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TABLE OF CONTENTS

President's Page	iii
DIALOGUE ON WATER ISSUES / Water Marketing in the Western United States	
Institutional Barriers to Water Marketing in the West - <i>Zachary McCormick</i>	953
Water Marketing: The Case of Indian Reserved Rights - <i>Mary McNally</i>	963
Administrative, Institutional, and Structural Characteristics of an Active Water Market - <i>Ari M. Michelsen</i>	971
TECHNICAL PAPERS	
The Ground Water Flux of Nitrogen and Phosphorus to Bermuda's Coastal Waters - <i>J. A. Kent Simmons and W. Berry Lyons</i>	983
Long-Term Changes in Low-Flow Channel Widths Within the South Umpqua Watershed, Oregon - <i>Jeffrey J. Dose and Brett B. Roper</i>	993
The Rational Method for Peak Flow Rate Estimation - <i>T. V. Hromadka II and R. J. Whitley</i>	1001
BMP Impacts on Watershed Runoff, Sediment, and Nutrient Yields - <i>S. W. Park, S. Mostaghimi, R. A. Cooke, and P. W. McClellan</i>	1011
Exposure Assessment of Populations Using Environmental Modeling, Demographic Analysis, and GIS - <i>Morris L. Maslia, Mustafa M. Aral, Robert C. Williams, Allan S. Susten, and Janet L. Heitgerd</i>	1025
Analysis of Wind- and Ship-Induced Sediment Resuspension in Duluth-Superior Harbor - <i>John B. Erdmann, Heinz G. Stefan, and Patrick L. Brezonik</i>	1043
Sizing Small Stormwater Pump Stations - <i>David C. Froehlich</i>	1055
Conflicting Perspectives About Detection Limits and About the Censoring of Environmental Data - <i>Malcolm J. R. Clark and Paul H. Whitfield</i>	1063

WATER MARKETING: THE CASE OF INDIAN RESERVED RIGHTS¹

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ABSTRACT: Water marketing is an increasingly important topic for policy makers and water managers, especially in the Western United States. Indian reserved rights (or *Winters* rights) differ in significant ways from water rights under most state prior appropriation systems. As *Winters* rights are quantified, a number of issues are emerging concerning the extent to which these water rights may be marketed, particularly to off-reservation users. This paper will review the evolution of Indian reserved water rights and discuss key issues surrounding the marketing of these rights.

(**KEY TERMS:** *Winters* rights; water marketing; Indian reserved water rights.)

INTRODUCTION

Water marketing has become a popular term in the Western United States, at least if popularity is measured in frequency of use. Marketing has come to encompass a broad array of water reallocation and transfer mechanisms, from simple transfers within water management districts to new initiatives designed to conserve, salvage, and re-deploy water resources (Shupe *et al.*, 1989). While marketing is usually defined as selling or purchasing a good, many water market transactions refer to a change in the use of a water right, as opposed to a change in the ownership of that right (Gould, 1989). In whatever form it takes, water marketing is generally recognized as a vehicle for reallocating water from lower-valued uses to higher valued ones, and as a way to adjust water supply and demand to reflect new economic, environmental, and demographic realities.

Perhaps the two words that best describe contemporary attitudes toward water marketing are ambivalence and caution. In spite of the attention engendered by *Sporhase v. Nebraska*, 458 U.S. 941

(1982), which recognized water as an article of commerce, water marketing remains more popular in theory than in practice. The potential benefits seem to be widely recognized, even endorsed in some form, by numerous organizations and entities (Western Governors' Association, 1987; Willey, 1992). At the same time, there are numerous impediments to establishing market mechanisms, state and private actions may be uncertain, and there is a lack of agreement about how to proceed. Discussions of water marketing nearly always acknowledge the need for institutional reforms, that is, for changes in existing water laws, policies, and practices, which will allow the foundations of water markets to evolve (Musick, 1990; Shupe, 1982). Ideas about appropriate 'reforms' are quite diverse, however, and range from what may be termed incremental or evolutionary approaches, to radical proposals for change (Getches, 1987; Anderson, 1983). In fact, a number of states have initiated legal and administrative changes designed to facilitate certain types of transfer activities, although formal water markets are still the exception rather than the rule (Colby and Bush, 1987; Committee on Western Water Management, 1992).

The ambivalence and confusion surrounding water marketing in general is only exacerbated when the marketing of Indian Reserved rights (or *Winters* rights) is brought up. It is an important topic, quite simply, because there is a lot at stake for both Indians and non-Indians (Folk-Williams, 1982; Western States Water Council, 1984). There are numerous cases involving Indian reserved rights pending (McCool, 1989), and whether these situations are resolved through eventual litigation or some other form of settlement, water marketing is likely to be a

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pivotal issue. This paper will review the evolution of Indian reserved water rights and discuss key issues surrounding the marketing of these rights.

SIGNIFICANCE OF INDIAN RESERVED RIGHTS – WINTERS RIGHTS

The Indian claim to water was first outlined in the Supreme Court decision *Winters v. U.S.* 207 U.S. 564 (1908), and subsequently has been modified through a number of court cases. Under what is known as the Doctrine, it has been found that the Indian right to 'sufficient' water was implicitly reserved at the time reservations were established, and that these reserved rights cannot be lost by non-use, state action, or private appropriation. The meaning of 'sufficient' water has come to be understood as the amount necessary to fulfill the purposes of the reservation, though debate over the scope of those purposes continues.

These rights are significant for several reasons. They are an exception to the prior appropriation principles which have governed water allocation throughout the West. Under the general provisions of the prior appropriation doctrine, one has a legitimate claim to water only when it is diverted and put to an appropriate (beneficial) and continuous use. In contrast, Indian rights exist even if they have never been exercised. In addition, under the prior appropriation system, claims of early (senior) water users have priority and must be completely satisfied before later (junior) claims have validity. Since the priority date of an Indian water right is generally considered to be the date a reservation was established, Indian reservations effectively have priority over many other water users.

Indian reserved rights have existed largely in theory, and the effect of developing these paper rights may pose serious conflicts for established interests. *Winters* rights are based upon federal law and were largely unasserted for decades. State appropriation systems evolved independently of the reserved rights doctrine, and there were only intermittent and ineffectual efforts to protect Indian claims during the first half of this century. As a result, western states developed and allocated water, while tribal rights remained virtually unaccounted for. In a region notable for water scarcity, such unmet obligations may eventually pose a serious challenge (U.S. Water Resources Council, 1978).

These same obligations have great significance for Indian tribes. Though they comprise only a fraction of the nation's population (less than 1 percent), Indians control substantial acreage in the American West and

their potential claim to water is considerable. For example, one estimate put potential *Winters* claims at 45.9 million acre feet of water per year (Western States Water Council, 1984). Based on treaties, and modified by legislation and court decisions, tribes have status as distinct, separate communities. As quasi-sovereign governments, tribes have jurisdictional and proprietary rights, and compete with different constituencies – notably states – in carrying out these roles. Water is clearly a valuable and coveted resource (Zah, 1985). Tribes are aware of its potential benefits, and are weary of decisions which may deprive them of their full entitlement and its benefits (Bacal, 1991).

The potential significance of *Winters* rights came to public attention as a result of *Arizona v. California*, 373 U.S. 546, 1963. The case sought to allocate the waters of the lower Colorado River between the basin states pursuant to the 1928 Boulder Canyon Project Act (P.L. 70-642). As part of that allocation, claims for federal and Indian reserved rights were asserted. The Supreme Court decision affirmed the basic nature of reserved rights, including *Winters* rights, adopted the standard of practicably irrigable acreage as a feasible and fair way to quantify Indian claims, and awarded five tribes 1,000,000 acre feet (of the 7,500,000 acre feet apportioned to the lower basin states).

If the Arizona decision brought the reality of *Winters* rights to the forefront of public attention, subsequent litigation added impetus to state efforts to quantify and settle these claims, and gave them the leverage with which to do so. The McCarran Amendment, passed by Congress in 1952, was intended to facilitate the ability of States to quantify their water rights with certainty and finality (42 U.S.C. 666, 1988). It waived the sovereign immunity of the United States in certain types of state water adjudications and allowed federal rights to be quantified in State courts. A series of Supreme Court decisions, beginning in 1971, held that the McCarran Amendment was applicable to *Winters* claims as well (*U.S. v. District Court for Eagle County* 401 U.S. 520, 1971; *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 1976; *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 1983). As a result, tribes became subject to state jurisdiction in the matter of quantifying *Winters* rights, under state-initiated comprehensive adjudications. Several states have initiated such actions, but few have completed these proceedings. The recent *Wyoming v. U.S.* (1989) decision, which quantified the reserved rights of the Shoshone and Arapaho Tribes, is one adjudication that has been completed. It has been, and continues to be, quite controversial (Membrino, 1992; Kirk, 1993; Williams, 1994).

As adjudications proceed and litigation continues, there are increasing instances of tribes and states using alternative venues – including negotiated

settlements – to resolve conflicts over water rights (Thorson, 1985; Folk-Williams, 1988). The reasons for this are numerous, and include a concerted federal effort to encourage negotiated agreements; the flexibility and cooperative opportunities possible through negotiations; and the expense, time, and uncertainty involved in litigation. Although various forms of negotiated settlements are still dwarfed by pending litigation their number is increasing (Sly, 1988; Checchio and Colby, 1993). At the same time, a number of concerns are being raised about the equity of some of these proceedings and their outcomes (McCool, 1993; Burton, 1991; Brienza, 1992). Some of these concerns are particularly relevant when settlement provisions related to water marketing are considered.

MARKETING WINTERS RIGHTS: THE CONTEXT

Many aspects of the *Winters* Doctrine continue to be defined and debated; and there is no more contentious issue than the right and ability of tribes to market their water. The debate is grounded in a maze of legal, political, and pragmatic concerns. Legal questions include the dimensions of Indian reserved rights – for example, whether reserved water rights can be severed from the land and are transferable, and whether the purposes of reservations should be broadly or narrowly interpreted. Political issues include the nature of tribal and state relations and respective regulatory authorities, the ability to control and manage water in a coherent and reasonable fashion, and the potentially disruptive effects on existing users and water allocation practices.

As is the case with water marketing in general, Indian water marketing encompasses a variety of practices and ideas (Shupe, 1990). Indeed, some forms of marketing (for example, the leasing of Indian water, along with lands, to non-Indians) have been in evidence for decades. In addition, other arrangements (including deferral agreements) have also been initiated in the past (Fetzer, 1982). What is new is the scope and dimensions of water marketing provisions being contemplated as tribes and states attempt to settle outstanding *Winters* Rights claims.

The focus on water marketing is, in part, a consequence of the broader forces which are re-shaping water allocation and management practices in the West. Some of these include economic and demographic changes, which are shifting the demand for water from agricultural to municipal and industrial uses; the decline in public support for new water supply projects; the increasing concern for environmental protection, including water quality and instream

flows; and the judicial decisions which recognize water as a commodity. Tribal interest in water marketing is further heightened, however, by the particular realities that characterize resource development in Indian country. During the decades when water and regional development were the cornerstones of Federal water policy in the West, such developments generally ignored, or even usurped, Indian claims to water. As the National Water Commission noted:

“In retrospect, it can be seen that this policy was pursued with little or no regard to Indian water rights . . . With few exceptions, the projects were planned and built by the Federal Government without any attempt to define, let alone protect, the prior rights that Indian tribes might have had in the waters . . .” (National Water Commission, 1973, pp. 474-475).

This gap between water rights in theory and in fact has been, and remains, persistent, often even after these rights are recognized and quantified (Shupe, 1986). For example, agriculture has been the predominant use of water on most reservations, and while Indian agriculture has expanded in recent years, largely as a result of the settlement of *Winters* claims (Chambers and Echohawk, 1991-92), future investments in irrigated agriculture often do not make economic sense (Young and Mann, 1993). Other options for tribal development of water resources are often limited, not least because of insufficient capital and limited local demand. As a recent Task Force on Indian Economic Development noted, water development on Indian reservations typically would require large amounts of federal capital that probably will not be available. The Report concluded that leasing of Indian water rights had the potential for becoming a significant new source of revenue for some Indian tribes (U.S. Department of Interior, 1986). It is evident that reserved rights may remain largely useless, in a practical and economic sense, unless tribes are free to ‘market’ their water. Yet off-reservation marketing is perhaps the most contentious issue of all, the one that raises the decibel level of any discussion and magnifies the potential economic and political conflicts. As it now stands, unused reserved rights ‘flow’ to other (primarily non-Indian) users, a clearly desirable state of affairs for some. Obviously this situation could be altered if tribes started to market their undeveloped rights.

There are no clear legal precedents either supporting or precluding a tribe’s ability to market water. Interpretation of the purposes for which specific reservations were created, as embodied in Treaties and Executive Orders, have served as the basis for the quantification of *Winters* rights. A strict reading

of these purposes can limit quantified rights and, it has been argued, could restrict the scope of permissible uses (Palma, 1980). In contrast, a broader understanding of purpose, one that encompasses the notion that reservations were intended as 'homelands' for tribes, offers more flexibility in accommodating contemporary realities of reservation life and more latitude in considering appropriate uses of *Winters* waters (Schapiro, 1986-87; Storey, 1988; Lichenfelds, 1989). It is generally accepted that, once a tribal right is quantified, the water can be used on a reservation for a variety of non-agricultural purposes which many states and tribes recognize as beneficial uses (for example, domestic industrial, recreation, and wildlife). However, the limits of such 'other' uses remain unclear.

There are a number of other factors contributing to the confusion surrounding Indian water marketing. For example, the Indian Non-Intercourse Act prohibits the alienation of Indian land (and resources) without Congressional consent (25 U.S.C. 177, 1983). Exceptions have been made over the years for the transfer, sale, or leasing of a number of resources, including timber, and minerals. Hypothetically a similar exemption could be made for water, but as yet no such action has been initiated, nor is it likely to be (U.S. Congress Senate Select Committee, 1989). Current law and practice does allow tribes to lease lands (and related water resources) to non-Indians, with approval of the Secretary of Interior, for a variety of on-reservation uses (25 U.S.C. 415, 1982), but there is no explicit provision that allows leasing or transferring water independent of tribal lands. As a result, the dimensions of tribal marketing authority are being litigated – or negotiated – on a case-by-case basis, and negotiated settlements involving off-reservation water transactions are subject to Congressional scrutiny and approval. The issue is a critical one, as the ability to market water, especially to off-reservation users, may be crucial, both for tribes determined to realize the full value of water rights and for regions adjusting to the new realities of water allocation and management (Getches, 1988).

MARKETING *WINTERS* RIGHTS IN PRACTICE: RECENT SETTLEMENTS

While key legal issues about the dimensions of tribal water marketing remain undecided, a number of recent settlements have provisions that directly address marketing concerns. Table 1 is a brief summary of major Indian water settlements in the Western United States that contain marketing provisions. All of these are negotiated settlements and, with the

exception of the Fork Peck Compact, all have been ratified by Congress. The settlements outlined in the table are often extremely complex, involve numerous parties and sources of water, intricate transfer and/or exchange arrangements, complex financing provisions, and specific restrictions on sources and uses of water. In nearly all cases, the amount of total water agreed to in the settlement (and shown in Table 1) is not available for marketing; at best some portion may be. For example, in the Fork Peck case, which has the largest quantity of water, there are provisions which govern off-reservation uses, including an initial marketing cap of 50,000 acre feet for the Tribes, with additional increments tied to State requirements (Montana Code Annotated 1993, 85-20-201 Art. 3).

Each settlement reflects unique circumstances, and provisions contained in these agreements are variable and often wide-ranging in their marketing implications. However, several general trends are evident. One constant is that virtually all these settlements prohibit the permanent alienation of tribal rights. Thus marketing in most cases involves transferring use rights, not ownership, of water. Another commonality is that these 12 settlements recognize, in some form, a tribe's right to market water resources. This is often distinguished, however, from a tribe's right to market reserved rights. For example, marketing provisions in these agreements are often tied to specific sources of water (e.g., Central Arizona Project or CAP entitlements; federal contract storage waters, etc.) that are not necessarily considered to be *Winters* waters – that is, waters which arise upon, border, transverse, or underlie reservations. In the Colorado Ute Act, for example, a provision allows the tribe to sell, exchange, lease, use, or otherwise dispose of any portion of their water right off reservation, while another section expressly disapproves any characterization of a water right used off-reservation as a 'reserved' water right (PL 100-585 Sec. 5c, 5c(2)). The differentiation between marketing reserved rights and marketing water rights is a matter of semantics and political necessity. Congress is clearly reluctant to endorse the general principle that tribes have the right to market their reserved rights off-reservation, but at the same time is allowing tribes to market at least some water off-reservation.

This hesitancy is reflected in other aspects of these agreements. Most settlements either restrict the geographic region within which tribes may market and/or specify entities with whom tribes can arrange leases or transfers. Some of these restrictions (as with the Tohono O'odham) are minimal, but in other agreements (such as the San Luis Rey) these qualifications can be quite specific, even restrictive. In several cases, more limited marketing provisions emerged as a result of the Congressional ratification process. Two

TABLE 1. Summary of Major Indian Water Settlements in Western U.S. with Marketing Provisions.

Settlement	Date*	Quantity** (a/f year)	State	Off-Reservation Marketing Provisions
Ak-Chin	1984	72-85,000	Arizona	Marketing provisions removed from 1984 Bill. Amendment passed in 1992 allows off-reservation marketing in Pinal, Phoenix, and Tucson Active Management Areas.
Colorado Ute	1988	70,000	Colorado	Limited to upper Colorado basin; portion of right used off-reservation changed to Colorado State right and subject to state jurisdiction.
Fort Hall	1990	581,031	Idaho	Off-reservation marketing from Federal contract storage water through Shoshone-Bannock Water Bank allowed; geographical restrictions (Snake River Basin; in-state only) apply.
Fort McDowell	1990	36,350	Arizona	Off-reservation leasing allowed in three-county region; permits leasing of CAP water to Phoenix.
Ft. Peck	1985	1,000,000	Montana	Off-reservation marketing provisions included, with some qualifications and quantity limits. Tribes must meet criteria similar to Montana state laws; Compact signed by State and Tribes, but not ratified by Congress.
Jicarilla Apache	1992	40,000	New Mexico	Off-reservation marketing allowed subject to applicable Federal and State laws.
Northern Cheyenne	1992	91,330	Montana	Off-reservation marketing permitted, with some qualifications; marketing outside of Tongue and Rosebud Basins subject to State law.
Salt River Pima-Maricopa	1988	122,400	Arizona	Provisions to lease and/or exchange portions of entitlement with other entities involved in settlement.
San Carlos Apache	1992	77,434	Arizona	Off-reservation marketing provisions allow leasing of Tribal CAP waters in three-county region.
San Luis Rey	1988	16,000	California	Marketing provisions eliminated from Bill; some limited exchanges allowed with local entities.
Tohono O'odham	1982	76,000	Arizona	Off-reservation marketing allowed within Tucson Active Management area with no restrictions.
Ute	1992	481,000	Utah	Marketing off-reservation allowed (not in Lower Colorado Basin), but that portion of Tribe's right changed to State (Utah) right during its use off-reservation.

*The date is the year Congress ratified the settlement. In the case of Fort Peck, it is the year Montana and the Fort Peck Tribes signed the compact.

**The quantity is the total amount of water (diversion right) in acre feet per year. In most cases this is significantly more than the quantity of water a tribe may be allowed to market.

examples of this are the San Luis Rey and Colorado Ute settlements. As the respective bills moved through Congress the water marketing provisions crafted during the negotiations were substantively changed. The San Luis Rey Settlement Bill, as introduced, included authority for the Bands to use, lease, sell, and manage water resources on or off the reservation, subject to certain conditions (Senate Report 99-485). This broad provision is eliminated in the final legislation, which specifies that water be used by the Bands on their reservation or exchanged with identified local water users (P.L. 100-675, 1988, Section 106(c)).

Substantive changes made to the Colorado Ute settlement took a somewhat different form, but reflected similar concerns. The original bill was amended to eliminate any reference to the sale, lease, or other disposition of water contemplated in the Agreement. Instead, a provision now states that the Indian Intercourse Act will not apply to tribal reserved water, but any and all other laws pertaining to the Colorado River are unaffected by the legislation (P.L. 100-585, Sec. 5). As a result, the legislation tried to be neutral on the question of the marketability of Indian water rights, with Congress preferring that the issue be settled by future litigation (Senate Report 100-555).

Concern over tribal marketing is also evidenced by provisions which make any tribal right marketed off-reservation subject to state law. The language in these sections varies from making a tribe's use subject to criteria that is similar to state requirements (e.g., Fort Peck Compact regarding off-reservation in-state uses) to changing a tribal right to a state right during its use off-reservation (as in the Colorado Ute and Ute settlements). The implications of such language are potentially far-reaching. For example, one major tribal concern about this language was that tribal rights, when leased off-reservation, could be lost due to non-use, as is common under state laws, a practice completely contrary to basic premises of *Winters* rights. In several recent settlements this issue has been addressed through provisions which specify that non-use by a subcontractor of the tribe does not result in forfeiture or other loss of the tribal right, as illustrated in Jicarilla Apache Settlement Act (P.L. 102-441, Sec. 7(e)). Even with such assurances, however, the question of what it means for tribal water rights to become state rights go to the heart of concerns about the nature of *Winters* rights and their uses, and especially highlight potential issues about the control and management of water resources (Williams, 1990). It is apparent that there has been considerable disagreement over the meaning of such language, even among those who agreed to it in Congress. An example is the debate over the language in the Colorado Ute Settlement (Senate Report 100-555; *Congressional Record*, 100th Cong., 2nd Sess., 1988, 148, S:16248-16243).

Given the varying scope and nature of water marketing provisions emerging from these settlements, it is difficult to draw strong conclusions about marketing tribal waters. Clearly, many instances exist where tribes, states, and other water users have developed what appear to be mutually beneficial solutions to persistent water conflicts. In settlements like the Fort McDowell, Salt River Pima-Maricopa, and San Carlos Apache tribes, states and local water users have been able to quantify rights, obtain more certain supplies, and create market opportunities that potentially benefit all parties. But none of this is without cost or controversy, and the marketing of Indian water remains a highly controversial concept (McCool, 1990).

None of this should surprise anyone familiar with Western water institutions, legal or otherwise. None of this should come as a surprise to anyone familiar with Indian resource development issues, either. It is significant, and encouraging, that many of the difficult issues associated with Indian water marketing are being worked out in these settlements, seemingly to the satisfaction of all involved parties. But not all affected or interested parties are involved in the negotiations, and some of these settlements have been

significantly changed by Congress as they have been scrutinized. This is especially true in terms of marketing provisions, which have the potential to affect a broad spectrum of parties. In both the Colorado Ute and Fort Peck cases, for example, the settlements, as initially presented to Congress, were challenged by downstream states who have not been parties to the settlement negotiations and were concerned with the potential impacts of off-reservation marketing provisions. In the Colorado Ute case, there are provisions restricting the disposal of waters into the lower Colorado River Basin (P.L. 100-585, Sec. 5(b)). Congress has yet to pass a bill ratifying the Fort Peck Compact, though three have been introduced. The most recent version prohibited the Fort Peck Tribes from marketing their water out of the Missouri River Basin and proposed, for the first time, a \$50 million Tribal economic recovery fund (H.R. 5098, 103rd Cong., 2nd Sess.). It is notable that, while Congress also removed marketing provisions from the Ak-Chin Settlement Act before ratifying it in 1984, a 1992 Amendment now permits some off-reservation marketing for the community (P.L. 102-497, Sec. 10).

CONCLUDING COMMENTS

Indian water marketing is in its infancy, and its dimensions are still evolving. It is understandable that it is a controversial subject – in both the theoretical and practical realm. However, it is also possible to look at this issue as an opportunity. Clearly several tribes, states, and other water users have done just that, with some encouraging results. None of these settlements is without problems, and each is necessarily unique and grounded in local context. But it seems possible – and necessary – to recognize the rights of tribes to put their water resources to appropriate use, and to work out accommodations that will suit both Indian and non-Indian interests. And water marketing, in all its various guises, may well be the appropriate use in many contemporary situations. To restrict tribal water management options to inflexible uses that are no longer economically viable clearly diminishes the value of the water right, and simply does not make sense in light of emerging policies which seek to put water to its most productive use.

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