A NATIVE AMERICAN VIEW OF WESTERN WATER DEVELOPMENT

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This paper presents an individual Native American, or American Indian, view of western water development and not necessarily the view of a particular tribe or its government. A disclaimer of this kind is necessary because there has been a historical tendency in this society to look for a single Indian spokesman and search for that spokesman among the Indians who say what society wants to hear. But the Indian community, while sharing many characteristics and problems, is culturally and politically diverse and there are no real shortcuts to dealing with it in all its diversity.

Indian water rights, as they relate to western water development, must be seen against the backdrop of the history of the hemisphere. Ever since the arrival of the Europeans on the continent, an important current in the development of the legal system has been to define Indian rights and then develop an orderly process for taking them away. From the formulation of the doctrine of discovery itself, this two-step exercise has served the humanitarian purpose of attempting to accord some fairness to the Indians while providing discipline to the competition among non-Indians for the right to use Indian resources. Recognition of full and natural rights of Indian sovereignty and ownership in the hemisphere is commonly viewed as having been a historical impossibility, just as denying them all rights was not practically and morally feasible. The problem then, was and is to balance the two historical necessities appropriately.

In the case of Indian water rights, many of the legal battles which we see today involve the definition of the scope of the rights--their priority dates, the measure of the rights and the uses to which they can be put. This initial step is vitally important to the American legal system because the broadest formulation of the scope of Indian rights can--in this context--be characterized as Indian "claims" to water. As the legal system proceeds to narrow these "claims," society can assure

itself that it is merely "defining rights," not taking them away. Being property, Indian water rights cannot be taken away without just compensation.

Indian water rights can be put to productive use in the American economy by the Indians themselves if they can obtain the enormous sums necessary to support modern forms of development. These water rights can be put to use through the normal channels of law and commerce by non-Indians if they pay an appropriate sum of money to the Indians for the use of the Indians' water. But it is also possible, because of the unique nature of water, for non-Indians to use what would otherwise be Indian water outside the legal and economic channels if Indians are excluded from the normal system of planning, allocating and funding water development. If Indians lack the funds to develop their water resources, their water rights remain dry and abstract, and those who use the same water need not compensate them.

The attack on Indian water rights, then, is on two fronts: one, to narrow their definition as much as possible, and the other to delay their actual development as long as possible--to the point where the costs become out of reach. Both strategies are based on keeping Indian water rights as an exception to the system of defining, allocating and developing water resources. And both strategies are integrated into the system of law and policy in such a way as to preserve the appearance of fairness.

The system attempts to guarantee fairness to the Indians through federal trusteeship; Indian tribes and their property are subject to the trusteeship of the federal government. If there is any purpose to the federal trust relationship between Indian tribes and the United States, it is to ensure that things of economic value in the non-Indian economy to which Indians assign a different cultural value are not lost to the Indians during the period when they have a competitive disadvantage in the majority system due to their culture or their poverty. This trusteeship commonly applies to trust funds, to land and to water.

It has been said--most notably by former President Nixon in his 1970 message to Congress on Indians--that the federal Indian trusteeship is

fundamentally defective because the federal government has a conflict of interest between its Indian trust responsibilities and its duty to promote the general welfare. Former President Nixon's candid acknowledgment of this conflict is very important, of course, but somewhat simplistic. It is rare that a specific interest of an Indian tribe will clearly conflict with the general public interest, i.e., the interests of all the people of the United States. It is more likely that the interests an Indian tribe seeks to have protected by its federal trustee will conflict with the specific interests of an identifiable group of non-Indians. It is, then, a highly subjective judgment of whether this specific non-Indian interest rises to the level of legitimately calling on the constitutional duty to promote the general welfare.

The notion of a federal conflict of interest can be used by the federal government as an excuse for what is in reality an exercise of discretion to prefer the interests of a specific group of non-Indians over the trust interests of the Indians. The real process by which non-Indian interests are favored over those of the Indians in the federal government is rarely reviewable by the courts, and hence, the system offers the Indians little protection in that sense. Instead, non-Indian interests tend to be favored in the exercise of executive discretion, in the development of the budget, the allocation of funds, and in technical assistance. These all relate to the overall strategy of appearing to define and protect Indian water rights while keeping them as narrow as possible. This strategy makes it virtually impossible for the Indians to take advantage of what rights are confirmed.

We, in this country, have just come through an era of 15 years of hindsight, during which we engaged in guilt over the treatment of the Indians by the non-Indians in the nineteenth century. Yet, this moral cartharsis has not led to an adjustment of the process by which the same treatment can be substantially repeated--without, one hopes, military confrontation.

The nineteenth century arguments were, with respect to land, that the Indians claimed more land than they could possibly put to productive use and that if their claims to land were confirmed as rights, they would

frustrate the progress of non-Indian development embodied in the concept of Manifest Destiny. We now see basically the same argument made with respect to the settlement of Indian water rights in the West. The question is whether in the next century, our descendants will look back with embarassment at the ways in which we have allowed the system to be manipulated to deny fundamental fairness to the Indians.

It has been said that there are three systems of water law in this country--riparian, prior appropriation and federal reserved. In fact, the notion of federal reserved rights makes no sense outside the context of a larger system of allocating private and state rights. It is more accurate to see that there are basically two systems, and that they are both subject to the power of federal reservation which includes the protection of Indian water rights.

The nation has been operating--at national, state and local levels--for many years as if Indians didn't really exist. That was the perception largely because of the vain hope that Indian societies were so close to extinction and assimilation that there was no need to define the system with them as a permanent part. The problem with this view is that it is unrealistic, and because it is unrealistic, the system must be adjusted from time to time to allow for Indian rights.

The time is right for society to include Indians and their rights and claims as part of the system from the beginning, plan to take care of their needs and rights as part of the system, and include them in the overall process of planning and allocation of resources. Such an approach would be cheaper in the long run and would allow for the regularity and predictability that is essential to development in the West.

Several specific steps could be taken. Granting that the federal decision process exists in a context of legal, bureaucratic, economic and social considerations, conflicts of political, economic and social interest should be managed in a system that ensures a regularity of process and fairness to the Indians. This is simply a management problem. There always will be competing interests affecting the federal process. The goal should be to manage those interests fairly by removing

them from a process where conflicts are resolved by bureaucrats in internal meetings to one where everyone concedes the existence of a conflict which is then managed through an open and fair procedure.

Next, Indians must have the technical capability to participate in the mainstream process. They must have the technical capability to support their claims to water and to make sensible and timely plans for its development. Because of the federal trusteeship, this assistance must come from the federal government. Federal assistance is necessary because the tribes largely lack the funds to provide it for themselves, because of the federal complicity in historically preventing the tribes from developing this capability for themselves, and because it is the most efficient way to move the problem toward a solution that will resolve outstanding problems.

Society must create incentives for Indians to help move the process to one of predictability. In order to do that, society must deliver on its promises and demonstrate to the Indians that there is a fairness to the process and that they will receive the benefits of a fair share of the water. Currently, Indians are provided little incentive to do anything other than make the system as costly and inefficient as possible by disputing every issue. But if litigated judgments resulted in developable water, and if negotiated settlements resulted in developed and delivered water, Indian tribes might be more likely to cooperate.

The American Indian Law Center--the organization of which I am the director--has for the past eight years provided the staff work for the Commission on State-Tribal Relations. The purpose of the commission--which is composed of tribal chairmen, state governors, attorneys general, legislators and county commissioners--is to identify areas of actual and potential cooperation among tribes, states and counties.

States and tribes only compete for water if there is an assumption that there are two economies--state and tribal. Otherwise, there is a great deal to be said for the notions that the development of tribal water rights is an important asset to the state's economy and that the nature of Indian reserved rights is an asset to the state in its regional competition for water with other states.

It may be argued that if the states embrace a broad definition of Indian water rights as a potential "wild card" in the regional competition with other areas of the country, this wild card status would disrupt an orderly system for the allocation of water resources. While that argument has some merit, if the orderly system its proponents seek to preserve excludes Indian water rights, then it is by definition unrealistic and inefficient--and unfair to the degree that its success depends on denying Indians the benefits of their rights. Additionally, the present system, for all its pretense of orderliness, is well known to be a complex system of law, economics, influence and pork barrel politics. To introduce Indian rights into such a wide open competition probably would not make it any more disorderly than it already is.

The fundamental issue is this: As long as Indian rights are seen incorrectly as an exception to the system, and as long as funding for their development is considered to be an additional cost, Indian tribes will have no choice but to fight every inch of the way, making the system as costly and inefficient as possible. But if those who are interested in water development in the West come around to the view that it is in their interest to see that Indian water rights are defined in such a way as to satisfy reasonable Indian needs, Indians and non-Indians in the West will be able to sit down and plan development that meets the common and interdependent needs of all people and interests in the West.

In the bluntest possible terms, those who are interested in western water development will be acting in their own interest if they become the Indians' most effective lobbyists.