

LAW in ACTION

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THE NAVAJOS AND WATER

Everyone knows that there is not much water on the Navajo Reservation. Often Navajo sheepherders must travel far to find a few drops of the precious liquid to feed their animals. One can see sand dunes and dry mesas all over. The ground water table is getting lower and lower.

Yet not far from the middle of Navajoland flows one of America's mightiest rivers, the Colorado. All of the water from the Rocky Mountains in Wyoming, Colorado and New Mexico runs into this great river, as well as the water from Utah, Arizona, Nevada, and California. So much water fills the Colorado River that its water has quickly filled the 180 mile long Lake Powell behind Glen Canyon Dam near the reservation.

If the Tribe could use the water in that River it could make the reservation bloom, just like parts of California and Arizona which were once desert before they were irrigated. But can the Tribe claim any of this water?

The answer is, yes. The United States Supreme Court in 1908, gave Indian Tribe's extensive rights to the use of water on or near their Reservations.

The law established by the Supreme Court reserves enough water for each Indian reservation to take care of all the needs of the Indians both presently and in the future. Along with land, in other words, on which the Indians could live, the U.S. Government granted water rights in nearby lakes, rivers and streams to fulfill the aims of the treaties or orders setting up the reservations.

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This Indian claim to water is a powerful one which, if properly asserted by the Navajo Tribe, will meet all the water needs of the Navajo Indians for the future. Recently the Supreme Court of the United States declared that the tiny Lower Colorado River Indian Tribes had a right to about 1,000,000 acre-feet of Colorado River water a year because of their reserved water rights. By contrast, the whole State of Arizona got only 2.8 million annual acre-feet, while California got 4.4 million annual acre-feet. And these small tribes, with only 135,000 irrigable acres of land, had a right to this water even before they used it. The Supreme Court thus took care of all possible future tribal needs and disregarded the relatively small amount of water now being used by the tribes.

The Navajo Tribe's water claim does not depend upon the amount of water now being used by the Tribe. Nor does it depend upon Arizona's Upper Basin allocation of 50,000 acre-feet. The amount of water to which the Navajo Tribe is entitled depends only upon what the Tribe needs now and in the future. And those needs are extensive. The 50,000 acre-feet mentioned in Res. CD-108-68 is owned by Arizona and not by the Navajo Tribe. The

Tribe's claim is directly against the 13,000,000 annual acre-feet in the Colorado River.

Moreover, the Supreme Court has stated many times that the Indian water need not be used for any special purpose. Indians may thus use their water for agriculture, livestock, industry, or sale to others. Water is extremely valuable in the Southwest. This means that water owned by Indian tribes in the area is worth its weight in gold or oil. While the Tribe's land is valuable, the water is invaluable.

Unfortunately the Navajo Tribe, which is the nation's largest Indian tribe and thus may potentially have the largest Indian claim to water, has not yet perfected its rights to water. In fact, no one has yet even studied the exact amount of water which would be necessary to make the reservation bloom.

When the Navajo Tribal Council passed Resolution CD-108-68 on December 11, 1968, it waived the Tribe's water rights for 50 years. Fifty years from now, the Tribe will have a very difficult time actually acquiring the Colorado River water because long before then, all of the water will be under actual use by the states.

In order to obtain the power plants provided for in Resolution CD-108-68, the Navajo Tribe does not need to waive its water rights. The Tribe could guarantee the power companies sufficient water to run the plants and retain its claim against the remainder of the river water.

On May 28, 1969, the water rights of the Tribe were again before the Tribal Council. On that day, DNA distributed a complete memorandum on the water rights of the Tribe to each Tribal Council member who was present at the Council Chambers. We felt that it was important to do that because so far as we could tell, the Councilmen had never been fully informed about the Tribe's water rights.

On June 3, 1969, the Tribal Council passed a Resolution which they intended to save the Tribe's water claim. The Resolution is supposed to rescind or take back the Tribe's waiver made in December. From a careful study of the June 3rd Resolution, however, it appears that the legal effect of the Resolution does not save the Tribe's water claim. DNA is still studying the matter to determine exactly what should be done.

Fortunately it is not yet too late to protect the Navajo's interests to water. It is possible to recall and redraft CD-108-68 and the resolution concerning Page to protect the Tribe's rights while still guaranteeing the power companies a minimum annual amount of water to run the power plant. The Tribe's rights to water are too valuable and important to be thrown away without this type of detailed reconsideration. The Council could delegate authority to a Special Water Committee to investigate all aspects of the water issue: legal rights, extent of tribal claims, and ways to protect this water and use it. And the Special Water Committee should take the time necessary to thoroughly study the matter.

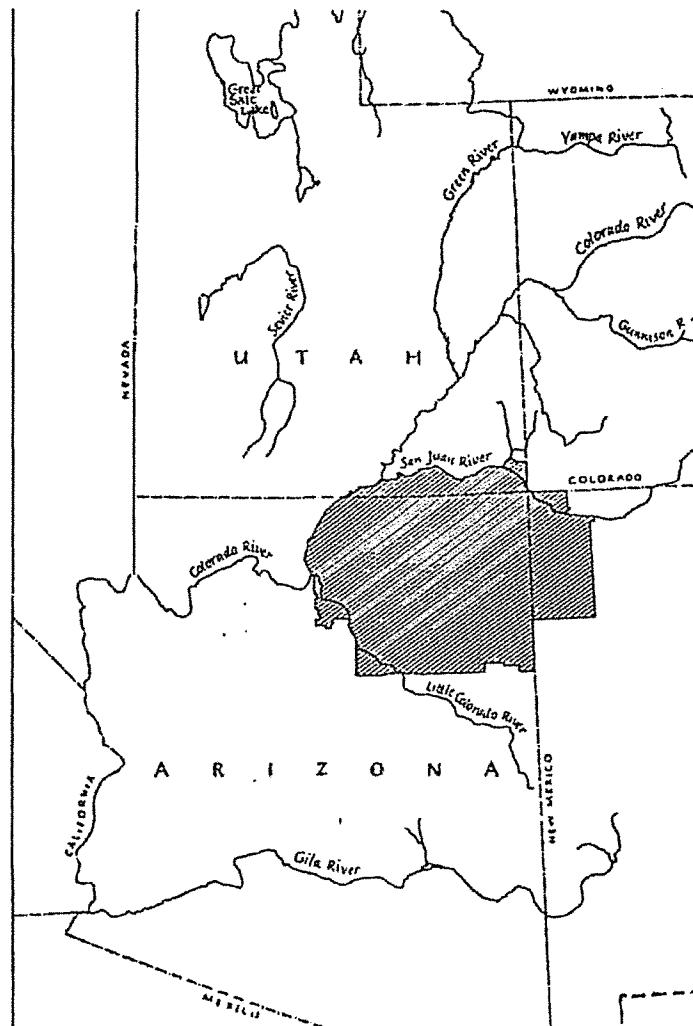
In the very near future, the Tribe, or the United States government in association with the Tribe, should bring an action in court to perfect the Tribe's water claim and obtain a court order awarding the Tribe a certain amount of water for its exclusive ownership.

The question has been raised about how the Tribe can get the water out of the Colorado or San Juan Rivers to put it to actual beneficial use on the Reservation. It is true that it costs money to pump the water out of the River and transport it to various places on the Reservation where it may be used. But the Navajo Tribe can seek the funds to develop use of its water from the same place Arizona seeks funding of Central Arizona Project - the United States Congress. And if the Tribe pushes well and hard enough, like Arizona has, it can obtain the necessary funds.

Water is absolutely vital to the continuation and development of the Navajo Indian Reservation. The Tribe has a valid legal claim to enough water from the Colorado River system (including its tributaries) to make the Reservation productive. Rather than waiving that right, the Tribal Council should assert it and perfect it and begin taking steps to have the water pumped out of the River and piped to places all over the Reservation. But the Tribe has the claim to the water whether it has used the water or not in the past. The right to use any water awarded the Tribe is owned by the Tribe, just like the Tribe now owns its oil, gas, uranium, timber and coal.

The Navajo Tribe is in the same situation as the Indians on the Lower Colorado (Yuma, Cocopah, Chemehuevi, Fort Mohave, Colorado River) who were awarded about 1,000,000 annual acre-feet in Arizona v. California in 1963. In that case the Supreme Court said at 373 U.S. 598-599:

"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 can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were 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 and to the animals they hunted and the crops they raised."



The Navajos have the right to use as much water from the Colorado, San Juan and Little Colorado Rivers as is necessary to make the Reservation productive.