INDIAN LEGAL TRENDS

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> "In the 1908 case of Winter v. U.S., the court gave its classic statement on Indian water rights. ...and found that State law did not control Indian water rights. Rather, it was held that the United States, when it recognized the Indian reservation through Congressional action, implicitly reserved sufficient water with the land in order to fulfill the very purpose for which the reservation had been created, namely, to help the Indians establish a new way of life based on the arts of non-Indian civilization, including agriculture." (What Indian Water Means to the West by Western Network, Inc.)

The Winters Doctrine II decision has been the standard bearer that tribes have taken into courts for over half a century in attempts to defend their rights to the use of their waters. Under the so called "Winters Doctrine", a tribe's right to water has been seen as an expanding right, one that would expand with the tribe's growth and needs. However, in the arid Southwest, water as a physical resource does not necessarily expand as easily as the court decreed on paper.

The physical limitations caught up with the decision in 1963, when the U.S. Supreme Court in Arizona v. California held that a tribe's apparent open-ended reserved rights could indeed be quantified through a formula based on the amount of "practically irrigable acreage" within the confines of the reservation. Like the U.S. Supreme Court's definition of tribal governments as "quasi sovereigns", the yard stick of "practically irrigable acreage" has been subject to problems of interpretation. Courts, in attempting to define "practically irrigable acreage" have attempted to tie it to the economic feasibility of irrigating Indian lands, applying parameters to a once open-ended decision.

In New Mexico, the Mescalero and Jicarilla Apache tribes and the Navajo tribe are currently in litigation attempting to define their rights to water based on the principles of reserved rights enunciated in

Winters v. U.S. and Arizona v. California. In the meantime, the Pueblo Indians of New Mexico are apparently re-defining what may be a new Indian water right. The U.S. District Court in New Mexico v. Aamodt has recently held that those portions of the Pueblos created by Executive Order (and presumably similar types of federal action) could claim Winters Doctrine rights to their waters, while those Pueblo lands aboriginally retained would be subject to prior appropriation guidelines.

The court found that:

> "The Pueblos have the prior right to use all of the water of the stream system necessary for their domestic uses and that necessary to irrigate their lands, saving and excepting the land ownership and appurtenant water rights terminated by the operation of the 1924 Pueblo Lands Act...acreage under irrigation of 1846 was protected by Federal laws including the Treaty of Guadalupe Hidalgo, supra, and the 1851 Trade and Intercourse Act, supra." (N.M. v. Aamodt, Memorandum Opinion and Order, 1985)

The decision is being appealed, the Pueblos contending a "Winters Right" for all lands. At the very least, the parties still face a long period of court activity that will likely end in another U.S. Supreme Court decision as to the water rights of the Pueblos.

As all these cases of both Pueblo and Treaty tribes began winding their way through the federal courts and the state courts (under the McCarren Act), the physical parameters of water are beginning to exert a different kind of pressure. As New Mexico's population grows, and water needs expand, the luxury of extended court battles concerning paper water rights are becoming viewed as a stumbling block to development. Threats of relatively quicker solutions through the legislative route continue to rise and fall seemly in rhythm to dry and wet seasons. But, legislation is the Sword of Damacleas that continues to hang over Indian water rights and consideration of future Indian water uses.

The pressures of expanding water uses and congressional whims have moved some Southwest tribes to consider the once forbidden areas of negotiation and arbitration. The former method for resolving water disputes is still viewed very cautiously by tribal groups. This need for

caution rests partially on the contention that negotiation presupposes knowing the extent of the commodity that can be negotiated, but this cannot be done until the full extent of the tribe or Pueblo's rights have been defined; and partially because of the history of Indians coming out on the short end of the stick in most negotiation proceedings. Tribes and Pueblos have usually fared better through the court system.

Arbitration carries with it more of the fairness of a court proceeding. However, there is some difficulty in selecting an arbitrator that might be considered fair by both Indian and non-Indian water users.

Some tribes outside of New Mexico have felt the physical pressures of water usage more acutely and have actually entered into or attempted negotiated settlements. In doing this, tribes have found how important it is to have a good knowledge of the technical use of water and not simply a strong legal principle. This growing awareness of how water usage is changing in a growing society that is shifting away from an agrarian lifestyle is the latest ripple on the old problem of Indian water rights.

There is a growing awareness that they, as Indian communities, are being pressured to develop limited resources in direct competition with rapidly growing non-Indian communities. At the same time, tribal communities are growing, not dwindling, as more and more Indians remain on the reservations. With such internal and external pressures, Indian communities are looking much more closely at how their legal paper rights will translate into actual useable water. This issue more than anything will cause many tribes to look not only to the court system for a resolution, but has and will begin opening up other areas of resolution to the very emotional and volatile issue of water rights.