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Reviews

Indian Water Policy In a Changing Environment: A Symposium on Indian Water Policy. Convened under the auspices of Affiliated Tribes of Northwest Indians, American Indian Bar Association, American Indian Lawyer Training Program, Inc. (AILTP), California Tribal Chairman's Association, Inter-Tribal Council of California, Inc. (ITC), and Native American Rights Fund (NARF). With foreword by Alvin M. Josephy, Jr., preface by Richard Trudell. Three selected bibliographies. ed., Patricia Zell. Oakland: American Indian Lawyer Training Program, 1982. 163 pp. \$25. Paper.

On November 8-10, 1981 the American Indian Lawyer Training Program convened their first of two conferences to date on Indian water issues which is the basis of the present book. The second, titled First Annual Indian Resources Institute, ran September 13-14, 1982, and the proceedings of that conference, Indian Water for Indian Survival, will appear shortly.

These conferences were most timely and significant. Never has the competition for that most essential commodity been so fierce. The conferees' burden in 1981 and 1982 was the heavier for their certain knowledge that the present generation of Indians faces a crisis of unparalleled and bewildering proportions in the preservation of their tribal reserved water rights. The pitched battle for water is not confined to the Indian/non-Indian arena, and indeed bigger fronts lie elsewhere. States have fought and parlayed among themselves on matters of water rights for decades, while they also have made every effort to wrest control of water jurisdiction from the federal government and from Indian tribes as wards of the United States. Aggressive and anxious corporations, developers and local planners apply almost irresistible pressures for cheap access to resources, including water on Indian reservations. These struggles do not fume without notice at the highest levels of government. Washington State's Republican Representative Slade Gorton's recent efforts to gut Indian water rights through federal legislation have posed a very serious menace. The

position of President Reagan at the time of this writing seems to be one encouraging the development of natural resources the United States now holds in trust for the tribes, in the name of tribal economic development and self-sufficiency. He desires energy independence for the country and lessened dependency of tribes on the federal trustee for funding for self-determination and services. Meanwhile, tribal moves toward economic self-sufficiency have waived, even stalled on the point of the United States' failure to support Indians in their efforts to preserve rights to water guaranteed them under treaties, agreements and executive orders. The big stakes here include not just profits and territory but life itself for the tribes and their People.

The three-day conference of 1981 drew on the talents of many of the best minds in the province of water law and federal-Indian law. Speakers offered a compact treatment of the questions and legal basis for Indian reserved water rights. The activities and policies of federal and state governments affecting these rights received only necessary attention, focussing on particular problems in thirteen, primarily western states.

The published volume of proceedings includes a survey of tribal-state conflicts involving Indian water rights and a short treatise--helpful mostly to the lay reader--on the basic concepts and doctrines of Indian water law. This brief survey is the minimum necessary to the understanding of what follows. The editors also offer a syllabus of recent decisions affecting Indian water rights and include a good selective bibliography of cases, law articles and treatises pertinent to the subject, with a compendium of federal legislation pending at press-time. The volume has value as a commemoration of a well-mounted effort to develop an environment for concerted action in a rapidly-evolving field of law and social, economic, environmental and spiritual concern to Indians and other Americans. Here is a good avenue for beginning one's personal education in Indian water legal issues, with the proviso that such materials, however instructive, are necessarily soon dated in such a rapidly developing field. The proceedings of the Symposium of 1982, "Indian Water for Indian Survival," continues and will update many of the same discussions.

The featured speakers included prominent Indian statesmen: Wendell Chino, President of the Mescalero Apache Tribe in New Mexico; Joseph De La Cruz, President of the National Congress of American Indians and of the Quinault Indian Nation; Peter McDonald, Sr.* Chairman of the Council of Energy Resource Tribes (CERT) and of the Navajo Tribal Council; William R. Rhodes, Chief Judge of the Gila River Indian Community Court; Reuben A. Snake, Vice-Chairman of the Winnebago Tribe of Nebraska; Kenneth L. Smith, Assistant Secretary of Interior for Indian Affairs; Richard Trudell, Executive Director and co-founder of the American Indian Lawyer Training Program. Their remarks appear in sequence with the rest of the Symposium.

The meat of the Symposium was in the proceedings of the four panel sessions, a summary of which follows in brief. In the first, "Water and the Indian Future" (p. 59-71), Moderator Richard West, Jr.--a member of the Washington, D. C. law firm of Fried, Frank, Harris, Shriver and Kampelman which is counsel to several Indian tribes and organizations--emphasized the need for conciliation among tribes, the federal government, business interests, private landowners, citizens' groups and states in settling differences on allocation and appropriation of water over which they assert conflicting claims. Litigation has been the usual, and cooperative agreements and legislation the uncommon, means of settling these conflicts. The panelists discussed the history and legal basis for Indian water rights from their own viewpoints, identifying interests of non-Indians which are in conflict with those of Indians, and possible avenues for finally and peaceably defining Indian water rights.

Frank Trelease of McGeorge Law School, author of many articles and casebooks on Indian water law, offered a primer of appropriation theories in western water law, including pertinent cases and policy considerations, and concluded on the optimistic note that there is at least in theory room for compromise on the issue of on-and-off-reservation use of Indian water. His call for cooperation rings somewhat hollow in light of the reservations of Robert Pelcyger of the Native American Rights Fund, also a prominent water law authority; Pelcyger emphasized the role of water in supporting a land base and the need to rein in competing

state sovereigns to prevent their abusive assertions of jurisdiction in the face of the federal-Indian relationship. To trust states with the care of the trust relationship as it affects Indian water rights, he warned, is to ignore historical precedent and inevitability--old chestnuts from that tainted tree we call "Manifest Destiny"--for in this province, surely, states remain harsh competitors of tribal sovereigns. Pelcyger's disquieting emphasis on the courts' unpredictable stance in deciding Indian water rights on such basic matters as allocation/quantification and priority becomes no less disturbing for the remarks of Claudeen Bates Arthur, Field Solicitor for the Department of Interior. Her remarks focussed inevitably on the glaring conflicts of interest which beset the federal government in its various branches, all of which carry the charge of carrying out some aspect of the Indian trust relationship, including litigating on behalf of tribal interests. She raised the point that federal litigation on behalf of trust water interests depends directly on appropriations supporting such efforts, and that successful litigation here requires determination of reservation purposes, priority dates and case-theory. Russell Jim of Yakima Nation Tribal Council and Ned Anderson, Chairman of San Carlos Apache Tribe, sounded a wistful counterpoint to the foregoing legal dissertations with personal reflections on abortive efforts to deal with state governments whose intransigency on the issue of Indians' rights to water allocations threatens tribes' survival.

Balancing competing interests (between states and tribes) in water issues was the subject of a second panel under that title (pp. 74-89). Moderator Joseph Myers of AILTP cautioned that while, as means to settlement of water disputes, litigation is undependable and legislation is the uncertain creature of political matings, negotiated settlements, far from affording any easier solution, require intense planning and accumulated leverage. Gary Weatherford of the Center for Natural Resource Studies, John Muir Institute, focussed on the "objectives, context, values, competitors, and choices involved in western water competition;" and, for all the hope he had for resolution through improved technology, successful arbitration and the like, he admitted the danger that in the rush of competition Indians and non-Indians will all lose sight of long-term goals

and squander their birthright in endless wrangling. In this, he echoed an allegory in Reuben Snake's dinner speech at the conference, in which he compared Americans to a floundering, greedy eagle who clutched a sodden, strangled rabbit so intently it could not avoid the rushing icy cataract that ended its life. John B. Narcho of the Papago Water Commission rehearsed his tribe's efforts to litigate and negotiate, rather than leave matters to Congress or the toll of years. His fear of possible betrayal through legislation did not refer directly to the "compromise" Papago Water Bill of 1982, an uncertain bargain. Douglas Nash, attorney for the Umatillas in Oregon, discussed the need for adequate data bases in preserving and defining water resources. Competing states' water legislation and incursions on tribal water resources must be curbed, if possible, and then tribes must contend with other competing water users. Nash raised two spectres: the uncertain position of the federal courts on tribal sovereign rights to control their own water, and economic competition from non-Indian users who can persuade politicians that the best interests of the country are served best by limiting Indian water rights. Richard Collins, University of Colorado School of Law, suggested the need for investment capital was greater than the dangers of dealing with non-Indian developers and entrepreneurs seeking access to Indian water. He reasoned that the water rights most in controversy in Indian Country are those supporting economic development and that every effort should go to achieving appropriate economic solutions through astute political moves, bringing federal funds in to render Indian water resources more remunerative to tribal coffers. John Folk-Williams--whose Western Water Network has produced an excellent contemporary sourcebook, What Indian Water Means to the West as Volume 1 in its Water in the West series (Santa Fe: Western Network, 1982)--addressed the decision-making process as non-Indian competitors manipulate it. Looking at the array of non-agricultural users--municipalities, energy companies, recreation concerns and environmentalists--he finds confrontation as unavoidable in the absence of mutual understanding and real conciliation.

"Managing the Resource," the third panel (pp. 90-119), offered Alan Parker as Moderator. Parker led a discussion along the lines of what-to-do-after-the-doctor-leaves. Once

the water rights are ascertained and secured, tribes must resume the wise stewardship of their resource, creating laws and marketing techniques to assure proper development. Ronald Robie of the California Department of Water Resources talked about disputes concerning the use of resources and the need to involve all "sides" in tribal-state water disputes in management discussions, lest Indian interests be legislated comfortably out of existence. David Getches of University of Colorado School of Law gave a strong overview of tribal jurisdiction over water management, as against the states. He called on tribes to use or lose their jurisdiction in this, as in all other areas. Economist Lee Brown of University of New Mexico discussed the strategy of marketing water to users, and the need for prioritizing on the basis of best-use in terms of "nonmaterial values" as well as financial bases. Frank Tenorio resisted the idea of "managing" water, seeing the problem as one of humans needing to manage their own circumstances and working to fulfill their needs around the resource. Guy McMinds, Director of the Quinault Department of Natural Resources, offered a somber account of his tribe's efforts to resolve differences with non-Indian competitors for water even in a wet state, and a heartening evaluation of the prospects for his people's economic well-being given canny planning and cooperation in the marketplace. Chris McNeil of Sealaska Corporation and Nelson Angapak of Calista Corporation commented on the role resource use, competition and protection play in the administration of the Alaska Native Claims Settlement Act.

The final panel, "Strategies for Clarifying and Protecting Indian Water Rights," had as Moderator John Echohawk of Native American Rights Fund. Echohawk continued the discussion of alternatives for settling water disputes to the panel. Charles Wilkinson of University of Oregon School of Law compared water and energy scarcities and called on Indians to work through state legal process to limit water waste by non-Indian users. Dr. Helen Ingram, political scientist from University of Arizona, suggested that the Tribes' alternatives are to convince other users that a tribe's proposed use is the best use, or refuse to do more than rest on their ascertained rights, or participate in the

exchange of advantages that owners and would-be users enjoy. Henry Loble, Chairman of the Reserved Water Rights Compact Commission of the State of Montana, urged clarification and quantification of federal and Indian water rights in Montana and other states through negotiation, compromise, settlement and compact, rather than litigation. <Editor's note: The reader might find it instructive to compare the remarks in Loble's address to Mr. Peregoy's article on water rights issues in Montana which conveniently appear elsewhere in this volume of The Journal.> Scott McElroy, in Land and Resources Division of the Department of Justice, compared the advantages of confrontation in the courts with prior settlement, on the basis of his experience of litigation in water rights. Suzan Shown Harjo, legislative liaison for Native American Rights Fund, rallied Indians to control what they own--to march forward with the certainty of their right, properly insisting on litigating, arbitrating and negotiating in keeping with their own priorities, principles and identities. Several tribal representatives--Rodney Lewis, attorney for Gila River, Robert Harris, Sr., Chairman of Shoshone Business Council at Wind River, and Ronnie Lupe, Chairman of White Mountain Apaches--pledged to challenge non-Indian water users to get leverage in negotiation and to hold the United States accountable as trustee for all malfeasance in its protection of tribal water rights.

The Indian Resources Institute is performing a vital service in continuing its programs for Indians. The most sane alternative for resolving these disputes is conciliation through negotiation. A critical element of the audience for these programs did not appear at the conference in force: the vast array of corporate officials, developers, entrepreneurs, state and federal non-Indian politicians and functionaries, who, as several panelists and moderators noted, neither understand nor accept the continuing federal-Indian relationship, particularly as it affects water rights. It would be interesting to know whether that potential audience is even remotely interested in these conferences or reading their proceedings. One can hope.

*Now former Chairman of CERT and Navajo Tribal Council
<Ed.>.