, and has pursued other policies (such as Reclamation) without regard to Indian water rights.<sup>158</sup> Because Congress and the relevant administrative agencies ignore the *Winters* doctrine, most of the water belonging to the tribes has long been used by non-Indians without compensation to the tribes.

For a variety of reasons the tribes initially did not try to enforce their *Winters* rights themselves. Prior to the passage of the Indian Reorganization Act (IRA) in 1934, authority to represent the tribes in court rested solely with the Federal Government which acted as the trustee of Indian interests.<sup>159</sup> Even after the IRA, which empowered tribes to retain their own counsel subject to approval by the Interior Department, "most tribes continued to rely primarily on the Federal Government for protection of their interests because of the extraordinary costs involved in the independent sponsorship of water-rights litigation."<sup>160</sup> The Federal Government and federal agencies have a trust responsibility to protect

---

154. McCool, *supra* note 5, at 64 (quoting letter from J. Edwards to the Attorney General, (1928) (National Archives, RG 75, BIA Irrigation Division., Dist. 3, Fort Belknap, 1917-1924, Entry 653)).

155. *Hearings, July 1990, supra* note 75, at 96 (statement of Donovan Archambault, Chairman of Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community).

156. Even at the time of the decision the case was not a remarkable divergence from settled law; rather it applied the general treaty interpretation doctrine set forth in *Worcester v. Georgia*, 31 U.S. 515 (1832), and clarified, as regarding Indian water rights, principles set out in *United States v. Winans*, 198 U.S. 371 (1905) (holding that all resource development rights not specifically surrendered by the tribe in treaties or agreements are to be considered as having been retained by the tribes). See BURTON, *supra* note 1, at 21.

157. See, e.g., *Arizona v. California*, 373 U.S. 546 (1963); *United States v. Powers*, 305 U.S. 527 (1939); *United States v. Athanum Irrigation Dist.*, 236 F.2d 321 (9th Cir. 1956); *United States v. Walker Irrigation Dist.*, 104 F.2d 334 (9th Cir. 1939); *Skeem v. United States*, 273 F. 93 (9th Cir. 1921); *Conrad Investment Co. v. United States*, 161 F. 829 (9th Cir. 1908).

158. BURTON, *supra* note 1, at 58.

159. *Id.* at 47.

160. *Id.*

the interests of the Indian people.<sup>161</sup> Yet, the BIA remained passive while the Bureau of Reclamation, its sister agency in the Department of Interior, and the Corps of Engineers developed water for non-Indian use.<sup>162</sup>

As the attorney for the United States, the Department of Justice (DOJ) was in a difficult position litigating the *Winters* doctrine. Charged with representing the interests of Indian people and at the same time representing the water development agencies, DOJ attorneys "did not fulfill their responsibility to protect and defend Indian rights and property fully."<sup>163</sup> The 1960's ushered in the "modern era" of Indian water rights,<sup>164</sup> as tribes began to secure their own representation to argue for their water rights. Currently, tribes all over the West are embroiled in suits or negotiations (or both) under the aegis of the *Winters* doctrine.<sup>165</sup>

Merely giving away the lands surrounding Fort Belknap to non-Indian settlers, and then failing to prevent these people from diverting water, would have at least violated the rule of fairness applicable to the treaty of 1887.<sup>166</sup> However the Federal Government did more. It constructed irrigation projects which transferred Indian water to non-Indians, flagrantly breaking its earlier promises. Hence, while the 1908 *Winters* decision appeared to be a victory for the tribes, "the *Winters* Doctrine lacked political legitimacy, and the BIA knew it."<sup>167</sup> Congress has ignored the *Winters* Doctrine, never codifying it into statutory law, nor openly admitting its unwritten policy by abolishing the doctrine. The *Winters* doctrine has consistently been treated by the Congress, the Bureau of Reclamation, and the BIA as though it were not good law, as though it were no more than a kind of "legal scripture for lawyers to debate like theologians."<sup>168</sup> Despite both rhetoric that Indians were to become just like white farmers by owning their own plots of land and the *Winters* guarantee of enough water to meet the Indians' reasonable needs, the Federal Government has not helped the Indians realize the goal of become self-supporting agriculturalists.<sup>169</sup>

---

161. Moore, *supra* note 1, at 772 n.33.

162. *Id.* at 770-73.

163. MCCOOL, *supra* note 5, at 184. McCool adds that criticizing DOJ may be a case of "killing the messenger." That is, the real policy decisions come from Congress, and DOJ is supposed to act in accordance with its client's wishes. *Id.*

164. *See id.*

165. *See* BURTON, *supra* note 1.

166. *See* the discussion of the rule of fairness at *supra* note 153.

167. MCCOOL, *supra* note 5, at 117.

168. Collins, *supra* note 153, at 494.

169. *See supra* notes 64-74.



### E. Selective Reclamation

Fradkin notes the "curious" phenomenon that even after official grants of Indian land to non-Indians under the Dawes Act had ended, the Indian land base continued to shrink.<sup>170</sup> According to Moore, the Bureau of Reclamation "developed water resources that easily could have been developed for the Indian reservations [and a] portion of the resources, in fact, *was Indian property*."<sup>171</sup> In other words, as the Bureau of Reclamation and the Corps of Engineers pursued their agenda of water development for the benefit of non-Indians, they located many of their large reservoirs on *Indian land*. "The American Indian Policy Review Commission, established by Congress, concluded in its 1977 report . . . that 'historical experience has shown that it is less politically sensitive and less expensive to take Indian lands for federal water projects than non-Indian lands.'<sup>172</sup> The report estimated that the loss to Indian people amounted to approximately 13,000 acres a year.<sup>173</sup>

The taking of land for non-Indian water development followed a typical pattern. Regardless of Indian consent, the land would be taken and the tribe compensated with however much money the Indians' few friends in Congress could procure. As distributive policy this was atypical because, while benefits were concentrated among those receiving water from the project, the costs to Indians were concentrated as well.<sup>174</sup> Yet, as McCool concludes, the Indians "were not sufficiently powerful to do much about it."<sup>175</sup> The federal "[c]onstruction engineers . . . and dam erectors have an uncanny knack for discovering that the only feasible and economic way to do what *must* be done will . . . necessitate taking the Indian's land."<sup>176</sup>

One example of this outrage is the reservoir formed by Garrison Dam in North Dakota, "Lake Sacajawea."<sup>177</sup> The lake is the result of the Bureau of Reclamation's and Corps of Engineers' Pick-Sloan plan for the Missouri River.<sup>178</sup> The Pick-Sloan plan has been called "without

170. See *supra* note 74 and accompanying text.

171. Moore, *supra* note 1, at 771 (emphasis added).

172. FRADKIN, *supra* note 74, at 161-62 (quoting AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT (1977)).

173. *Id.*

174. MCCOOL, *supra* note 5, at 133.

175. *Id.*

176. CAHN, *supra* note 2, at 69 (emphasis added).

177. See REISNER, *supra* note 7, at 198 ("In what looked to the Indians like a stroke of malevolent inspiration, the Corps of Engineers had decided to call the giant, turbid pool of water Lake Sacajawea.")

178. Joint Resolution to Vest Title to Certain Lands of the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, in the United States, and to Provide Compensation Therefore, ch. 790, § 15, 63 Stat. 1026, 1028-49 (1948). See REISNER, *supra* note 7, at 189-202 for an excellent, detailed account of the history of the Pick-Sloan Plan, which resulted from the merger of two plans, one by the Corps of Engineers and one by the Bureau of Reclamation.

doubt, the single most destructive act ever perpetrated on any tribe by the United States . . . . [The Plan] eventually involved [and violated the treaties of] almost all tribes living on the Missouri and its major tributaries in the states of South Dakota, North Dakota, Montana and Wyoming . . . ."<sup>179</sup> The agencies took "extraordinary care not to inundate any of the white towns that were situated along the [Missouri] river." However, "no such intricate gerrymandering of reservoir outlines was even attempted" for the Indian tribes living there.<sup>180</sup> The Corps of Engineers wanted to build the Garrison Reservoir precisely upon the location of the best winter cattle range in North Dakota, which happened to belong to the Three Affiliated Tribes of the Fort Berthold Indian Reservation, the Mandan, Hidatsa, and Arikara Tribes.<sup>181</sup>

The creation of Lake Sacajawea continued the policies that eroded Indian land holdings. When the Three Affiliated Tribes negotiated the Fort Laramie Treaty of 1851 with the United States, the tribes reserved to themselves some 12.5 million acres.<sup>182</sup> By 1944, through successive executive orders and Acts of Congress, often without the consent or knowledge of the tribes, that land base was reduced to 643,000 acres.<sup>183</sup> The Pick-Sloan plan continued the government's tradition of unilaterally taking Indian land and offering to negotiate only after beginning construction.<sup>184</sup> The Federal Government's money could not compensate

---

Reisner argues that the agencies' greedy agreement — lacking any basis in logic or economics — to develop every project each had proposed (plus some new ones) canceled out any benefit that each of the proposed dams alone might have produced. Drawn up in a matter of days, the plan was calculated to cost \$1.9 million, "an estimate which would, as usual," Reisner writes, "turn out to be much too low." *Id.* at 193. This plan of dubious benefit and certain harm to Indians was approved wholeheartedly by Congress. For a discussion of the excessive costs and questionable benefits of the project, see DORIS O. DAWDY, CONGRESS IN ITS WISDOM: THE BUREAU OF RECLAMATION AND THE PUBLIC INTEREST 49-60 (1989).

179. Vine Deloria, Jr., *Foreword* to MICHAEL L. LAWSON, DAMMED INDIANS: THE PICK-SLOAN PLAN AND THE MISSOURI RIVER SIOUX, 1944-1980 at xiv (1982). See generally, LAWSON, *supra*, for a detailed account of the tragic effects of the Pick-Sloan plan upon various tribes.

180. REISNER, *supra* note 7, at 194-95.

181. *Id.* at 144.

182. *Three Affiliated Tribes and Standing Rock Sioux Equitable Compensation Act of 1991: Hearings on S. 168 Before the Select Comm. on Indian Affairs*, 102d Cong., 1st Sess. 43 (1991) [hereinafter *Hearings, April 1991*] (statement of Wilbur D. Wilkinson, Tribal Chairman, Three Affiliated Tribes of Fort Berthold Reservation).

183. *Id.* at 85.

184. One can glean the unorthodox nature of the "negotiation" from the questioning of Brig. Gen. Charles Dominy of the Corps of Engineers, by Daniel Inouye, Chairman of the Select Comm. on Indian Affairs, in *Final Report and Recommendations of the Garrison Unit Joint Tribal Advisory Comm.: Joint Hearing before the Senate Select Comm. on Indian Affairs, Senate Comm. on Energy and Natural Resources, and House Comm. on Interior and Insular Affairs*, 100th Cong., 1st Sess. 23 (1987). Chairman Inouye stated that construction had already begun when the tribes were first asked to "negotiate":

General Dominy. . . . [I]t's not uncommon for much of the real estate activities associated with that to take place several years following the initiation of construction of the dam.

tribes for their unwilling surrender of their land. Garrison Dam flooded about 150,000 acres of tribal land where the Indians grazed their cattle, and where 325 Indian families had their homes, schools, and hospitals.<sup>185</sup> The tribes strongly opposed the flooding and made that opposition known.<sup>186</sup> They offered alternatives, but in vain; their opinions, lives, homes, and well-being were ignored. Today the reservation remains divided in half by the massive lake, a permanent flood on tribal land that provides "flood control" for non-Indians.<sup>187</sup> With their best land

The Chairman. You mean to tell me that even today if my property were in that valley, that you'd come in with your bulldozers and start digging trenches on my property? . . . I'd have the Marshals on you. . . . I'd have the Congress on you. And you know that would happen.

General Dominy. Yes.

The Chairman. . . . My question is just the matter of the ethics involved. Do you think that is the way Americans should have conducted themselves in dealing with Indians?

General Dominy. Mr. Chairman, the legislative history and the negotiation history for this one has been laid out very clearly, and I think there's evidence that there's a great deal of unhappiness and a difficult situation for the parties concerned.

*Id.*

185. *Hearings, April 1991, supra* note 182, at 14, 87. Garrison Dam "would flood [156,000] acres of prime river bottom lands, which were our ancestral home and lands, forcing the relocation of [90%] of [our] people. The Tribe would lose the hospital, the schools, the bridge, the dormitories, roads, sawmills, the flour mill, the cattle program, cemeteries, and, most importantly, our economic self-sufficiency. Our community would be divided and we would lose our way of life. Our people would be uprooted, shuffled, and mixed. Every semblance of our organization would be destroyed." *Id.* at 87-88 (statement of Wilbur D. Wilkinson, Tribal Chairman, Three Affiliated Tribes of Fort Berthold Reservation). *See also id.* at 16 (statement of C. Emerson Murry, Manager, Garrison Diversion Conservancy District) ("The loss of infrastructure, governmental and otherwise, by the creation of Lake Sakakawea [sic] . . . was very substantial. . . . The infrastructure included such things as hospitals, bridges, roads, housing, water systems, sport and recreational areas, sawmills, but most important of all, the economic base: . . . prime river bottomland.").

186. *See id.* at 88 (detailing how the Tribal Council first appealed to the BIA). When the BIA commissioner rebuffed the tribe, they hired a BIA-approved attorney, who "rather than help the tribe stop the Garrison Dam . . . began compromising the settlement." *Id.* at 88-89. Then, in desperation, the Tribes offered other land "free of charge" for the location of the dam, but the Corps' Colonel Pick "summarily dismissed the offer." *Id.* at 88. *See also* LAWSON, *supra* note 179, at 60.

Just as we were in sight of economic independence you began to build a reservoir and to take away the heart of our reservation and divide it up into five isolated segments. The homes which we built, the bottom lands on which 85 percent of our people lived and on which [our] cattle industry depended, our churches, our schools, our government, and our social life will be disrupted.

We did not want Garrison Dam built. We pleaded with you to find another place to build a dam. It was not that we wish to hamper progress. In fact, we voluntarily offered some of our other land . . . as a place to be used to construct a dam. Our prayers and pleas were fruitless. The Government told us, "Either you agree to some terms, or we'll take the land without your consent."

1 *Hearings April-May 1949, on Ratification by Congress of Land Purchase from Three Affiliated Tribes, Fort Berthold North Dakota Indian Reservation*, 81st Cong., 2nd Sess. 67 (1949) (statement of Carl Whitman, Jr., Chairman of Council of the Three Affiliated Tribes).

187. REISNER, *supra* note 7, at 191.

flooded, the tribes no longer possess the means to be self-supporting, and welfare payments to the reservation have risen steadily.<sup>188</sup>

Unfortunately, Pick-Sloan type takings are not unique, and Congress has been slow to respond to the unfairness with which Indians have been treated. "The catalogue of instances in which Indian land has been taken for the public good extends to California, Arizona, Idaho, Montana, New York, South Dakota, Pennsylvania and elsewhere."<sup>189</sup> Congress recently considered a bill to pay the Three Affiliated Tribes and the Standing Rock Sioux (affected by the Pick-Sloan Plan's construction of the Garrison and Oahe Dams, respectively) a "more fair" amount of money, to return the land that was not flooded, and to fund irrigation projects.<sup>190</sup> In 1990, Congress held the first oversight hearing in 80 years "on the subject of Indian irrigation projects," with Chairman Inouye saying:

[I]n the light of the importance of the 125 Indian irrigation projects authorized by the BIA [not one of which has been finished] . . . to Indian agriculture, economic development, water use, and conservation, virtually all the complex problems that face Indian country today, the lack of oversight as to the status of these projects cannot be justified. . . . [B]ut that's the past, and today, hopefully, we begin a new chapter, a chapter which I am committed to assuring will not be a story of neglect and . . . inattention.<sup>191</sup>

However, the reality is that "neglect and inattention" would have been better for the tribes. Tribal resources have been the subject of rather too much attention by hungry westerners. Thus, the tribes should be compensated not only for the use of their resources for all these years, but also for denial of what they were promised so long ago — the right to

188. CAHN, *supra* note 2, at 72.

189. *Id.* at 72. See, e.g., FRADKIN, *supra* note 74, at 145 (describing takings from the Ute Indians by the Bureau of Reclamation to build the Strawberry Valley Project); *Hearings, July 1990, supra* note 75, at 99 (describing BIA transfer of around 2,580 acres of Fort Belknap Reservation land to the Bureau of Reclamation to build Dodson Dam); LAWSON, *supra* note 179, at 198 (describing takings by the Bureau of Reclamation and Corps of Engineers for dams on the land of the Crow tribe in Montana (Yellowtail Dam) and the Papago village of Sil Murk (Painted Rock Dam)). See also A. MORGAN, DAMS AND OTHER DISASTERS: A CENTURY OF THE ARMY CORPS OF ENGINEERS CIVIL WORKS, 40-63 (1971). The Indians do not appear to have derived any benefit from having sacrificed their land for water projects.

190. See generally *Hearings, April 1991, supra* note 182. The government's plan first was to provide the Tribe with suitable replacement lands or "in lieu" lands for the lands being taken. *Id.* at 16 (statement of C. Emerson Murray, Manager, Garrison Diversion Conservancy Dist., Carrington, ND). However, since the land to be flooded was acknowledged by the Bureau of Reclamation as the best winter cattle range in the state, REISNER, *supra* note 7, at 194, no adequate in lieu lands could be found at a price Congress was willing to pay. See *Hearings, April 1991, supra* note 182 at 16. Ultimately, \$12.6 million was offered on a "take it or leave it" basis, an amount which was *not* compensation "anywhere near the principle of substitute or replacement valuation." *Id.*

191. See *Hearings, July 1990, supra* note 75, at 1 (statement of Senator Daniel K. Inouye (HI), Chairman, Select Committee on Indian Affairs).

be self-supporting, to live their own lives in dignity and peace on their reservations. The history of Indian efforts to secure a homeland and the federal response is a history that must be known and acknowledged in order to discuss "Indian water rights" in any just way.

### III

#### BATTLES IN THE COURTHOUSE

As the Western United States has become more densely populated, demands for its scarce water resources have increased. Tension has mounted between growing urban centers, such as Los Angeles, and rural farming communities that exist due only to plentiful, inexpensive water.<sup>192</sup> One might expect that in this environment of ever-increasing water scarcity the Supreme Court, like Congress, would turn its back on Indians and the promises made to them, but it has not.

#### A. Incompatibility of "Reserved Rights" with Prior Appropriation

*Winters* water rights stem from a different legal framework than do water rights acquired under the doctrine of prior appropriation. Under a state law system of prior appropriation, one acquires water rights by using water beneficially, with the priority date of the right stemming from the date the water was first used and the right dissolving if the water is not used.<sup>193</sup> *Winters* rights are a kind of "federal reserved water rights."<sup>194</sup> Not all the water in the West was transferred by the Federal Government to the states for distribution by prior appropriation to settlers.<sup>195</sup> The Supreme Court "has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."<sup>196</sup> This federal reserved right in unappropriated

192. See, e.g., REISNER, *supra* note 7, at 54-107 (detailing the conflict between Los Angeles and the Owens Valley); SAX, *supra* note 18, at 212-45 (reviewing the controversy over water transfers).

193. See *supra* part I.C.

194. SAX, *supra* note 18.

195. See *supra* note 43 and surrounding text. The Federal Government vested states with the plenary power to distribute water for use according to their state laws. However, since the end of the 19th century, the law has been that when the Federal Government "reserved" land (designating it to be a National Park, Wildlife Refuge, military base, etc.), "as of the date of establishment of the reservation, all of the then-unappropriated water in or on the reserved lands that is needed to fulfill the purposes for which the reservation was made" is reserved to the government. SAX, *supra* note 18, at 805-06. These rights "are created and defined by federal law . . . [and thus are] neither appropriative nor riparian rights," and "[w]hat seems most controversial about federal reserved rights is less their existence than their scope and extent." *Id.* at 806.

196. *Cappaert v. United States*, 426 U.S. 128, 138 (1976). The *Winters* Court said that "[t]he power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be." 207 U.S. 564, 577 (1908).

water "vests on the date of the reservation and is superior to the rights of future appropriators."<sup>197</sup> While the right is a matter of *federal* and not state law, it corresponds to state prior appropriation laws in that all appropriative rights dating from before the reservation are senior to it, while all those after are junior to it. Substantial portions of the public domain have been withdrawn and reserved by the United States for such diverse uses as Indian reservations, National Monuments and Parks, National Forests, Recreational Areas and Wildlife Refuges.

Indian reserved rights are by their nature the most complex of reserved water rights; the purposes of Indian reservations cannot be clearly limited as they can be for a reservation like a National Forest.<sup>198</sup> The federal rights are not only outside the prior appropriation system, they are incompatible with it, for they have generally been left *unquantified* and are not lost by *non-use*.<sup>199</sup> If a tribe's reservation was established earlier than an appropriator's appropriation date, the tribe has rights to the water, even if it has never exercised those rights. In short, federal reserved rights, such as Indian *Winters* rights, constitute a cloud over many state-issued water rights.

### B. Arizona v. California

Congress has seldom addressed federal reserved rights and instead has left doctrinal development to the courts, with all the consequent ambiguities such a course provides.<sup>200</sup> The most controversial reserved right is the Indian *Winters* right because it is seen as posing the greatest threat to established water users.<sup>201</sup> *Winters'* clear articulation of the right of Indians on reservations to water,<sup>202</sup> was reaffirmed fifty years later in *Arizona v. California*.<sup>203</sup> In this famous case, important in several

---

197. *Cappaert*, 426 U.S. at 138.

198. See Getches, *supra* note 74, at 411 (contrasting the specific purposes of national forests, "conserving watershed[s] and furnishing a continuous supply of timber," from the broadly stated purposes of Indian reservations which were to be a homeland). See also *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir.) ("The specific purposes of an Indian reservation . . . were often unarticulated. The general purpose, to provide a home for the Indians, is a broad one and must be liberally construed. We are mindful that the reservation was created for the Indians, not for the benefit of the government.") (footnotes omitted), *cert. denied*, 454 U.S. 1092 (1981).

199. See generally SAX, *supra* note 18, at 806.

200. See *United States v. New Mexico*, 438 U.S. 696, 699 (1978) ("If water were abundant, Congress' silence would pose no problem. In the arid parts of the West, however, claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams.").

201. See, e.g., *Perspectives*, *supra* note 15, at 396 ("I doubt that federal non-Indian reserved rights, with the exception of rights for National Wildlife Refuges, will create significant dislocations in local water-based economies.").

202. 207 U.S. 564 (1908).

203. 373 U.S. 546, 600 (1963), *decree entered*, 376 U.S. 340 (1964), *modified*, 460 U.S. 605 (1983).

areas of water law, the Supreme Court divided the water of the Colorado River's lower Basin between three states: California, Arizona, and Nevada. Much to everyone's surprise,<sup>204</sup> the Court also awarded nearly one million acre-feet of water to five Indian reservations located along the lower Colorado.<sup>205</sup> This allocation was necessary because of the blatant disregard for Indian water rights in the Colorado River Compact.<sup>206</sup> "Their rights were considered 'negligible' and were dealt with perfunctorily in what [Herbert] Hoover called the 'wild Indian article': Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes."<sup>207</sup> Since the Indians' share was to come out of the states' shares, especially Arizona's,<sup>208</sup> Arizona made several unsuccessful attempts to distinguish these reservations from the Fort Belknap reservation considered in *Winters*.<sup>209</sup>

*Arizona v. California* greatly clarified the *Winters* rights. The *Arizona* court unequivocally recognized that the *Winters* right inheres in *all* reservations, both those created by Executive Order and those, like the Fort Belknap Reservation, created by treaty and Congressional Acts.<sup>210</sup> The Court said, "We can give but short shrift at this late date to the argument [proposed by Arizona] that the reservations either of land or water are invalid because they were originally set apart by the Executive [and not by Congressional Act]."<sup>211</sup>

Secondly, *Arizona* made clear that reservations may claim water rights to rivers which run neither within or along their boundaries. Unlike the Milk River which was adjacent to the Fort Belknap reservation,<sup>212</sup> one of the *Arizona* reservations "was close by the Colorado River, but was not riparian to the river, suggesting that a source of water does

---

204. See, e.g., A. Dan Tarlock, *One River, Three Sovereigns: Indian and Interstate Water Rights*, LAND & WATER L. REV. 631, 649 (1987).

205. The five reservations were the Chemehuevi, Cocopah, Yuma, Colorado River, and Fort Mohave. *Arizona v. California*, 373 U.S. at 595 n.97. More tribes than the five represented in *Arizona* "may claim extensive reserved rights to Colorado River Basin waters." David H. Getches, *Competing Demands for the Colorado River*, 56 U. COLO. L. REV. 413, 439 (1985). However, even the tribes whose rights were clarified in *Arizona* have been unable fully to utilize their water, partly because they are unable to finance diversion and distribution facilities. *Id.* at 438.

206. Colorado River Compact, 70 CONG. REC. 324 (1928). The President's proclamation declaring the compact in effect appears at 46 Stat. 3000.

207. Moore, *supra* note 1, at 766 n.6 (quoting Norris Hundley, Jr., *The West Against Itself: The Colorado River - An Institutional History*, in NEW COURSES FOR THE COLORADO RIVER 18 (1986)). "After the Colorado River Compact, eighteen more interstate compacts were negotiated on Western rivers, but most have either been silent on the issue of Indian rights or have exempted Indian rights from their allocation provisions." Tarlock, *supra* note 204, at 649.

208. See SAX, *supra* note 18, at 708.

209. 373 U.S. at 600-01.

210. *Id.* at 598.

211. *Id.*

212. See *supra* note 133.

not actually have to cross or bound a reservation in order for reserved water rights to attach to it."<sup>213</sup> The Court said:

Most of the land in these reservations is and always has been arid. If the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries. . . . It is impossible to believe that when Congress created the great Colorado River Indian Reservation . . . [it was] unaware that most of the lands were of the desert kind — hot, scorching sands — and that water from the river would be essential to the life of the Indian people . . . .<sup>214</sup>

The Court thus suggested that all western reservations have a right to water, because it is essential to desert life.

Thirdly, the *Arizona* Court attempted to create a system for quantifying the *Winters* right. The Court held that enough water was reserved "to satisfy the future as well as the present needs of the Indian Reservations."<sup>215</sup> The Court rejected Arizona's argument that the quantity of water contained in the right should be measured by the "reasonably foreseeable needs" of the tribe, a measure related to the number of Indians living on the reservation.<sup>216</sup> Instead the Court recognized that "[h]ow many Indians there will be and what their future needs will be can only be guessed."<sup>217</sup> The Court then held that "the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage," and thus enough water was reserved to irrigate all the practically irrigable acreage on the reservations.<sup>218</sup>

Practically irrigable acreage (PIA) has now become nearly synonymous with the *Winters* right, despite much debate over whether PIA is either feasible or fair. The standard is based on the *Arizona* special master's conclusion that agriculture was the purpose for which the reservations were established, and thus the reservations were entitled to as much water as necessary for irrigation.<sup>219</sup> Later courts have found that "agriculture was one of the purposes for the establishment of most, if not all, Indian reservations in the arid West,"<sup>220</sup> and thus PIA has been widely used. In practice, the PIA standard determines how many acres on the reservation can be irrigated by looking at facts such as slope and

213. *Indian Water*, *supra* note 83, at 62, 64 (Statement of Robert S. Pelcyger).

214. *Arizona*, 373 U.S. at 598-99.

215. *Id.* at 600.

216. *Id.* at 600-01.

217. *Id.* at 601.

218. *Id.* at 600-01.

219. *Id.*

220. Pelcyger, *supra* note 113, at 25. Where other purposes are found, such as the maintenance of fisheries or hunting grounds, rights must be quantified by a standard other than PIA. See, e.g., *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (1981) ("[P]reservation of the tribe's access to fishing grounds was one purpose for the creation of the Colville Reservation . . . [thus] we find an implied reservation of water . . . for the development and maintenance of replacement fishing grounds.").



soil type, and referencing data on climate and the practices of other irrigators.<sup>221</sup>

The determination of whether land is practicably irrigable is problematic because it involves complicated calculations of agricultural economics and hydrological science, which "turns into a costly war of experts."<sup>222</sup> When *Arizona v. California* was reopened in 1980-1981 to adjudicate water rights on omitted and boundary lands on the reservations, the special master noted that a finding that annual benefits exceed costs will suffice for a finding of practicable irrigability.<sup>223</sup> As economists readily admit, a "cost-benefit" analysis is highly subjective. One group of economists writes that "there is no single, objective measure for economic feasibility. Results from a benefit-cost study may be very sensitive to underlying assumptions."<sup>224</sup> To non-Indian water users who will lose their water once tribes exercise their rights, the PIA standard seems unfair, even unreasonable. The declared Indian rights on large reservations may entitle tribes to a significant percentage of the water that flows nearby. For example, *Arizona v. California* awarded five Colorado River tribes almost one million acre feet of water from a river whose flow is only 14 million acre feet per year.<sup>225</sup>

In fact the PIA cost-benefit test is a heavier burden than non-Indians in the West have ever been required to meet. Non-Indian farmers are subsidized by the Federal Government precisely because their irrigation is *not* economically feasible. "In order to maximize the flow of expenditures to home districts and states, however, Congress has always taken a broad view of what constitutes a benefit, and, conversely a very restrictive view of costs[.]" resulting in "benefit/cost formulas" widely regarded as absurd and an abuse.<sup>226</sup> The author of the Bureau of Reclamation's "quasi-official history,"<sup>227</sup> entitled *Water for the West*, candidly explains:

By the late 1930's, the high cost of projects made it increasingly difficult for Reclamation engineers to meet economic feasibility requirements. In the early 1940's, the Bureau devised a plan of considering an entire river basin development program as an integrated project. It enabled the agency to derive income from various revenue-producing subfeatures (notably power facilities) to fund other works not economically justifiable under Reclamation law.<sup>228</sup>

221. See SAX, *supra* note 18, at 859-60.

222. John Riley, *The Water Wars*, NAT'L L.J. at 1, (Feb. 18, 1985).

223. H. S. Burness et al., *Practicably Irrigable Acreage and Economic Feasibility: The Role of Time, Ethics, and Discounting*, 23 NAT. RESOURCES J. 289, 289 (1983) (quoting In the Supreme Court of the United States, *Arizona v. California*, Report of Elbert P. Tuttle, Special Master, February 22, 1982, at 100).

224. *Id.* at 301.

225. *Perspectives*, *supra* note 15, at 397.

226. MCCOOL, *supra* note 5, at 97.

227. See REISNER, *supra* note 7, at 119.

228. MICHAEL C. ROBINSON, *WATER FOR THE WEST* 77 (1979). Robinson adds that

The veil of river basin development and paying partners allowed many projects to be built that were not at all economically feasible.

Not surprisingly, Indians have called the unequal application of an economic feasibility standard implied in PIA unfair since non-Indian uses have never been required to meet such a standard.<sup>229</sup>

The Federal Government gave its solemn promise to create a permanent homeland for our tribes. It cannot thereafter place an economic condition on its promise . . . . [F]ederal Indian treaties are not predicated on budget cuts. It is fundamental that federal reservations are entitled to sufficient water to fulfill the purpose for which they were intended. Economics is not a factor. No one has ever argued that if a national forest or national monument is established it gets only as much water as it can economically justify. Even under state law, water rights can be obtained without regard to economic feasibility. Like a national forest or a national monument, a permanent homeland for Indian people cannot be valued economically. Why then have we been singled out to meet this burden?<sup>230</sup>

### C. *Use of the Winters Water — Where, How and by Whom*

It remains unclear which land owners on the reservation are eligible for the right to reserved water. One "partial" list of successors includes seven different kinds of land ownership on an Indian reservation.<sup>231</sup>

It appears settled that Indian allottees as well as non-Indian successors to the land have a right to use the reserved water.<sup>232</sup> In 1939, the Supreme Court upheld the contention that "when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners."<sup>233</sup> However, the Court "did not consider the extent or precise nature of [the successor's] rights in the waters."<sup>234</sup> Getches argues that "reserved rights measured by all of an allottee's present and future needs or by all irrigable acreage would be inappropriate," but notes that courts

---

such "river basin development" was used in 1942 "for the first time in planning a basin development program for the Big Horn River in Wyoming" and that "in 1944 the Bureau's 'Sloan Plan' for development of the Missouri River followed the same formula." *Id.*

229. See, e.g., FRADKIN, *supra* note 74, at 171; *Western Water*, *supra* note 20, at 330.

230. *Indian Water*, *supra* note 83, at 57 (statement of Wendall Chino, President, Mes-calero Apache Tribe).

231. They are: 1) Tribal land, 2) Individual Indian trust or allotted land, 3) Individual Indian fee land, 4) Federal public land, 5) State land, including in some cases the beds of navigable watercourses, 6) Non-Indian fee land, and 7) Non-Indian fee land in which the owner owns the surface estate and the United States owns the minerals beneath the surface. *Perspectives*, *supra* note 15, at 398.

232. *United States v. Powers*, 305 U.S. 527 (1939).

233. *Id.* at 532.

234. *Id.* at 533.

have used similar standards in determining what water rights were acquired with the land.<sup>235</sup>

One possible approach is to fix the rights of successors to allotments by the date on which the allotment was transferred from Indian control. Such a resolution was followed in *United States v. Hibner*.<sup>236</sup> More recently, in *Colville Confederated Tribes v. Walton*, the court held that a non-Indian purchaser of an Indian allottee's land "acquires a right to water being appropriated by the Indian allottee at the time title passes" as well as "a right, with a date-of-reservation priority date, to water that he or she appropriates with reasonable diligence after the passage of title."<sup>237</sup> Getches acknowledges that possibilities such as "[fixing] the priorities of successors to allotments as of the date an allotment transfers out of trust or the date of its transfer from Indian hands" are somewhat arbitrary.<sup>238</sup> Any ultimate resolution of the rights of successors will depend on the Court's, and possibly Congress', view of the reason for *Winters* rights.

Another important issue concerns the uses to which the tribe may put the water reserved for them by *Winters*. It is settled that Indians do not have to irrigate reservation land with their water, even if it was acquired under the PIA standard.<sup>239</sup> More controversial is whether tribes may market their water. One state court has opined that "[t]he Tribes can sell or lease any part of the water covered by their reserved water rights but the said sale or lease cannot be for exportation off of the Reservation."<sup>240</sup> Due to the Indian Non-Intercourse Act,<sup>241</sup> tribes must obtain Congressional permission to market their water because Indians can transfer interests in reservation real property only if Congress consents. However, tribes are allowed to lease their land and lessees can make use

---

235. Getches, *supra* note 74, at 424.

236. 27 F.2d 909, 912 (D. Idaho 1928).

237. 647 F.2d 42, 51 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981).

238. Getches, *supra* note 74, at 426.

239. While Indian reserved rights extend to the quantity of "water necessary to supply the consumptive use required for irrigation of the practicably irrigable acres . . . within a reservation," this quantification "shall not constitute a restriction of the usage of them to irrigation or other agricultural application." *Arizona v. California*, 439 U.S. 419, 421-22 (1979).

240. *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 100 (1988), *cert. granted in part by Wyoming v. United States*, 488 U.S. 1040 (1989), *aff'd* 492 U.S. 406 (1989). Note, the Wyoming Supreme Court is quoting its own district court here and does not itself decide the issue; "the Tribes did not seek permission to export reserved water, and the United States concedes that no federal law permits the sale of reserved water to non-Indians off the reservation." *Id.* The U.S. Supreme Court did not grant certiorari on this issue. 488 U.S. at 1040.

241. 25 U.S.C. § 177 (1982). The purpose of this act is to protect Indian people and secure their property, "and as such is the essence of the Indian trust relationship." *Special Hearing on Indian Water Policy Before the Select Senate Comm. on Indian Affairs*, 101st Cong., 1st Sess. 90 (1989) (statement of David H. Getches, University of Colorado law professor) [hereinafter *Hearings, April 1989*]. See also *Holmes v. United States*, 53 F.2d 960, 963 (10th Cir. 1931) (interpreting similar reference to land as extending to water).

of Indian water rights on these lands.<sup>242</sup> A recommendation has been made (but not acted upon) by the National Water Commission that general legislation be passed enabling tribes to lease their water.<sup>243</sup>

Two opposing arguments are made concerning tribes marketing their water off the reservation. The first claims that:

Indian reserved water rights were never intended to serve any function other than adding to the productivity of the reservation. . . . There is no indication in treaties, executive orders, legislative history, or the holdings of our highest Court that the United States intended to reserve excessive amounts of water so that tribes could market all that was not needed for their own use on the reservation.<sup>244</sup>

Palma concludes that "surplus water is beyond the scope and extent of the reserved right, which is limited to that *minimum quantity* of water necessary to satisfy the purposes for which the reservation was created" and that "any water in the stream beyond the needs of the tribe should be available for other water users."<sup>245</sup>

The second argument rejects the first as self-serving. Indeed, Palma's concept of surplus seems to echo the sentiments enshrined in the Dawes Act.<sup>246</sup> The proponents of the first argument seem more concerned with non-Indian water needs and economic interests than with the needs of the tribes.<sup>247</sup> The second argument rejects attempts to limit *Winters* rights to only "enough water to meet [a tribe's] subsistence . . . needs," or only "so much as, but no more than, is necessary to provide Indians with a livelihood — that is to say, a moderate living."<sup>248</sup> Such a severely limited right is inconsistent with many of the U.S.-Indian treaties which state that "reservations [were] created to 'civilize' the Indians."<sup>249</sup> Getches writes that:

Surely non-Indian society would judge entry into the free market and utilization of tribal resources, including land, minerals, timber, and

242. *Sheen v. United States*, 273 F. 93 (9th Cir. 1921). The basic statutory authorization permitting leasing of Indian water rights is found in 25 U.S.C. § 415 (1988).

243. NATIONAL WATER COMMISSION, *WATER POLICIES FOR THE FUTURE: FINAL REPORT TO THE PRESIDENT AND TO CONGRESS OF THE UNITED STATES* 480-81 (1973). See also David H. Getches, *Management and Marketing of Indian Water: From Conflict to Pragmatism*, 58 U. COLO. L. REV. 515, 543 (1988) [hereinafter *Management and Marketing*].

244. Jack D. Palma II, *Considerations and Conclusions Concerning the Transferability of Indian Water Rights*, 20 NAT. RESOURCES J. 91, 94 (1980). "[T]he current trend seems to be for Indians to attempt off-reservation marketing of water in excess of their reservation needs." See also Michael D. White, *McCarran Amendment Adjudications-Problems, Solutions, Alternatives*, 22 LAND & WATER L. REV. 619, 621 (1987).

245. Palma, *supra* note 244, at 94.

246. See discussion *supra* notes 67-74 and accompanying text.

247. The discussion of this argument favoring water marketing of Indian water relies heavily on the views of David Getches, as presented in his articles and Congressional testimony.

248. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 684-686 (1978). This case, concerning fishing rights, endorses the minimal reading of the *Winters* doctrine.

249. Getches, *supra* note 205, at 543.

water, as capital assets, to be among the most "civilized" activities a tribe could undertake. Thus, reservation purposes conceivably could be fulfilled by selling or leasing water to others for use off the reservation.<sup>250</sup>

Limiting what tribes can do with their water lessens the value of their water right, and may force tribes into using water in a less economical and beneficial manner.<sup>251</sup> If one accepts that "[t]he overall purpose of virtually all Indian reservations is to provide a permanent homeland where a tribe can be economically self-sufficient and govern itself," then "it is reasonable to allow a tribe's water rights to be put to the highest economic use that the tribe may choose . . . ."<sup>252</sup> Moreover, forbidding the tribes from marketing their water is "out of step with a major trend in western water policy that favors water marketing as a device to make more efficient use of our scarce water resources."<sup>253</sup>

Not allowing tribes to market their water imposes on the tribes many of the burdens of the current water rights system without the benefits. For example, Indian water rights *may* be junior to appropriative rights and therefore subject to curtailment.<sup>254</sup> As with appropriative rights, Indian rights are limited to a certain quantity of water,<sup>255</sup> and tribes sometimes must participate in state water rights adjudications to determine this quantity.<sup>256</sup> Yet, the general rules allowing the transfer of water rights when no other water users are injured<sup>257</sup> do not apply to tribes if they cannot market their water off the reservation.

As "[t]here is relatively little law to be applied" on the question of whether tribes can transfer their water rights to other purposes, "[t]he arguments about transferability seem to rely more on policy and perspective than on existing legal precedents."<sup>258</sup> In light of a 1989 Senate Report calling for "a new federalism for American Indians,"<sup>259</sup> however, Congress should let the tribes decide, free of encumbrances, whether to market their water off the reservation, to use it themselves for farming or in other ways, or even to simply let it flow in its natural course. Getches

---

250. *Id.*

251. *Hearings, April 1989, supra* note 241, at 80-92 (testimony of David H. Getches). Getches concludes that Congress' taking a "stingy approach to [Indian] water marketing" limits the practical utility and values of the tribes' rights and "is a backhanded way to diminish the quantity of rights that the tribes 'own'." *Id.*

252. *Management and Marketing, supra* note 243, at 543.

253. *Hearings, April 1989, supra* note 241, at 86.

254. *See SAX, supra* note 18, at 806.

255. *Id.* at 826-28.

256. *See* discussion *infra* Part III.D.

257. For a discussion of the no-injury rule and its ramifications, see Palma, *supra* note 244.

258. SAX, *supra* note 18, at 879.

259. S. REP. NO. 216, 101st Cong., 1st Sess. 3 (1989). The Report quotes with approval the United Nations Working Group on Indigenous Peoples' conclusion "that indigenous peoples should be free to manage their own affairs to the greatest possible extent." *Id.* at 22 (quoting *Report of the Working Group on Indigenous Peoples*, U.N. Commission on Human Rights, 7th Sess., Annex II, U.N. Doc. E/CN.4/Sub. 2/1989/36 (1989)).

feels that opposition to Indian water marketing is a thinly veiled attempt to "forestall paying for a benefit that is now free . . . . As long as the tribes continue to be deprived of public funds to develop water, and as long as they have difficulty raising private capital, the water will continue to be unused and flow *without cost* to non-Indians."<sup>260</sup> He concludes that this status quo, maintained by economic and political conditions, allows non-Indians to benefit from the tribes' disadvantages and should be addressed by the Administration and Congress.<sup>261</sup>

### E. The State Court Arena

When tribal water rights went unused, the water was appropriated by non-Indians under state laws. The law has long been clear that the state appropriators were taking the water subject to subsequent assertion of Indian rights.<sup>262</sup> Water lawyers could have read in Weil's 1911 treatise that "the right of the reservation to water flowing through it, even in the absence of actual use thereon (if necessary for use in the future), cannot be destroyed by private appropriators who first put it to use under local laws."<sup>263</sup> The right acquired by appropriators was a defeasible one, which could be lost whenever the tribes chose to use the water to which they were entitled.<sup>264</sup> The clouding of the appropriators' titles and the uncertainty as to how much water within a river basin may be appropriated has been very disturbing to states. States view federal reserved rights as inhibiting economic investment and development. Consequently, states have sought to quantify reserved rights.<sup>265</sup>

The usual method to determine who has what water rights in a water basin is to conduct a general adjudication.<sup>266</sup> In a general adjudication, notice is sent to all users of the particular watercourse directing them to come into court to submit proof of their appropriations claims. The result is a court decree listing every appropriator, the date of his right and the amount of water to which he is entitled.<sup>267</sup> Until the passage of the McCarran Amendment in 1952, the Federal Government's sovereign immunity stood as a bar to joining the United States in general adjudication disputes.<sup>268</sup> However, the McCarran Amendment waived the immunity in this situation and gave consent to federal joinder in state

---

260. *Hearings, April 1989, supra* note 241, at 90.

261. *Id.*

262. *SAX, supra* note 18, at 826.

263. SAMUEL C. WEIL, *WATER RIGHTS IN THE WESTERN STATES* 239 (3d ed. 1911).

264. *SAX, supra* note 18, at 826.

265. *Id.* at 827.

266. See generally 6 Edward W. Clyde, *General Adjudication Proceedings, in WATERS AND WATER RIGHTS* 503-617 (1972).

267. See *id.* at 513-14.

268. *SAX, supra* note 18, at 827.

general stream adjudications.<sup>269</sup> Federal consent to adjudication in state court has been a source of disquiet for Indian people who believe "state courts have traditionally been antagonistic to Indian interests . . . [and] this animosity is magnified in the area of water rights."<sup>270</sup>

The scope of the McCarran Amendment has developed through case law. In 1971 the Supreme Court ruled that, although the language of the Amendment was limited to general adjudications, it also applied to cases invoking only federal reserved water rights.<sup>271</sup> In 1976 the Supreme Court held that the Amendment reflected a clear policy to allow states to adjudicate *all* water rights cases, including those suits brought by the United States on behalf of Indian tribes.<sup>272</sup> The *Colorado River* Court held that the Amendment established concurrent jurisdiction in state and federal court in "controversies involving federal rights to the use of water."<sup>273</sup> The Court also concluded that the Amendment evinced a federal policy of avoiding piecemeal adjudication of water rights in a river system and a preference for having a single court decide a case.<sup>274</sup> Which court should decide would be determined by factors such as where the suit was first brought and the scope of the proceedings.<sup>275</sup> Dismissal in the case at bar was appropriate because of the "policy underlying the McCarran Amendment," as well as the 300-mile distance between the federal district court and the state court and the water at issue.<sup>276</sup> The three dissenting justices found the latter reason for dismissal to be insubstantial.<sup>277</sup>

---

269. 43 U.S.C. § 666 (1970). The Amendment states that "consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit." *Id.*

270. *Indian Water*, *supra* note 83, at 58 (statement by Wendell Chino). Mr. Chino goes on to say, "the competency of the state courts is not the issue: Justice is the issue." *Id.* For suggestions that the state court judges may misapply federal law and that, while individual state court judges may not be biased against Indian claims, they may be politically vulnerable to interest groups who are, see SAX, *supra* note 18, at 832; Peter Toren, Comment, *The Adjudication of Indian Water Rights in State Courts*, 19 U.S.F. L. REV. 27, 47-48 (1984). Some tribes have called for Congress to repeal or appropriately amend the McCarran Amendment because the amendment as it is now interpreted both impairs Indian reserved water rights and breaches the U.S. government's special obligations to protect Indians. *Hearings, April 1989, supra* note 241, at 304 (testimony of Edward Lone Fight).

271. *United States v. District Court*, 401 U.S. 520, 525-26 (1971).

272. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 811 (1976). The court said that, "[B]earing in mind the ubiquitous nature of Indian water rights in the Southwest, it is clear that a construction of the Amendment excluding those rights from its coverage would enervate the Amendment's objective." *Id.*

273. *Id.* at 809.

274. *Id.* at 819.

275. *Id.* at 820.

276. *Id.*

277. *Id.* at 823 n.6.

The courts have interpreted the McCarran amendment in a way that makes federal jurisdiction over Indian water claims unlikely if state court proceedings have already commenced. In *Arizona v. San Carlos Apache Tribe*,<sup>278</sup> the tribes wanted their water rights to be determined in federal court even though Arizona was already conducting a general adjudication for the basin encompassing the San Carlos Apache reservation. The tribes argued, among other things, that the "McCarran Amendment, although it waived the United States sovereign immunity in state comprehensive water adjudications, did not waive *Indian* sovereign immunity."<sup>279</sup> The Court disagreed and stated that "the state proceedings have jurisdiction over the Indian water rights at issue here [and that] concurrent federal proceedings are likely to be duplicative and wasteful."<sup>280</sup> The Court's conclusion obscured the question of the tribes' best interest:

Since a judgment by either court would ordinarily be *res judicata* in the other, the existence of such concurrent proceedings creates the serious potential for spawning an unseemly and destructive race to see which forum can resolve the same issues first - a race contrary to the entire spirit of the McCarran Amendment and prejudicial, to say the least, to the possibility of reasoned decision making by either forum.<sup>281</sup>

Thus, while *San Carlos* "did not totally foreclose the possibility of federal court determination of Indian water rights," federal jurisdiction will be "highly unlikely if state court proceedings either have begun or are planned for the near future."<sup>282</sup>

A review of one state court's general adjudication process illustrates that Indian apprehension regarding the scope of the McCarran Amendment was well-founded. The Wyoming Supreme Court case *In re General Adjudication of all Rights to Use Water in the Big Horn River System*<sup>283</sup> is a clear example of why state proceedings are disfavored by Indians. The case took eleven years to adjudicate, at great cost to all parties.<sup>284</sup> The Wyoming Supreme Court awarded the Shoshone and Arapahoe tribes the amount of water necessary to irrigate the practicably

278. 463 U.S. 545 (1983).

279. *Id.* at 566.

280. *Id.* at 567.

281. *Id.* at 567-68.

282. Steven J. Shupe, *Water in Indian Country: From Paper Rights to a Managed Resource*, 57 U. COLO. L. REV. 561, 569 (1986).

283. 753 P.2d 76 (Wyo. 1988).

284. MARIANE AMBLER, *BREAKING THE IRON BONDS: INDIAN CONTROL OF ENERGY DEVELOPMENT* 217 (1990). Specifically, "[b]y 1989 the Wind River tribes estimated that they had spent more than \$9 million defending their water rights from the state of Wyoming, in addition to \$1.9 million spent by BIA and \$864,000 by the U.S. Justice Department on the lawsuit filed by the state against the tribes. Wyoming figured it had spent \$9.9 million. The money had gone either for consultants or toward attorneys' fees, clearing records, and administration; none had gone toward the storage and construction that would be necessary to satisfy the conflicting rights." *Id.*



irrigable acreage on the reservation, thereby denying them water for fisheries, mineral and industrial development, and wildlife and aesthetic uses.<sup>285</sup> The court concluded that it was the intent of the treaty establishing the reservation to create a reservation with a sole agricultural purpose.<sup>286</sup> The court reached its finding by scanning the treaty and relying on any mention of farming to conclude that "the treaty does not encourage any other occupation or pursuit."<sup>287</sup>

The court's strained conclusion diverged significantly from the finding of the special master appointed to the case. The master wrote a 451-page report "covering four years of conferences and hearings, involving more than 100 attorneys, transcripts of more than 15,000 pages and over 2,300 exhibits."<sup>288</sup> He concluded that "the purpose for which the reservation had been established was a permanent homeland for the Indians," and that the reserved water right was not only for irrigation but also for "stock watering, fisheries, wildlife and aesthetics, mineral and industrial, domestic, commercial and municipal uses."<sup>289</sup> The *Big Horn* case shows that the purpose a treaty evinces depends strongly on who is scanning the treaty and what they would like it to mean.

The *Big Horn* special master also made technical arguments regarding which land was practicably irrigable, establishing six classes of arable land by looking to "the depth to barrier, maximum slope, hydraulic conductivity, barrier definition, and maximum drain spacing standards." The court examined his technical and legal conclusions in a lengthy (twelve page) discussion.<sup>290</sup> The *Big Horn* opinion dramatically illustrates the difficulty in applying PIA.

#### CONCLUSION

The Federal Government has failed to protect Indian water rights. In 1973, long before it was clear how complicated, lengthy, and expensive the legal battles to follow would be, the National Water Commission reported to the President and Congress on the Indian water situation:

Following *Winters*, more than 50 years elapsed before the Supreme Court again discussed significant aspects of Indian water rights. During most of this 50-year period, the United States was pursuing a policy of encour-

---

285. 753 P.2d at 96-99. Tribes were also given water "to fulfill municipal, domestic, and commercial needs." *Id.* at 99.

286. *Id.* at 96.

287. *Id.* at 97. The court upheld the lower court's finding that the reference in the treaty to a "permanent homeland" does nothing more than permanently set aside lands for the Indians; it does not define the purpose of the reservation. *Id.*

288. *Id.* at 85.

289. *Id.* The court found that livestock, municipal, domestic and commercial uses are subsumed in agricultural purposes. *Id.* at 99. See also *In re the General Adjudication of all Rights to use Water in the Big Horn River Sys.*, 835 P.2d 273 (Wyo. 1992) (limiting the tribes' authority to divert their water).

290. *Id.* at 100-12.

aging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the *Winters* doctrine. With the encouragement, or at least the cooperation, of the Secretary of the Interior — the very office entrusted with the protection of all Indian rights — many large irrigation projects were constructed on streams that flowed through or bordered Indian Reservations, sometimes above and more often below the Reservations. With few exceptions, the projects were planned and built by the Federal Government without any attempt to define, let alone protect, prior rights that Indian tribes might have had in the waters used for the project. Before *Arizona v. California* . . . actions involving Indian water rights generally concerned then-existing uses by Indians and did not involve the full extent of rights under the *Winters* doctrine. In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the reservations it set aside for them is one of the sorrier chapters.<sup>291</sup>

While the Commission's statement is accurate in certain respects, and is important because it represents the conclusion of a Presidentially-appointed commission,<sup>292</sup> some clarification is required. First of all, reservations were not exactly "set aside" for tribes by the Federal Government; rather, they were comprised of land which the Indians retained for themselves after surrendering to the United States much larger areas of land. Moreover, the assertion that the Federal Government merely failed to protect Indian water rights for use on the reservation is a grave understatement. More accurately, the Federal Government *actively* harmed Indian rights by developing water resources, either leaving Indians high and dry or flooding Indian land for the benefit of non-Indians. The intensity and importance of the current debate about water in the West illustrates the inadequacy of leaving the government's action as a vaguely "sorry chapter."

There are basically two options open to tribes at this time, neither of which is entirely satisfactory. The first is for a tribe to enter into general adjudications in state courts and argue for the most fair quantification of their *Winters* rights. Such suits are not only extremely costly and possibly unfair,<sup>293</sup> but they leave the old problem still unanswered — from where, if at all, will the money and expertise come to develop the newly-won water?<sup>294</sup> Congress, by failing to clarify the McCarran Amendment,

---

291. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE: FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES 474-75 (1973) (emphasis added).

292. *Id.* at x.

293. See *supra* note 284 and accompanying text.

294. *Hearings, July 1990, supra* note 75, at 189-90 (prepared statement of the Intertribal Agricultural Council). "With the continuing emphasis on quantifying Federally reserved Indian water rights, and the use of potentially irrigated acres to quantify these rights, there

has implicitly supported the judicial interpretation of the Amendment, which has forced tribes to participate in state court adjudications. However, in light of the poor history of Indian irrigation projects discussed above and the Federal Government's trust responsibility, Congress should pass legislation enabling and funding the tribes to develop their quantified, reserved water; even if, because of environmental constraints, such legislation is at the expense of other users. Indian people living in the West on reservations should be accorded the same level of federal generosity regarding water development that non-Indian Westerners have traditionally enjoyed.

The tribes' second option is to enter negotiated settlements with the state.<sup>295</sup> As in the NIIP, tribes may agree to limit considerably their *Winters* rights in exchange for a guaranteed amount of "wet water."<sup>296</sup> These transactions offer tribes a new opportunity to be involved in the apportionment of water, but are fraught with problems for tribes. While "[t]he past several Administrations, speaking with varying degrees of conviction, have paid lip service to the concept of negotiated settlements, . . . [t]he federal trustee has proved to be notoriously unreliable in negotiations."<sup>297</sup> The Federal Government cannot merely state that negotiated settlements are its preferred policy and consider the question settled. Rather, recognizing its past role in water development and its continuing responsibility to Indian people, the government must participate in these negotiations and provide financing.<sup>298</sup>

An overarching problem with both options is the economic and environmental reality that few new reclamation projects are likely to be built; the limited amount of water now available in the West is all there will be.<sup>299</sup> The cost of new dams seems prohibitive in a new fiscal and environmentally conscious era.<sup>300</sup> The situation of the Colorado Ute In-

---

remains no program in place, nor any plans we are aware of, to develop irrigation resources on the reservations which have completed the water quantification process . . . [I]t is unconscionable that the United States would support the quantification of Indian water rights, and then make no effort at developing the capability for beneficial use of this resource." *Id.*

295. For a discussion and examples of such negotiations, see John A. Folk-Williams, *The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights*, 28 NAT. RESOURCES J. 63 (1988) [hereinafter *Negotiated Agreements*].

296. See *supra* notes 102-11 and accompanying text.

297. *Hearings, April 1989, supra* note 241, at 83 (testimony of David H. Getches).

298. *Id.* at 83-86. Getches argues that "[t]he government's role in recent negotiations has been more as a trustee for the federal treasury than for the Indian tribes." *Id.* at 84.

299. "Common wisdom now says that the water development era is past, and that water conservation, reallocation, and transfer have superseded the provision of new supplies through dams and aqueducts." INGRAM, *supra* note 41, at 1.

300. See, for example, the recent statement by Drew Caputo, Sierra Club attorney: "The history of water in the West is a history of changing the natural landscape for human and agricultural development . . . The consequence has been harm for the environment." Dirk Johnson, *Indians' New Foe: Environmentalists*, N.Y. TIMES, Dec. 28, 1991, at 7.

dian tribes is an instructive example.<sup>301</sup> An adjudication of the water rights of the tribes began in the 1970's.<sup>302</sup> However, by 1985 nothing was settled in the suit and the governor of Colorado, Richard Lamm, "convened a task force of the principle parties to attempt a negotiated settlement."<sup>303</sup> A settlement was reached between the tribes and the state, and ultimately approved by the Departments of Interior and Justice and passed by Congress.<sup>304</sup> Yet, in addition to the question of whether or not the funds promised by Congress ever will be appropriated, there is the possibility that environmental concerns will prevent the tribes from receiving their water. Congress recently granted \$60 million in federal development money to the Ute Indians for a water diversion project from the Animas and LaPlata rivers. The project was opposed by the Sierra Club because it would imperil an endangered species: the squawfish.<sup>305</sup> The Mountain Ute leader commented in response: "For 100 years, we did not have running water on this reservation . . . . Where were the environmentalists then? They weren't hollering about the terrible conditions for our children."<sup>306</sup> Thus, even when the negotiation process works, it might not serve the Indian people.

The underlying question concerning the right of reservation Indians to water remains: how is an old treaty, statute, or court decision to be applied in times bearing little resemblance to the era in which the words of law were originally written?<sup>307</sup> Wilkinson writes:

These old laws emanate a kind of morality profoundly rare in our jurisprudence. It is far more complicated than a sense of guilt or obligation, emotions frequently associated with Indian policy. Somehow, those old negotiations — typically conducted in but a few days on hot, dry plains between mid-level federal bureaucrats and seemingly ragtag Indian leaders — are tremendously evocative. Real promises were made on those plains, and the Senate of the United States approved them, making them real laws.<sup>308</sup>

There was nothing particularly odd about the *Winters* decision. It was the logical outcome of the treaties the Federal Government had signed with the tribes who would live on reservations in the West. If the reservations were to be a home, a place providing life and sustenance to the tribes, they would have to have water. But *Winters* was ignored — by Congress, by the Bureau of Reclamation, by the BIA — and Indians

---

301. The two tribes involved are the Southern Ute and the Ute Mountain Ute tribes. *Id.*

302. *Id.* An earlier federal suit was dismissed in favor of adjudication in state court. Colorado River Conservation Dist. v. United States, 424 U.S. 800 (1976).

303. *Negotiated Agreements*, *supra* note 295, at 88.

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

305. Johnson, *supra* note 300, at 7.

306. *Id.* (quoting Judy Knight Frank)

307. Moore, *supra* note 1, at 769; *see also* TIME AND LAW, *supra* note 4, at 4.

308. TIME AND LAW, *supra* note 4, at 121.

either starved or were forced to trade their land and resources for welfare benefits. The reclamation of the West was selective, and promises of a viable homeland were not kept.

Despite neglect, *Winters* is the law. It was not an anomaly but the embodiment of the Federal Government's professed intent toward the Indians. Non-Indians across the West should not be allowed to continue to use water that is rightly the Indians'. No one can acquire a fee simple interest in water,<sup>309</sup> and appropriator's rights are occasionally curtailed to protect environmental, recreational, and aesthetic values.<sup>310</sup> The rights of Indigenous Americans too should now be recognized and the promises made to them long ago finally fulfilled. Once a Lakota [Sioux] holy man called Drinks Water dreamed of the future of the coming of white men to Indian land, and in his dream:

The four-leggeds were going back into the earth and . . . a strange race had woven a spider's web all around the Lakotas. And he said: "When this happens, you shall live in square gray houses, in a barren land, and beside those square gray houses you shall starve." They say he went back to Mother Earth soon after he saw this vision, and it was sorrow that killed him. You can look about you now and see that he meant these dirt-roofed houses we are living in, and that all the rest was true. Sometimes dreams are wiser than waking.<sup>311</sup>

The Federal Government's trust obligation can no longer be viewed as optional. A viable homeland for Indian people is too important to be sacrificed for the extravagances of non-Indians.

---

309. SAX, *supra* note 18, at xxiii.

310. See, e.g., *National Audubon Soc'y v. Superior Court*, 658 P.2d 709, 719, 728-29 (Cal. 1983).

311. JOHN G. NEIHARDT, *BLACK ELK SPEAKS* 8 (Pocket Book 1972) (1932).