

NAVAJO WATER RIGHTS: PULLING THE PLUG ON THE COLORADO RIVER?

WILLIAM DOUGLAS BACK* and JEFFERY S. TAYLOR**

INTRODUCTION

The Colorado River arises largely within the states of Colorado, Wyoming, Utah and New Mexico.¹ It drains some 242,000 square miles in six states, an area comprising about one-twelfth of the land area of the lower 48 states.² The virgin flow of the river has recently been calculated to average 13.5 million acre-feet (a/f) per year at Lee's Ferry,³ a meager amount of water for such a vast area of land. In addition to being subject to increasing demand for energy production, Colorado River water is called upon to service many important agricultural areas of the country.⁴ It also provides municipal water to such major cities as Los Angeles, Denver, San Diego, Salt Lake City and Albuquerque, though none of these is located within its natural drainage system. Yet the basin is so water-deficient that for years there has been discussion of water importation plans to augment limited supplies in the face of rising demand.⁵

Within the area drained by the Colorado River lies the 14-million-

*Attorney, Office of the Solicitor, Department of the Interior; B.A. Stanford University, 1973; J.D. Arizona State University, 1976.

**Office of Navajo Land Administration, the Navajo Tribe; B.A. University of New Mexico, 1972; J.D. University of New Mexico, 1978.

The opinions expressed in this article do not necessarily represent the views of the Department of the Interior or the Navajo Tribe.

1. Weatherford & Jacoby, *Impact of Energy Development on the Law of the Colorado River*, 15 NAT. RES. J. 171, 176 (1975). In fact, about 83% of the flow of the Colorado originates in these four Upper Basin states. *Id.* at 182.

2. Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 1 (1966).

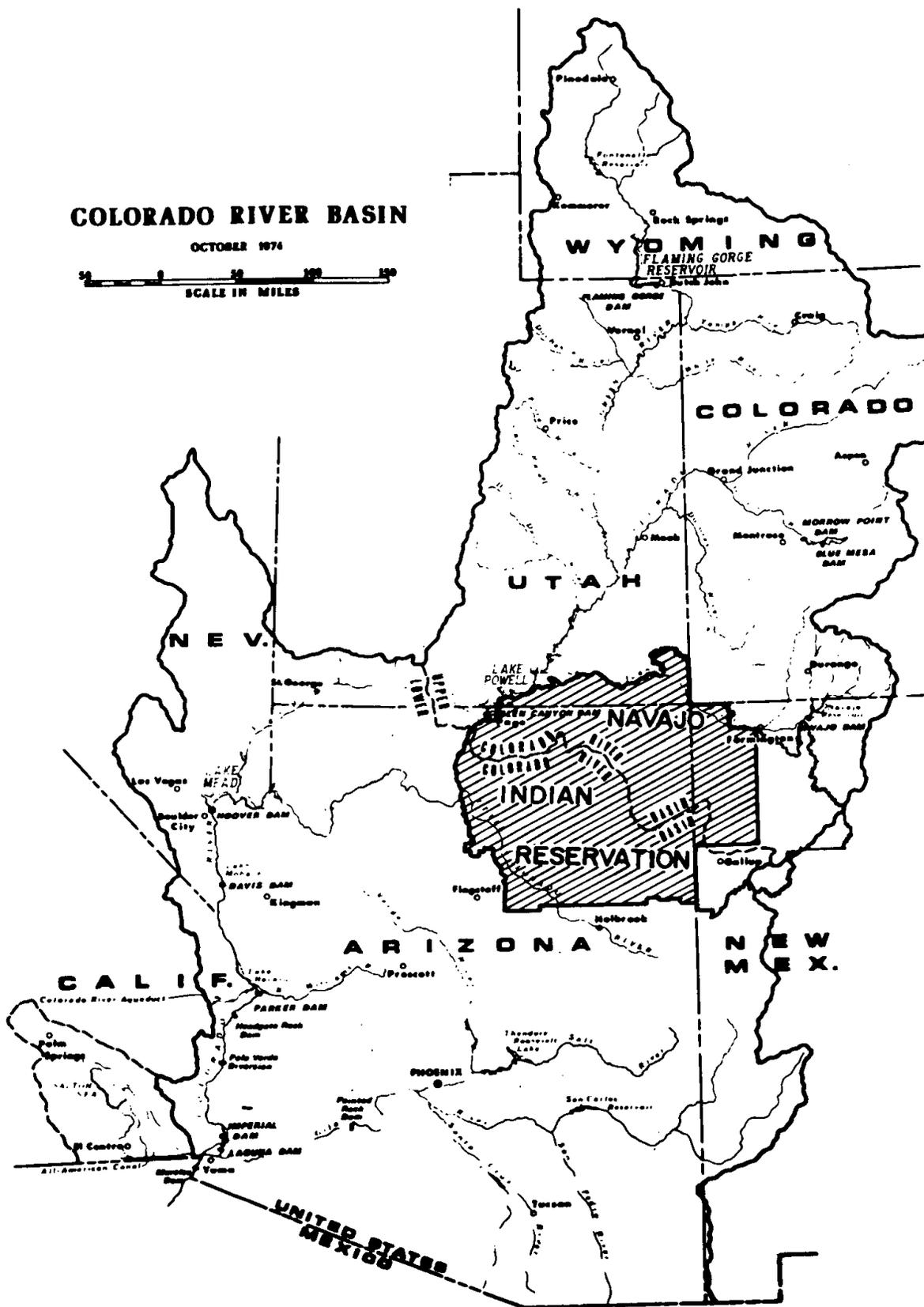
3. Weatherford & Jacoby, *supra* note 1, at 184. An acre-foot of water is the amount of water sufficient to cover an acre of land to a depth of one foot. There are approximately 325,000 gallons in one acre-foot of water.

4. Among these are the Imperial, Coachella and Palo Verde irrigation districts in California. Meyers, *supra* note 2, at 8.

5. See generally R. JOHNSON, NATIONAL WATER COMMISSION, LEGAL STUDY NO. 7, MAJOR INTERBASIN TRANSFERS: LEGAL ASPECTS (preliminary draft 1971). In an apparent attempt to protect the water-rich basins from any responsibility to assist the dry Colorado River Basin, Congress has for two decades prohibited the expenditure of federal funds to study interbasin transfers. See Colorado River Basin Project Act, 43 U.S.C. § 1511 (1976). See also Reclamation Safety of Dams Act of 1978, Pub. L. No. 95-578, § 10, 92 Stat. 2471 (1978). The 1,440 mile-long Colorado River Basin provides less water per unit area (sixty a/f per square mile) than any other major river basin in the United States. See Anderson & Keith, *Energy and the Colorado River*, 17 NAT. RES. J. 157 (1977).

COLORADO RIVER BASIN

OCTOBER 1974



acre, 25,000-square-mile Navajo Indian reservation, home of approximately 160,000 members of the Navajo Nation. The reservation straddles the hydrologic divide separating the watershed of two important tributaries of the Colorado River, the Little Colorado and the San Juan. Tribal lands are bounded on the west by the main-stream of the Colorado River for a distance of some 61 miles, from Lee's Ferry, Arizona south to its junction with the Little Colorado. The Navajo reservation formerly included the mainstream of the Colorado River for approximately 75 miles from Lee's Ferry north to the confluence of the San Juan River, but the Act of September 2, 1958,⁶ exchanged lands between the United States and the Navajo Tribe to establish a reservoir (Lake Powell) at Glen Canyon Dam.⁷ Approximately 44 percent of reservation lands drain into the San Juan; 49 percent drain into the Little Colorado; and seven percent drain directly into the Colorado.

The Navajo people have occupied this area of southeast Utah, northwest New Mexico and northeast Arizona for hundreds of years;⁸ even today they live in a sparse and seemingly hostile environment with inadequate water development, poor rangeland, and minimal economic structure. Reduced to a population of less than 9,000 in 1868, the tribe is now growing at a rate averaging 2.5 percent per year.⁹ Though many Navajos continue to exist in large part on a traditional economy based on stock raising and agriculture,

6. Pub. L. No. 85-868, 72 Stat. 1686 (1958).

7. The Executive Order of May 17, 1884 provides in part as follows:

It is hereby ordered that the following described lands in the territories of Arizona and Utah be, and the same are, withheld from sale and settlement and set apart as a reservation for Indian purposes, viz: Beginning on the 110th degree of west longitude at 36 degrees and 30 minutes north latitude (the same being the northeast corner of the Moqui Indian Reservation); thence due west to the 111th degree 30 minutes west longitude, thence north *to the middle of the channel of the Colorado River, thence up and along the middle of the channel of said river to its inter-section with the San Juan River, thence up and along the middle channel of the San Juan River to the west boundary of Colorado . . .* (emphassis added).

See also Executive Order of November 19, 1892 restoring lands west of 110° west longitude in Utah to the public domain and the Act of March 1, 1933 (47 Stat. 1418) adding lands to the reservation, including lands restored to the public domain by the 1892 executive order.

8. For a general discussion of Navajo aboriginal use and occupancy see R. Young, *The Role of the Navajo in the Southwestern Drama* 2-6 (1968). For a general reference to the various treaties, acts of Congress, and executive orders establishing the Navajo Reservation beginning with the 1868 Treaty see J. Correll & A. Dehiya, *Anatomy of the Navajo Indian Reservation: How It Grew* (1978) (prepared by the Navajo Tribe, Office of Navajo Land Administration). See also R. Young, *The Navajo Yearbook: 1951-1961, A Decade of Progress* 252-63 (1961) (prepared for the Department of the Interior by the Bureau of Indian Affairs, Navajo Area Office).

9. See R. Young, *The Navajo Yearbook: 1951-1961 A Decade of Progress* 315-21 (1961) (prepared by the Bureau of Indian Affairs, Navajo Area Office).

in recent years large scale mineral production, especially coal and uranium, has created some employment and provided capital for the tribal government. Still, about 90 percent of the homes on the reservation are without electricity, compared to only one percent nationwide, and less than 20 percent of reservation homes have indoor water or plumbing facilities, compared to 85-90 percent in the country as a whole. Water must be hauled from community wells often located miles from homes.¹⁰

If Navajo *Winters* rights¹¹ ever are adjudicated, the potential award is staggering. Though little water is now being utilized in the reservation area, potential development to a level commensurate with the rest of the country would require large diversions. Even assuming a practicably irrigable acreage figure as low as 500,000 acres¹² (four percent of the entire land base), the tribal entitlement would be approximately 2 million acre feet of water per year.¹³ Arizona's entitlement under *Arizona v. California*¹⁴ is only 2.8 million acre feet per year.

Whether or not Navajo water rights are settled (quantified) by negotiation,¹⁵ litigation or other means, the decisionmaker must analyze the Navajo right by using the "law of the river"—treaties, acts of Congress, judicial decisions and other relevant documents. The purpose of the following discussion is to identify and discuss the effect of this "law of the river" on the Navajo water entitlement.

10. See The Navajo Nation Overall Economic Development Program 20, 40 (1974) (prepared by the Navajo Tribe, Office of Program Development). See also Graymountain, Fact Sheet on Conditions Under Which Navajos Live (1978) (unpublished memorandum by Office of Veterans Affairs, Navajo Nation).

11. The *Winters* doctrine was enunciated in *Winters v. United States*, 207 U.S. 564 (1908). In general terms, the doctrine is that a reservation of land by the federal government for the benefit of an Indian tribe carries with it an implicit reservation of water, the amount of which is to be determined by the purpose of the reservation.

12. This estimate assumes that the irrigable Navajo acreage of 13 million acres (including 1.6 million acres of excellent soil, 3.5 million acres of good soil, 4.4 million acres of fair soil and 3.4 million acres of poor soil, Young, *supra* note 9, at 364-65) will not be the sole basis for determining the Navajo water entitlement. One must be cognizant of the heretofore undefined standard of "practicably irrigable acres" and the potential application of economic considerations that might limit and define the Indian right. Even so, it is our opinion that the 500,000 acre figure could be economically and readily obtained using only small diversion and retention structures on existing streams that flow through the reservation. Assuming that the Navajo entitlement is measured solely on the quantum of irrigable acres on the reservation the award might reasonably be 50 million acre-feet. See note 13 *infra*.

13. Assuming an irrigation diversion requirement of approximately four acre-feet of water per acre.

14. 373 U.S. 546 (1963).

15. The present policy of the President and the Department of the Interior is negotiation of possible water disputes. There is, of course, nothing to prohibit negotiation and negotiated settlements after the commencement of a lawsuit.

COLORADO RIVER COMPACT

The Colorado River Compact,¹⁶ an interstate agreement between the states of California, Arizona, Nevada, Utah, Wyoming, New Mexico and Colorado, was negotiated by representatives of those states in 1922 and became effective after congressional ratification in 1928¹⁷ and presidential proclamation in 1929.¹⁸ Negotiation of the compact was largely a result of the clamor by California irrigation and economic interests to ensure a reliable supply of Colorado River water for development, and to prevent flood damage along lower stretches of the river.¹⁹ Flooding occurred even though the entire natural flow of the river had been appropriated by 1916.²⁰ These interests lobbied for and promoted the construction of a dam on the downstream portion of the Colorado to harness the river. The states of the upper Colorado River Basin (New Mexico, Colorado, Wyoming and Utah)²¹ originally opposed such a plan for fear that the construction of storage facilities on the mainstream would permit a rapid expansion of downriver uses, thereby forming the basis for claims of appropriative rights to much of the water, and perhaps precluding its future availability to the more slowly developing Upper Basin.²² In order to reach a solution to this dilemma, the Colorado River Compact was negotiated to guarantee that development on the lower river made possible by a federally funded dam would not jeopardize or limit the eventual development of water resources by the upriver states. The compact allocates to the states of the Upper Basin and the states of the Lower Basin, (California, Nevada and Arizona) the beneficial consumptive use of 7.5 million acre feet per basin per year.²³ The Lower Basin is entitled to an additional allocation of 1 million acre feet annually if such an amount is available.

16. 70 CONG. REC. 324 (1928).

17. Congress consented to the compact in the Boulder Canyon Project Act, 43 U.S.C. § 617 l(a) (1976).

18. 46 Stat. 3000 (1929).

19. See generally N. HUNDLEY, WATER AND THE WEST chs. 2-3 (1975).

20. J. TERRELL, THE WAR FOR THE COLORADO RIVER 290 (1965).

21. These four states were designated "upper basin states" by Article II of the Colorado River Compact. 70 CONG. REC. 325 (1928). Arizona, Nevada and California were by that Article designated "lower basin states." *Id.*

22. The doctrine of prior appropriation governs water rights in all Colorado River Basin states except California. In California, the doctrine has significant weight. The Upper Basin states were justified in their concern—the Lower Basin population exceeded the population of the Upper Basin at this time by at least two to one. Added to this imbalance is the fact that the Lower Basin states have longer growing seasons and land contours more conducive to irrigation.

23. The term "consumptive use" is not defined in the Colorado River Compact. It was later defined by Congress in the Boulder Canyon Project Act as diversions less return flows to the river.

Although the Indian population in the arid Southwest at this time may have exceeded the non-Indian population, no Indians were invited to the compact negotiations and none came.²⁴ However, Indian rights in and to the Colorado River were not overlooked by the drafters of the Colorado River Compact. Secretary of Commerce Herbert Hoover, the designated federal representative to the Colorado River Compact Commission and its chairman, recognized the need to include a provision on Indian water claims. He knew the Commerce Clause of the United States Constitution required congressional consent to the Colorado River Compact,²⁵ and felt Congress might raise the issue of Indian rights when it considered the compact. The minutes of the Colorado River Compact Commission meeting include this statement by Secretary Hoover:

The Indian question is always prominent in every question of the West, (and you always find some congressman who is endowed with looking after the Indian, who will bob up and say, "What is going to happen to the poor Indian?" We thought we would settle it while we were at it).²⁶

Hoover's "settlement" of the question of Indian rights is found in Article VII of the compact which provides: "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes."²⁷ The decision to acknowledge that an Indian claim exists to the waters of the Colorado River but not to deal substantively with the issue was handed down from the 1922 Colorado River Compact Commission to the drafters of the 1948 Upper Colorado River Basin Compact.²⁸

BOULDER CANYON PROJECT ACT

In 1928 the Boulder Canyon Project Act²⁹ [hereinafter BCPA] authorized the construction of works for the protection and development of the Colorado River Basin. In particular, the BCPA autho-

24. HUNDLEY, *supra* note 19, at 57.

25. Article I, section 10, clause 3 of the United States Constitution provides in pertinent part: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State. . . ."

26. R. OLSON, *THE COLORADO RIVER COMPACT* 43 n. 81 (1926). Olson states that the portions of the minutes in parentheses may have been deleted by Secretary Hoover when correcting the minutes. *Id.* Secretary Hoover's statement, made at the twentieth meeting of the Colorado River Compact Commission on November 19, 1922, is virtually the only time Indians or Indian water rights were discussed by the Commission.

27. 70 CONG. REC. 325 (1928).

28. *See* discussion of the Upper Colorado River Basin Compact *infra*.

29. 43 U.S.C. §§ 617-617v (1976).

rized the construction and operation of a dam at Boulder Canyon (now called Hoover Dam) and a reservoir capable of storing at least 20 million acre feet of water (Lake Mead). The BCPA also approved the Colorado River Compact.³⁰

In Section 6 of the BCPA,³¹ Congress listed water use priorities for water impounded by the project works. First priority as given to "river regulation, improvement of navigation, and flood control." Second priority was given "for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Art. VIII" of the Colorado River Compact.³² In Section 13(b) of the BCPA, Congress provided:

The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River compact.³³

In *Arizona v. California*,³⁴ Arizona filed a complaint³⁵ alleging that pursuant to the Colorado River Compact and the BCPA, Arizona was entitled to 2.8 million acre feet of Colorado River water each year.³⁶ The United States requested, and was granted, leave to intervene on behalf of approximately 25 Indian reservations and other federal enclaves located throughout the 132,000 square mile lower basin.³⁷ The Supreme Court, however, chose to adjudicate

30. *Id.* §617 l(a).

31. *Id.* §617e.

32. Article VIII of the Colorado River Compact provides that present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by the terms of the Compact. 70 CONG. REC. 325 (1928). The Supreme Court in *Arizona v. California*, 373 U.S. 546 (1963), held that Indian water rights that had vested before the act became effective on June 25, 1929, are "present perfected rights" under the BCPA. *Id.* at 600. Article VIII also deals with "unperfected rights." Unperfected rights are specifically limited by Article VIII of the compact to the extent that they "shall be satisfied solely from the water apportioned to that Basin in which they are situated." 70 CONG. REC. 325 (1928). Not all Navajo rights to water were perfected as of June 25, 1929. For instance, part of the Navajo reservation in Utah was established in 1933. *See* Act of March 1, 1933, 47 Stat. 1418. It is doubtful that the language in Article VIII dealing with unperfected rights was meant to apply to Indian rights because it would directly conflict with the Article VII command that nothing in the compact affects the obligations of the United States of America to Indian tribes. 70 CONG. REC. 325 (1928).

33. 43 U.S.C. §617 l(b) (1976).

34. 373 U.S. 546 (1963).

35. The original jurisdiction of the Supreme Court was invoked pursuant to Article III, section 2, clauses 1 and 2 of the United States Constitution. 373 U.S. at 550 n. 1. 28 U.S.C. §1251(a) (1976) provides that "[t]he Supreme Court shall have original and exclusive jurisdiction of: (1) All controversies between two or more States."

36. Arizona also asked the Supreme Court to declare that California is entitled to the beneficial consumptive use of 4.4 million acre-feet of water each year.

37. 344 U.S. 919 (1953); S. Rifkind, Report of the Special Master 6 (1960) (*Arizona v. California*, 373 U.S. 546 (1963)). After the filing of the complaint by Arizona in the

water rights for only five of the Indian tribes.³⁸ In so doing, the Court adopted Special Master Rifkind's conclusion as to which claims filed by the United States on behalf of Indian tribes were appropriate for adjudication.³⁹ Rifkind did not find it appropriate to adjudicate the Navajo claims. Presumably, this decision was made because of the special master's conclusion that the BCPA did not apply to mainstream Colorado River waters above Lake Mead. The Supreme Court, however, disagreed with the special master on this issue and held the BCPA did apply to the mainstream of the Colorado River above Lake Mead.⁴⁰ The Court held the BCPA applied to all mainstream waters below Lee's Ferry (approximately 275 miles upstream from Lake Mead). Curiously, however, the Supreme Court did not then proceed to address the Navajo claim to the mainstream above Lake Mead and below Lee's Ferry.⁴¹

UPPER COLORADO RIVER BASIN COMPACT

The Upper Colorado River Basin Compact [hereinafter UCRBC], which allocates Colorado River water among those states situated above Lee's Ferry, was signed at Santa Fe, New Mexico on October 11, 1948. Congress ratified the UCRBC⁴² and it was approved by a presidential representative on April 6, 1949.⁴³ Upon approval by the

Supreme Court in 1952 the case was referred to a special master to take evidence, find facts, state conclusions of law, and recommend a decree. The actions of the special master were subject to the consideration, revision or approval by the Court. *Arizona v. California*, 373 U.S. at 551.

38. 373 U.S. at 595. The five tribes are on lands bordering the mainstream of the Colorado River below Lake Mead.

39. *Id.*

40. *Id.* at 590-91.

41. It is conceivable that the Court merely failed to recognize the impact of its decision as to the applicability of the BCPA above Lake Mead. Alternatively, the Supreme Court may have implicitly held that the Navajo Tribe has a reserved water rights claim to only tributary, not main-stream, waters of the Colorado River. It is unlikely that the Supreme Court intended to hold that the Navajo Tribe had no claim to the main-stream because of the fact that the western border of the Navajo reservation is the Colorado River for a distance of at least 61 miles between Lake Mead and Lee's Ferry. This confusing aspect of the case may ultimately be clarified as the Court specifically provided for the later exercise of the Court's jurisdiction in *Arizona v. California*, 376 U.S. 340 (1964):

Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

Id. at 353.

42. Act of April 6, 1949, Pub. L. No. 81-37, 63 Stat. 31. The legislatures of the signatory states ratified the compact prior to congressional ratification.

43. *Id.*

President, the UCRBC became effective and binding upon the signatory states. The UCRBC, by its terms, is subject to the provisions of the 1922 Colorado Compact.⁴⁴

The interpretation of two articles of the UCRBC will have a significant impact on assertions of Navajo water rights. Article VII of the UCRBC provides:

The consumptive use of water by the United States of America or any of its agencies, instrumentalities or wards shall be charged as a use by the State in which the use is made; provided, that such consumptive use incident to the diversion, impounding, or conveyance of water in one State for use in another shall be charged to such latter State.⁴⁵

Article XIX of the UCRBC provides: "Nothing in this Compact shall be construed as: (a) Affecting the obligations of the United States of America to Indian tribes."⁴⁶ The effect of these articles on Indian water rights claims was discussed by the UCRBC Commission. The discussions are contained in the official record of the UCRBC Commission proceedings.⁴⁷ It is necessary to look to this official commission record to establish the meaning of the UCRBC.⁴⁸

In a letter dated December 15, 1947, the Chairman of the UCRBC Commission requested that the Department of the Interior answer two specific questions: (1) What rights to the use of the Upper Colorado River water does the federal agency have or claim on behalf of the United States? and (2) What particular language should be incorporated in the UCRBC to protect rights to the use of Upper Colorado River water claimed by the United States?⁴⁹ The Acting Commissioner of Indian Affairs responded by stating that rights of Indian reservation lands to the water of the Colorado River were perfected prior to 1922 and that these perfected rights are recognized by Article VII of the Colorado River Compact.⁵⁰ Further-

44. Article 1(b) of the UCRBC states that "[i]t is recognized that the Colorado River Compact is in full force and effect and all of the provisions hereof are subject thereto."

45. Act of April 6, 1949, Pub. L. No. 81-37, 63 Stat. 31.

46. *Id.*

47. UPPER COLORADO RIVER BASIN COMPACT COMMISSION, NEGOTIATION OF UPPER COLORADO RIVER BASIN COMPACT SIGNED AT SANTA FE, NEW MEXICO ON OCTOBER 11, 1948 (1948) (3 vols.).

48. *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929). This rule does not apply to oral statements not written and not communicated to ratifying bodies. *Arizona v. California*, 292 U.S. 341, 359-60 (1934). The negotiations contained in the official record of the Upper Colorado River Basin Commission were reported to Congress by Harry W. Bashore, the representative of the United States to the commission. See Act of April 6, 1949, Pub. L. No. 81-37, 63 Stat. 31.

49. See *supra* note 47, vol. 2, meeting 6, at 22.

50. *Id.* vol. 1, meeting 5, at 49.

more, he stated the Department of the Interior concluded that by the terms of Article VIII of the Colorado River Compact, Indian water rights "are not impaired" by the UCRBC.⁵¹ The Acting Commissioner also suggested a provision to protect the Indian water rights.⁵² During a commission meeting, Geraint Humphreys, Chief Irrigation Counsel, Office of Indian Affairs, Department of the Interior, had the following discussion with UCRBC Commissioner Carson concerning the effect of the proposed compact provisions on Indian water rights:

MR. HUMPHREYS: The Indian Service, the Secretary of the Interior, nor those of us who have been sent here by the Department of the Interior and the Indian Service, could possibly give any of those rights away. We couldn't possibly shrink those rights whatever they may be even though in some instances they still are inchoate . . . [b]ut in view of some of the other provisions and in view of the explanation of this article that this compact contemplated that all instrumentalities and agencies of the United States were to require or acquire water rights under and in accordance with state laws—

COM. CARSON: Aside from Indians.

MR. HUMPHREYS: I haven't found that in here. Now if it means that, all right.

COM. CARSON: That is what it means.⁵³

In explaining the meaning of Article XIX(a), Commissioner Stone stated that, as to Indian water rights:

[T]he pattern for covering this subject was set by the Colorado River Compact to which these states are all signatories. It would be dangerous for these states to insert language in this compact on this subject which might not be acceptable to the other signatory states of the

51. *Id.*

52. The Commissioner proposed the following language as a Compact clause: Apportionment of water for which provision is made in this compact is subject to the first and prior water rights reserved for Indians, for Indian tribes, and for Indian reservations whether such first and prior water rights of the Indians are inchoate or covered by Federal court decrees.

Id. vol. 2, meeting 7, at 11.

53. *Id.* at 88-89. *But see* Sol. Op. M-36799, 76 Interior Dec. 357 (Dec. 10, 1969). In an oft-criticized opinion, *see* Weatherford & Jacoby, *supra* note 1, at 202 n. 103, the Solicitor concluded that the Upper Colorado River Basin Compact is binding on the Indian tribes. The Solicitor also concluded that if the states' share is insufficient to satisfy the Indian reserved rights, the available water supply can be augmented from other sources, i.e., inter-basin transfer. Article XVII of the UCRBC authorizes the importation of water by providing that "[t]he use of any water now or hereafter imported into the natural drainage basin of the Upper Colorado River System shall not be charged to any State under the apportionment of consumptive use made by this Compact." Act of April 6, 1949, Pub. L. No. 81-37, 63 Stat. 31.

Colorado River Compact States. I should like to state that these states in this compact cannot define or settle any questions which may exist relative to the obligation of the United States to the Indian tribes. It is not within the power of this Commission to do so. But we can say and make it clear, as was said in the original Colorado River Compact, that nothing in this compact shall be deemed to affect the obligations of the United States of America to the Indian tribes. We don't attempt either to take away or add to that obligation. That is a question which is beyond the power of this Commission.⁵⁴

COLORADO RIVER STORAGE PROJECT ACT

In 1956 the Colorado River Storage Project Act⁵⁵ [hereinafter CRSPA] was authorized by Congress for reasons similar to those underlying enactment of the Boulder Canyon Project Act in 1928; that is, to provide for comprehensive water development, regulate the flow of the Colorado River, store water for beneficial consumptive use, control floods, and produce power. An additional purpose was to make use of apportionments made to the upper states by the recently adopted UCRBC.⁵⁶ To carry out these purposes Congress directed the construction of several storage dams, including Glen Canyon Dam on the mainstream of the Colorado just below the Arizona-Utah border, and Navajo Dam on the San Juan River in New Mexico.⁵⁷ Glen Canyon Dam regulates the stream flow and generates hydroelectric power. Navajo Dam was designed to store and release water for downstream consumptive use, including municipal and industrial water for the Four Corners area, and the planned irrigation project on Navajo lands in the Farmington, New Mexico area. The project, now known as the Navajo Indian Irrigation Project, was

54. *Supra* note 47, vol. 2, meeting 7, at 89. A letter dated November 25, 1946 from the Acting Commissioner of Indian Affairs expressing the views of the Department on potential Indian water claims, *id.* vol. 1, meeting 5, at 49-52, is further support for the proposition that the UCRBC was not intended to include Indian claims. The letter was submitted so as to provide the compact negotiators with "full knowledge of the respective Indian Reservation irrigation requirements." *Id.* at 51. The Commissioner's "best estimate" of the amount of upper basin water required for the Navajo reservation irrigation projects situated in the upper basin was 813,000 acre-feet per year. The Commissioner relied on a June 7, 1946 planning report by the Bureau of Reclamation which projected ultimate annual diversions of 110,000 acre-feet in Arizona, 697,000 acre-feet in New Mexico (including 585,000 acre-feet from the San Juan River for the Shiprock Project) and 6,000 acre-feet in Utah. *Id.* at 49, 51-52.

55. 43 U.S.C. §§620-620k (1976).

56. *Id.* §620.

57. Other dams and reclamation projects authorized by Congress include the Curecanti, Flaming Gorge, Central Utah, San Juan-Chama, Hammond, Animas-La Plata and the Dolores project.

authorized in 1962 as a participating project in the CRSPA and currently is under construction south of Farmington, New Mexico.⁵⁸

Continuing the BCPA practice of requiring all users of water from project works to have a water delivery contract with the Secretary of the Interior,⁵⁹ the 1956 act had the practical effect of moving federal supervision upriver from Lake Mead to cover virtually the entire Basin.⁶⁰ The secretary literally took control of the river, apportioning water out of the federal projects by means of long-term contracts. The secretary is bound by the compacts and storage acts (except as to certain unperfected rights)⁶¹ though the contracting and delivery process leaves him much discretion as to who will get water.

As previous acts directed at development and control of the Colorado had done, the CRSPA avoided the issue of Indian water rights. The 1956 act does not mention reserved rights or the *Winters* doctrine. The primary discussion regarding Indians in the act's legislative history concerns the construction of Navajo Dam and authorization to study the proposed irrigation project to benefit the Navajos.⁶²

Sections 4(d),⁶³ 9,⁶⁴ and 14⁶⁵ of the CRSPA purport to make

58. See Act of June 13, 1962, Pub. L. No. 87-483, 76 Stat. 96 [hereinafter cited as the NIP Act]. This act is omitted from the official compilation of the United States Code. It can be found at 76 Stat. 96 and at 43 U.S.C.A. § 615ii-615yy (1964).

59. 43 U.S.C. § 620c (1976).

60. The Supreme Court in *Arizona v. California*, 373 U.S. 546, 590-91, held that the BCPA was intended to assert federal control of the river only at Lee's Ferry and below, not above Lee's Ferry.

61. See Art. VIII, Colorado River Compact, 70 CONG. REC. 324, 325 (1928); Boulder Canyon Project Act, 43 U.S.C. § 617e (1976).

62. See discussion of the Navajo Indian Irrigation Project *infra*.

63. Section 4(d) provides:

All units and participating projects shall be subject to the apportionments of the use of water between the Upper and Lower Basins of the Colorado River and among the States of the Upper Basin fixed in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively, and to the terms of the treaty with the United Mexican States (Treaty Series 994).

43 U.S.C. § 620c (1976).

64. Section 9 provides:

Nothing contained in this chapter shall be construed to alter, amend, repeal, construe, interpret, modify, or be in conflict with the provisions of the Boulder Canyon Project Act (45 Stat. 1057), the Boulder Canyon Project Adjustment Act (54 Stat. 774), the Colorado River Compact, the Upper Colorado River Basin Compact, the Rio Grande Compact of 1938, or the treaty with the United Mexican States (Treaty Series 994).

43 U.S.C. § 620h (1976).

65. Sec. 14 provides in part:

In the operation and maintenance of all facilities, authorized by Federal law and under the jurisdiction and supervision of the Secretary of the Interior, in the basin of the Colorado River, the Secretary of the Interior is directed to comply with the applicable provisions of the Colorado River Compact, the

the secretary subject to the Colorado River Compact, the UCRBC, and earlier legislation affecting rights on the river, and disclaim any effect on previous legislation dealing with the river. Although the secretary must conform to these previous agreements and legislation, each section denies any intent to affect Indian rights or else is silent on the subject.

NAVAJO INDIAN IRRIGATION PROJECT ACT

The development of a large-scale irrigation project has been envisioned since the establishment of the Navajo reservation on the banks of the San Juan River.⁶⁶ Early engineering studies showed a large irrigation project to be feasible, but because of the expense, its realization was delayed until passage of the CRSPA. In 1962 Congress authorized the Secretary of the Interior to construct the Navajo Indian Irrigation Project.⁶⁷ Concessions were necessary by the Navajo Tribe in order to get endorsement of the project. To obtain the political support of New Mexico the tribe agreed to endorse the San Juan-Chama Project⁶⁸ [hereinafter SJCP], a trans-basin diversion from the San Juan to the Rio Grande.⁶⁹ Because New Mexico's portion of the San Juan is a tributary of the Colorado River in the Upper Basin, New Mexico is entitled to the use of 11.25 percent of the Upper Basin's share of water pursuant to the UCRBC.⁷⁰ The Upper Basin's share of water is that which exceeds the required delivery of water for use in the Lower Basin. This amount has been recently calculated to approximate 5.8 million a/f per year, rather than the Colorado River Compact's presumed 7.5 million a/f per year.⁷¹ Assuming this lower estimate to be correct, New Mexico's

Upper Colorado River Basin Compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, and the Treaty with the United Mexican States, in the storage and release of water from reservoirs in the Colorado River Basin.

43 U.S.C. §620m (1976).

66. For a general synopsis of events preceding the construction of the Navajo Indian Irrigation Project see Price & Weatherford, *Indian Water Rights in Theory and Practice: Navajo Experience in the Colorado River Basin*, 40 LAW AND CONTEMP. PROB. 97 (1976).

67. 43 U.S.C.A. § §615ii-615yy (1964).

68. *Id.*

69. New Mexico might not have given NIIP the support needed for passage had the SJCP not been included in the bill. See *Colorado River Storage Project: Hearings Before the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs*, 83d Cong., 2d Sess. 240 (1959).

70. See Article III(a)(2) of the UCRBC, Pub. L. No. 81-37, 63 Stat. 31 (1949).

71. See Weatherford & Jacoby, *supra* note 1, at 185-87. The lower estimates of Upper Basin water generally consider a reduction of available water due to Mexico's entitlement of 1.5 million a/f per year.

share of Upper Basin Colorado River water that may be taken from the San Juan is approximately 650,000 acre feet per year. This must serve the entire 9,740 square miles of Upper Basin lands in New Mexico.⁷² Existing and prior uses, combined with the congressionally authorized 508,000 a/f diversion to the Navajo Indian Irrigation Project⁷³ and the 110,000 a/f diversion to the SJCP,⁷⁴ probably will deplete the flow of the river in any given year.

In the NIIP Act Congress required that shortages be shared on an equal basis by all users of water from NIIP project works.⁷⁵ Rather than determining priorities in times of shortage on the basis of priority of appropriation, NIIP requires that all users share proportionately in water shortages on the basis of respective authorized diversion. The act also provides as follows concerning Indian reserved rights:

None of the project works or structures authorized by sections 615ii-615yy of this title shall be so operated as to create, implement, or satisfy any preferential right in the United States or any Indian tribe to the waters impounded, diverted, or used by means of such project works or structures, other than contained in those rights to the uses of water granted to the States of New Mexico or Arizona pursuant to the provisions of the Upper Colorado River Basin compact.

72. WATER RESOURCES COUNCIL, UPPER COLORADO REGION STATE-FEDERAL INTER-AGENCY GROUP/PACIFIC SOUTHWEST INTER-AGENCY COMMITTEE, UPPER COLORADO REGION COMPREHENSIVE FRAMEWORK STUDY, app. V, at 3 (1971). The amount of available water in New Mexico would approximate 726,000 a/f if compact estimates of water supply were valid.

73. 43 U.S.C.A. §615jj (1964). The statute provides in part: "[T]he Secretary of the Interior is authorized to construct, operate, and maintain the Navajo Indian irrigation project for the principal purpose of furnishing irrigation water to approximately one hundred and ten thousand six hundred and thirty acres of land, said project to have an average annual diversion of five hundred and eight thousand acre-feet of water. . . ." Some of this diverted 508,000 a/f of water will eventually return to the flow of the San Juan River. Estimates vary as to the quantity of water the NIIP may consumptively use.

74. *Id.* §615pp provides that the initial stages of the SJCP are to be operated so that diversion shall not exceed 1,350,000 acre-feet of water in any period of ten consecutive years (an average depletion of 135,000 acre-feet per year). The Bureau of Reclamation (now called the Office of Water and Power Resources Service) has estimated, however, that the actual long-term average annual depletion by the SJCP will be approximately 110,000 acre-feet per year.

75. *Id.* §615ss(a) provides, in pertinent part, as follows:

No person shall have or be entitled to have the use [of water] for any purpose, including uses under the Navajo Indian irrigation project . . . except under contract satisfactory to the Secretary and conforming to the provisions of sections 615ii-615yy of this title. Such contracts, which, in the case of water for Indian uses, shall be executed with the Navajo Tribe, shall make provision, in any year in which the Secretary anticipates a shortage, taking into account both prospective runoff originating above Navajo Reservoir and the available water in storage in Navajo Reservoir, for a sharing of the available water.

The projects authorized by sections 615ii-615yy of this title shall be so operated that no waters shall be diverted or used by means of the project works, which, together with all other waters used in or diverted from the San Juan River Basin in New Mexico, will exceed the water available to the States of New Mexico and Arizona under the allocation contained in article III of the Upper Colorado River Basin compact for any water year.⁷⁶

Assuming a quantification of Navajo *Winters* rights in the amount of X million acre feet, the NIIP Act purportedly restricts the amount of delivery through project works of any Navajo preferential reserved right to the extent that only 508,000 a/f or, alternatively, 50,000 a/f (Arizona's share) plus 11.25 percent (New Mexico's share), whichever is greater, can be delivered from project works. Because other uses in the San Juan Basin must be subtracted from the 50,000 a/f plus the 11.25 percent it is likely that the 508,000 a/f will be the greater of the two figures. The NIIP Act, therefore, appears to effectively seal off the San Juan Basin in New Mexico from the satisfaction of *Winters* rights above 508,000 a/f. The act discourages the tribe from undertaking a project using its own funds to drill or divert water from the San Juan Basin in New Mexico because the amount of water delivered by project works, in accordance with the provision set forth above, will be reduced accordingly. Thus, the principal effect of the NIIP Act on Navajo *Winters* rights in the New Mexico portion of the San Juan Basin is to legislatively allocate a given amount of water that does not have an early priority date. This conclusion is supported by Section 13 of the act: "No right or claim of right to the use of the waters of the Colorado River system shall be aided or prejudiced by sections 615ii-615yy of this title. . . ."⁷⁷

76. *Id.* §615tt(a) & (b). Neither of these sections purports to do more than set a ceiling on the delivery of water through NIIP works. These sections do not, therefore, limit the Navajo claim in the Upper Basin outside of New Mexico.

77. *Id.* §615uu(c). Paragraph VII of the NIIP water delivery contract between the Secretary and the Navajo Tribe also contains a "disclaimer" clause concerning *Winters* rights:

The Navajo Nation does not waive any reserved *Winters* rights or consent that such rights have been or will be determined or limited by the Act of June 13, 1962 [43 U.S.C. §615ii *et seq.*] by execution of this agreement or by delivery of water pursuant to his agreement; and the United States does not waive its right to assert a position on the issues which is neutral, in support of, or contrary to that of the Navajo Nation.

The Navajo Tribal Council in 1976 has by resolution denied any waiver of compromise of the tribe's *Winters* doctrine rights. Navajo Tribal Council Res. CAU-52-76 (Aug. 26, 1976). Some commentators have argued that a December 12, 1957 Navajo Tribal Council resolution compromised the Navajo Tribe's *Winters* rights. This resolution urged Congress to approve the Navajo Indian Irrigation project and the San Juan-Chama project. The resolution, however, was never approved by the Secretary and is therefore ineffective even assuming, *arguendo*, that it attempted to transfer or give away trust property (water rights). *See, e.g., Heckman v. United States*, 224 U.S. 413, 446-47 (1912); *United States v. Southern Pac. Transp. Co.*, 543 F.2d 676 (9th Cir. 1976).

If Navajo water rights are quantified and Congress does not take further action to provide for the delivery of the Navajo Tribe's reserved rights in the San Juan Basin, the effect of NIIP will be that the bulk of the Navajo water right will have to be satisfied from waters outside of the San Juan Basin in New Mexico. That water may come from the mainstream of the Colorado River in Arizona or southern Utah or the San Juan Basin in Arizona or Utah.^{7 8}

COLORADO RIVER BASIN PROJECT ACT

The Act of September 30, 1968, known as the Colorado River Basin Project Act⁷⁹ [hereinafter CRBPA], authorized the Central Arizona Project and provided for further development and use of the water of the Colorado River. The Central Arizona Project allows Arizona to use its entitlement to 2.8 million acre feet of Colorado River water.⁸⁰ Water delivered by the project works can be used only on lands having a "recent irrigation history" unless the lands are Indian lands, national wildlife refuges or approved state wildlife management areas.⁸¹

The CRBPA explicitly does not apply to Indian water rights other than those which can be served by the project works. Navajo lands are hundreds of miles upstream from the Granite Reef Aqueduct, the point of diversion of the Central Arizona Project. Congress specifically provided in the CRBPA:

Nothing in this chapter shall be construed to alter, amend, repeal, modify, or be in conflict with the provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, the Water Treaty of 1944 with the United Mexican States, the decree entered by the Supreme Court of the United States in Arizona against California and others, or, except as otherwise provided herein, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, or the Colorado River Storage Project Act.⁸²

Although it does not specifically mention Navajo or Indian water rights, one provision of the CRBPA may affect Navajo water rights. The CRBPA provides that any Upper Basin water used for thermal

78. Some of the water right may also be satisfied out of the Little Colorado River Basin in Arizona or New Mexico. *See also* note 90 *infra*.

79. 43 U.S.C. §§ 1501-1556 (1976).

80. Arizona has been relying to a great extent on groundwater for irrigating central Arizona lands. Groundwater use in Arizona has been estimated to be more than 2 million acre feet per year more than groundwater recharge. *See* H.R. REP. NO. 1312, 90th Cong., 2d Sess. 55, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 3666, 3702; S. REP. NO. 408, 90th Cong., 1st Sess. 27 (1967).

81. 43 U.S.C. § 1524 (1976).

82. *Id.* § 1551(a) (citations omitted).

generating stations in Arizona should be charged to the water allocated to Arizona by the terms of the Upper Colorado River Basin Compact.⁸³ Shortly after the enactment of this provision, the Navajo Generating Station (a thermal generating station) was constructed at Page, Arizona, within a few miles of the Glen Canyon Dam and Lake Powell. One of the purposes of the plant is to provide pumping power for the Central Arizona Project. Because almost all of Arizona's lands within the Upper Basin are on the Navajo reservation, a discussion of Navajo water rights was deemed a necessary prerequisite to construction of the facility.⁸⁴ In December 1968, in "exchange" for certain limited promises by a consortium of utilities, the Navajo Tribe passed a resolution which provided as follows:

In consideration of the Secretary of the Interior executing a contract between the United States and Salt River Project Agricultural Improvement and Power District, operator of the coal-fuel power plant, committing the use of approximately 34,100 acre-feet of water per year for the power plant to be located on the Navajo Reservation near Page, Arizona, *the Navajo Tribe of Indians agrees that they will not make demands upon the 50,000 acre-feet of water per year allocated to the State of Arizona, pursuant to the Upper Colorado River Basin Compact, in excess of 50,000 acre-feet of water per year, of which 34,100 acre-feet of water per year shall be used by the coal-fuel power plant to be located on the Navajo Reservation near Page, Arizona.*⁸⁵

The resolution further provided: "It shall be understood that the Navajo Tribe's promise to limit its claim to 50,000 acre-feet of water per year shall only be for the term of the lifetime of the proposed power plant or for 50 years, whichever shall occur first."⁸⁶

There is no doubt that the only water rights considered in any of the leases, rights-of-way⁸⁷ and other legal documents⁸⁸ involving the

83. *Id.* §1523(d) provides as follows:

If any thermal generating plant referred to in subsection (b) of this section is located in Arizona, and if it is served by water diverted from the drainage area of the Colorado River system above Lee Ferry, other provisions of existing law to the contrary notwithstanding, such consumptive use of water shall be a part of the fifty thousand acre-feet per annum apportioned to the State of Arizona by article III(a) of the Upper Colorado River Basin Compact.

84. See discussion of the socio-economic and political considerations involved in the bargaining process with the Navajo Tribe for this water in Price & Weatherford, *supra* note 66, at 109-19.

85. Navajo Tribal Council Res. CD-108-68 (Dec. 11, 1968) (emphasis added).

86. The estimated plant life is 35 years, and the water service contract with the participants in the project runs for a maximum of 40 years.

87. The Navajo Generating Station (Page) Lease and Rights-of-way are part of Navajo Tribal Council Res. ACS-213-69 (Sept. 4, 1969).

88. See, e.g., Navajo Tribal Council Res. CJY-95-66 (July 28, 1966); Navajo Tribal Council Res. CJN-50-69 (June 3, 1969).

Page power plant is the 50,000 acre feet of water apportioned to Arizona under the UCRBC. The resolution that included the above language giving away and transferring Navajo trust property requires approval by the Secretary of the Interior to be effective.⁸⁹ The Navajo Area Office of the Bureau of Indian Affairs has no record that the secretary approved the tribal council resolution relating to the Page Generating Station. If, in fact, no secretarial approval has been given, the resolution is not effective and thus not binding on the Navajo Tribe. The effect of other tribal agreements vis-à-vis the 50,000 acre feet allocated to Arizona pursuant to the UCRBC apparently is that the tribe has agreed to make the water available for the operation of the thermal generating station.

So it appears that the tribe is free to claim more than 50,000 acre feet of water for the tribal lands situated in the Upper Basin in Arizona.⁹⁰ Whether or not the tribe can claim more water than is apportioned to the respective states in which the reservation lands are situated may depend upon the interpretation of the Supreme Court's statement in *Arizona v. California*, that uses of mainstream Colorado River water by the United States⁹¹ are to be charged against the apportionment of the state in which the federal use is located.⁹² The Supreme Court did not explain its reasoning in reach-

89. The Page power plant grant of right-of-way pursuant to 25 U.S.C. § 323 (1976) and the lease contain identical provisions on water rights. The provision is as follows:

In consideration of the execution of this lease and the benefits to the Tribe which shall accrue hereunder, the benefits to the Tribe from the construction and operation of Navajo Units #1, #2 and #3 and the benefits to the Tribe from Peabody's mining operations to provide coal fuel for said units, the Tribe agrees that during the term of this lease or the operating life of the Navajo Generation Station, whichever is the shorter, of the 50,000 acre-feet of water allocated to the State of Arizona pursuant to Article III(a)(1) of Compact (63 Stat. 31), 34,100 acre-feet of water per year shall at all times be available for consumptive use by Lessees in the operation of the Navajo Generation Station and all other purposes related to such operation including coal transportation and ash disposal. The Tribe agrees the use of water on Reservation Lands within the Upper Basin of Arizona (as said Upper Basin is defined in the Upper Colorado River Basin Compact) shall not reduce or diminish the availability of said 34,100 acre-feet to the Lessees. This agreement shall not be construed in any manner as a waiver by the Tribe of any present or prospective water rights of the Tribe, other than as set forth above.

It should be noted that this clause does not state, as does unapproved resolution CD-108-68, that the tribe "will not make demands upon the 50,000 acre-feet of water allocated to the State of Arizona . . . in excess of 50,000 acre-feet of water per year."

90. Groundwater may be used to satisfy the Navajo entitlement and it is possible that groundwater may be part of the Navajo reserved right. *Cf. Cappaert v. United States*, 426 U.S. 128 (1976) (holding that groundwater could not be pumped if it adversely affects a surface water reserved right, but not specifically reaching the point of whether groundwater was within the reserved water rights doctrine).

91. The Supreme Court discussed Indian rights in *Arizona v. California* as a part of the claim by the United States. 373 U.S. at 595.

92. *Id.* at 601.

ing this conclusion, but only noted that it agreed with the special master's conclusion. Because of its potential effects on the water rights of the Navajo Tribe, it is appropriate to examine the special master's conclusion and apply his reasoning to the Navajo claim.⁹³

The special master relies on Section 4(a) of the BCPA to support his conclusion that all federal uses are to be charged against individual states in which the use occurs.⁹⁴ However, the special master concluded that an exception to the rule includes all "present perfected rights" within the meaning of Section 6 of the BCPA.⁹⁵ Indian reserved water rights on reservation lands created prior to June 25, 1927, the effective date of the BCPA, are "present perfected rights" within this meaning.⁹⁶ Because almost all Navajo reservation lands were established before this date,⁹⁷ the exception operates to exclude water rights to these lands from the rule that all uses must be charged to the state in which the land is situated.⁹⁸ Thus the 50,000 a/f limitation imposed on Arizona's use of Upper Basin water, or any other compact limitation on a state's use of Colorado River water, would not seem to affect Navajo claims.

93. The statement by the Court that "all uses of mainstream water within a state are to be charged against the state's apportionment, which of course includes uses by the United States," *id.*, may be interpreted in such a manner so as to not affect the Navajo Tribe; or it may be interpreted to mean that the tribe must first look to the state's share of water, then it may look elsewhere for fulfillment of its *Winters*'s entitlement; or it may be interpreted to mean that the Navajo Tribe is bound by the amount of water allocated to the state in which the reservation land is situated. The latter interpretation is probably incorrect because it would directly conflict with the *Winters* holding and the holding in *Arizona v. California* itself of the tribe's entitlement to enough water to irrigate all "practicably irrigable acreage." One cannot argue an intention at the time of creation of the reservation to limit the claim to the water available to a particular state because in most cases, including the Navajo, the reservation was created well before the creation of the state.

94. S. Rifkind, Report of the Special Master 301 (1960) (*Arizona v. California*, 373 U.S. 546 (1963)).

95. *Id.* at 301 n. 1. See also *Arizona v. California*, 373 U.S. at 600.

96. *Id.*

97. See note 32 *supra*.

98. Although beyond the scope of this discussion, it may also be possible for the Navajo Tribe to look to other states or basins for water to satisfy the reserved right. This unresolved point may turn upon the interpretation of the term "appurtenant," as it has been 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. . . . The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and non-navigable streams.

Cappaert v. United States, 426 U.S. 128, 138 (1976) (citations omitted). The difficulty and inadequacy of proceeding in state forums on this theory is readily apparent when one contemplates the probable response of a state forum to an Indian claim for water to lands not situated in the state. The problem of satisfaction of large reserved rights claims may be more amenable to a basin-wide or national forum.

CONCLUSION

It is evident from the foregoing discussion that the Navajo reserved water right has been all but ignored in the 71 years since *Winters v. United States*.⁹⁹ But in an era of increasing demand for water from the Colorado River Basin, it is apparent that western water users can no longer continue to ignore the Navajo claim to its share of water. The effect of the quantification of Navajo and other Indian rights necessarily will affect the status quo. As Northcutt Ely, chief counsel for California during congressional hearings on the Colorado River Storage Project in 1955, stated on the question of whether Indian rights are inside or outside the provisions of the compact apportionments: "If inside, and as large as claimed, the Compact is splitting at the seams, and if outside, busted."¹⁰⁰

Because of the size of the Navajo reservation, the largest Indian reservation in the country, Navajo water claims merit the attention of the entire basin. The Indian reserved water right is not a new one. Development decisions by federal, state, and local interests have been made for decades with full knowledge of the existence of Indian claims.

This article has attempted to briefly review the basis of the Navajo entitlement by analyzing the "law of the river" and its effect on Navajo water rights. Early priority dates stemming from the 1868 treaty, acts of Congress, and executive orders creating the Navajo reservation place the Navajo claim at the forefront of almost all claims to water in the arid Colorado River Basin. Most of the relevant legislation, including the Colorado River Compact (1922), the Boulder Canyon Project Act (1928), the Upper Colorado River Basin Compact (1948), the Colorado River Storage Project Act (1956), and the Colorado River Basin Project Act (1968), either disclaim any intent to affect, or do not discuss, Indian water rights. The Navajo Indian Irrigation Project Act (1962), although dealing with Navajo water rights, does not purport to affect the right outside of the San Juan basin in New Mexico. By setting forth the basis and probable magnitude of the Navajo claim the authors hope that the impact of its eventual quantification on development in the West can be lessened, and the tribe's claim can be harmonized and incorporated into all water development decisions that will or may be affected thereby.

99. 207 U.S. 564 (1908).

100. J. TERRELL, *supra* note 20, at 299.