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Permalink

<https://escholarship.org/uc/item/4d7321vt>

Journal

Western Legal History, 27(2)

ISSN

0896-2189

Author

Thorne, Tanis

Publication Date

2014-07-01

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INDIAN WATER RIGHTS IN SOUTHERN CALIFORNIA IN THE PROGRESSIVE ERA: A CASE STUDY¹

TANIS THORNE

Mr. Chairman, ladies and gentlemen, it seems like our chairman has said we have a pipe-line into the treasury. So far, we have failed to even find that pipe. Where is that pipe? On our Reservation we have a water problem. We write letters and don't get no answers to them. I don't know where to start. . . . Now we want something done. How about it?

—Testimony of Del Mar Nejo, Mesa Grande Reservation²

Historian Norris Hundley, Jr., described Indian water rights as a “dark and bloody ground.”³ Congress asserted its authority to allot Indian reservations under the Dawes

¹This article is a tribute to the late Norris Hundley, water scholar and mentor. My thanks to Donald Pisani, Timothy Tackett, and Spence Olin for comments on earlier drafts of this article.

²“Mission Indians Problem in San Diego County,” unpublished hearing before a U.S. House subcommittee of the Public Lands Committee, October 18, 1950, San Diego, CA. HRC-1950-PLH-0021, accessed from Congressional ProQuest site, <http://congressional.proquest.com/congressional/result/congressional/pqdocumentview?accountid=14509&groupid=96104&pgId=a86110a9-f458-47b8-a23d-ec5aa94ca19>. These and other government documents cited in this paper are available from the Congressional ProQuest website.

³Norris Hundley, Jr., “The Dark and Bloody Ground of Indian Water Rights: Confusion Elevated to Principle,” *Western Historical Quarterly* 9:4 (Oct. 1978): 454–82. Approved February 2, 1887 (49-2), the Dawes Act, section 7, asserts the secretary of the interior’s right to distribute water within the reservations, implying that Indian water rights existed beyond state authority.

Dr. Tanis C. Thorne taught Native American history at the University of California, Irvine, for twenty-five years. The primary focus of her research is California Indians. She is now retired.

Act of 1887. The Supreme Court asserted that water rights of reservation Indians were guaranteed via federal treaties in the *Winters v. United States* decision of 1908, establishing the “reserved rights” doctrine. Yet the landmark *Winters* decision—undergirding a national policy of converting Indians into self-supporting, landholding farmers—was stillborn. The reserved rights doctrine threatened the vested rights of non-Indians under the prior appropriations doctrine of state law. As secretary of the interior Ethan Allen Hitchcock informed President Theodore Roosevelt, if the *Winters* decision were enforced, the “development of the entire arid West [would] be materially retarded, if not entirely destroyed.”⁴

Concurring with Hundley’s assessment in his well-regarded book, *Command of the Waters*, Daniel McCool argues that Indian stakeholders were largely invisible until the *Arizona v. California* decision (1963) reaffirmed the reserved rights principle and the federal government’s authority to enforce it.⁵ The consensual opinion of water rights historians is that piecemeal legal transfer of Indian water rights to the non-Indian majority progressed unabated, decade after decade, throughout the arid American West. The water rights of Southern California Native people remained ill defined well into the twentieth century, as the epigraph suggests. A term coined by McCool provides a succinct tool for explaining the political dynamics by which

⁴Quoted in Donald Pisani, *Water and American Government: The Reclamation Bureau, National Water Policy, and the West, 1902–1935* (Berkeley, CA, 2002), 166; Pisani argues that the Republican Party’s investment in the Reclamation Bureau’s success in the Teddy Roosevelt administration was at the expense of Indians. See Charles Rhoads’ summary of the Capitan Grande Reservation’s legal history, in the Hearing Before a Subcommittee of the Committee on Public Lands on S. 1715 (72-1), March 9, 1932 [hereafter Rhoads Report], <http://congressional.proquest.com/congressional/result/congressional/ppqdocumentview?accountid=14509&groupid=96104&pgId=bef8e412-0eff-4d30-8072-e78dbe981878#756>. For a more full story of Capitan Grande, see Tanis Thorne, *El Capitan: Adaptation and Agency on a Southern California Indian Reservation* (Banning, CA, 2012). Based on new archival research, this paper views the story through the narrower lens of water rights.

⁵*Winters* (207 U.S. 564 1908) was reaffirmed in *Arizona v. California* (373 U.S. 546 1963) with the practicable, irrigatable acreage doctrine. Norris Hundley maintains that the *Winters* decision sent a clear message about the priority of Indian water rights and the wide range of Indian uses, as well as the quantity, to which Indians were entitled. Hundley, “The *Winters* Decision and Indian Water Rights: A Mystery Reexamined,” *Western Historical Quarterly* 13:1 (1982): 42. But even after 1963, as Hundley has demonstrated, there was little public consensus on the reserved rights doctrine and too little enforcement because of the West’s water scarcity. The Indian Office relied on state appropriation law and beneficial use as a stronger approach. Daniel McCool, *Command of the Waters: Iron Triangles, Federal Water Development, and Indian Water Rights* (Berkeley, CA, 1987), 117–18.

Indians' rights, needs, and preferences were rendered invisible: the "iron triangle" is a politically powerful and efficient but "informal political alliance" of politicians (on congressional committees/subcommittees), administrative agencies (like the Bureau of Reclamation), and local interest groups, lobbying for water infrastructural development for their constituencies.⁶

This study departs from the consensual position, which has argued that Indian water rights were ignored until the 1960s. In the case of the Capitan Grande Indian people of San Diego County in the early twentieth century, Indian rights were hardly ignored; they were, in fact, a subject of considerable importance to the federal government. In 1919, the El Capitan Act gave the city of San Diego the right to purchase the Capitan Grande Reservation's most valuable agricultural acreage along the San Diego River to build the El Capitan Dam and create the El Capitan Reservoir as a city storage site. The transfer of Indian land, held under federal trust, required complicated local, state, and federal negotiations both in the 1910s and in 1932, when the El Capitan Act was amended. The Department of the Interior made a concerted effort to define and protect the Capitan Grande people's riparian rights using the state prior appropriation doctrine. The terms of transfer negotiated in 1919 anticipated the quantification measures based on "practicably irrigatable" acreage set in *Arizona v. California*.

BACKGROUND: THE CAPITAN GRANDE STORY

Southern California was an unlikely place for even a pyrrhic federal victory in behalf of Indians. In the first place, all of the Indian trust lands in the Southern California region were created by executive order, not treaty.⁷ The resources of executive order reservations were particularly insecure. The Capitan

⁶Ibid., 5–6. See also Marc Reisner and Sarah F. Bates, *Overtapped Oasis: Reform or Revolution for Western Water* (Washington, DC, 1990), 9, quoting the report of the National Water Commission (1973). The commissioners claim that *Winters* was ignored and the secretary of the interior encouraged and/or cooperated in further irrigation projects via the Bureau of Reclamation "without attempt to define, let alone protect, prior rights that Indian tribes might have."

⁷There are about thirty reservations, principally in Riverside and San Diego Counties, located on isolated, marginal parcels of land in the interior: the foothills, mountains, and passes that separate the desirable coastal property from the desert. Much of the well-watered land for pasturage was granted to Mexicans after the missions were secularized. See Florence Shipek, *Pushed into the Rocks* (Lincoln, NE, 1987), chs. 3–4.

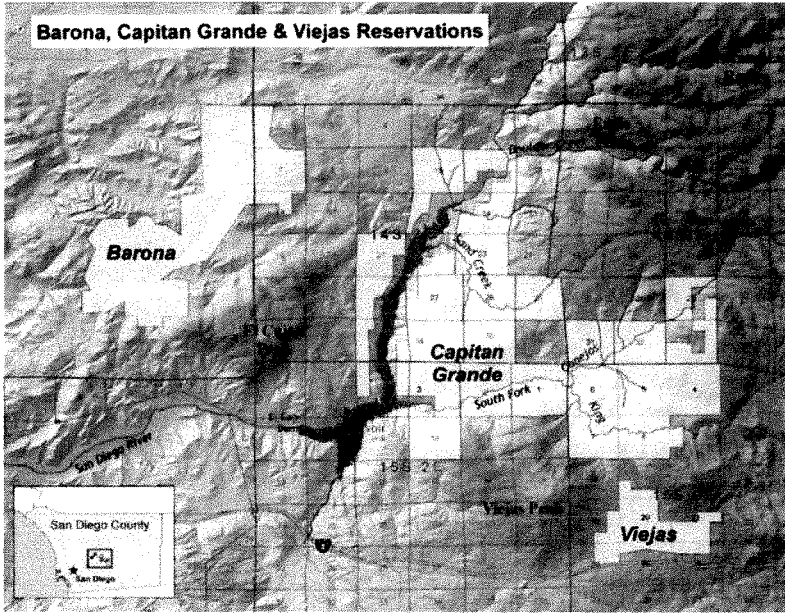
Grande bands, along with other Indian communities of the region, received some benefits of federal trust protection for their resources after 1875; but by the time the Mission Indian Agency reservations were created and the federal trust relationship was solidified with the Mission Relief Act in 1891, it was already too late for the federal government to provide Indians there with high-quality agricultural land. The disadvantaged position of the surviving Indian groups was institutionalized. Only 5 percent of Indian lands in the region were arable. Secondly, Southern California's aridity and its rapidly growing population of non-Indians made this an extremely competitive region for water. The few resources that Native people held were under continual assault by intruders. The oft-quoted statement that Indians' survival depended on securing their long-ignored water rights comes, not surprisingly, from historian Rupert Costo, a Cahuilla Indian of Southern California.⁸ Thirdly, Southern California is a borderlands area where Hispanic law and culture profoundly influenced the region during the Franciscan mission period (1769–1834) and the subsequent Mexican land grant era prior to the American takeover following the Mexican War (1846–48). The cities of Los Angeles and San Diego would win court judgments based on the "pueblo rights doctrine," giving these growing, coastal, urban areas paramount rights to ground and river waters of the interior hinterland.

Although the executive-order reservations lacked arable land, many were strategically located for access to water. For example, the Morongo community, situated at the base of the lofty San Bernardino Mountains, was the best reservation in California in terms of its agricultural potential, according to the Smiley Commission's assessment. Several Indian reservations were along the San Luis Rey River, and the Capitan Grande Reservation straddled the San Diego River.⁹

The strong legal case for the Capitan Grande entitlement to water dates to the 1850s, when a group of San Diego Mission Indians successfully petitioned a federal official to allow them to colonize riverbed lands thirty miles into the interior. The Capitan Grande community had a record of beneficial use for

⁸"Indian Water Rights: A Survival Issue," *Indian Historian* 5 (Fall 1972): 4–6; Thorne, *El Capitan*, chs. 1–2ff.

⁹Albert K Smiley, Joseph B. Moore, and Charles C. Painter, *Report of the Mission Indian Commissioners* (Washington, DC, 1891), 62; Damon Akins, "Lines on the Land: The San Luis Rey River Reservations and the Origins of the Mission Indian Federation, 1850–1934" (Ph.D. diss., University of Oklahoma, 2009), ch. 5. Santa Ysabel and Palm Springs are other examples of communities in mountainous areas or at the base of mountains where river and groundwater were abundant.



Many California reservations were strategically located for access to water, including the Capitan Grande Reservation, which straddled the San Diego River. (Courtesy of the author)

agriculture predating any non-Indian claim. When American homesteaders threatened to appropriate the homes and improvements of the Capitan Grande and other Southern California Indian communities in the 1870s, reformer Helen Hunt Jackson and her East Coast allies persuaded the federal government to place the so-called “Mission Indians” under trust protection. The construction of the transcontinental railroads brought many more people to the region; ditching, flume, and dam construction by private water companies immediately followed in the boom of the eighties. Six major dams were built on local rivers in the region between 1887 and 1897.¹⁰

One of the most important landmarks in San Diego’s water infrastructural development was the organization of the San Diego Flume Company (SDFC) in the mid-1880s. The flume company laid preemptive claim to the waters of the San Diego River under state prior appropriation laws. The company built a flume system bringing water from the river’s headwaters

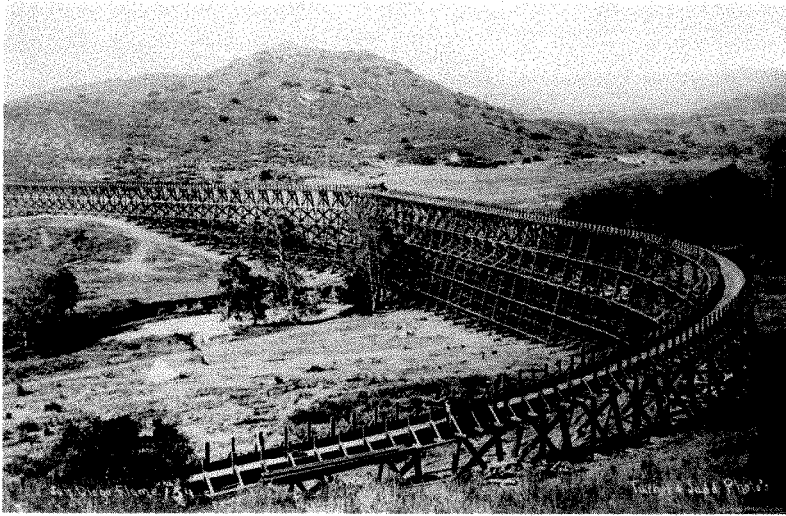
¹⁰Michael Connolly Miskwish, “Kumeyaay Water and Policy Issues” (unpublished ms. 2009); Thorne, *El Capitan*, chs. 2–3.

in the Cuyamaca Mountains to the coastal region to irrigate farms and ranches. Although the flume crossed through the federal trust lands of the Capitan Grande Reservation, the SDFC ignored the rights of the Indians and the authority of the federal guardian. Charles Painter, an East Coast Indian rights activist carrying the mantle for Helen Hunt Jackson's unfinished work, alerted the government to the trespass. Caught red-handed, an SDFC representative said that the company "assumed" that permission would be freely given for such an important improvement to the rapidly growing city of San Diego. The Mission Indian agent subsequently drafted a document with the company in 1888, reserving for the U.S. government for Indian use "ample and sufficient" water for "agricultural and for domestic purposes, and for stock" from the flume—as well as an annual fee for the right-of-way across the reservation—in return for "undisputed right to all the natural flow of the San Diego River."¹¹ Water companies were also developing the waters of the San Luis Rey River and the San Bernardino Mountains.¹²

An example of iron triangle politics, the 1891 Act for Relief of the Mission Indians permanently secured Southern California Indians' land rights, but, at the same time, seriously undermined their water rights. Article 6 authorized the secretary of the interior to grant permission for private water projects crossing Mission Indian reservations. The legislation emblemized the U.S. Department of the Interior's conflict of interest to serve both Indian and non-Indian interests simultaneously. Contrary promises were being made both to protect and to free Indian water resources. (These contradictory promises would become the basis for Indian water rights litigation advanced by the Luiseño along the San Luis Rey River in the late twentieth

¹¹"Special Report regarding actions in matter of the San Diego Flume Company on Capitan Grande . . .," agent J.W. Preston to commissioner of Indian affairs John D.C. Atkins, 20 January 1888, National Archives, Washington, DC, Special Cases-31, 2753-1888, RG-75; Thorne, *El Capitan*, 92-93, 183, Appendices 3-4. On the flume company's responsibility to deliver water to the Indians, see "Report on Illegal Occupation of Capitan Grande and La Jolla Reserves, May 12, 1890," Senate Exec. Doc. #118 (51-1).

¹²The Banning Land and Water Company built two reservoirs in the San Bernardino Mountains between 1883 and 1884. Kenneth M. Holtzclaw, *San Geronimo Pass* (San Francisco, CA, 2006), 7. The Smiley Commission spent much of its time in the late 1880s and early 1890s negotiating a land swap to secure the Potrero River waters for the Morongo Reservation Indians. Almost identical legal language was used in the SDFC agreement and in grants to other private water companies for the San Luis Rey Indians and other western tribes in this same decade. Megan Benson, "Damming the Bighorn: Indian Reserved Water Rights on the Crow Reservation, 1900-2000" (Ph.D. diss., University of Oklahoma, 2003), 4; Atkins, "Lines on the Land," 142; Pisani, *Water and American Government*, 162.



The San Diego Flume Co. built a flume system that brought water from the river's headwaters to the coastal region to irrigate farms and ranches. (Courtesy of the San Diego History Center)

century.¹³) Speeding the process of Indians' private property ownership of farms was a primary goal of the legislation. The lands of Capitan Grande were allotted in 1895.

The Indian Office's aim to make self-supporting farmers of the Mission Indians was on a collision course with reality from the outset. The introduction of Christianity, agricultural skills, and foods during the mission period enhanced Mission Indians' image as prime candidates for both federal protection and ultimate assimilation. Ironically, the Hispanicized, Catholic Indians—lacking adequate farmland—more pragmatically embraced pastoralism and wage labor for self-support in this arid region. From the late 1880s to the 1920s, the Indian Office faced chronic resistance in its ethnocentric attempts to make

¹³Thorne, *El Capitan*, 60–62; "San Luis Rey Water Rights Challenge—A 100-Year-Old Struggle," *Indian Country Today*, March 22, 2013, <http://indiancountrytodaymedianetwork.com/2013/03/22/san-luis-rey-water-rights-challenge-100-year-old-struggle-148305>.

Southern California Indians self-supporting farmers under the Procrustean policies of the allotment era.¹⁴

INDIAN WATER RIGHTS IN THE PROGRESSIVE REFORM ERA:
FULFILLING THE AIMS OF THE DAWES ACT

The turn of the century was a formative but volatile period of change in western water infrastructural development. The Dawes Act provided a clear directive for the Indian Office to follow for Indian economic adjustment and assimilation. Western Indians obviously needed water to be successful farmers. "Congressional recognition of an implied Indian water right antedated the *Winters* case by a decade," as Pisani has demonstrated.¹⁵ Exemplifying the Department of the Interior's attempt to fulfill its mandate, in 1892 it contracted a second agreement with the SDFC in behalf of the Capitan Grande Indians. This was an explicit acknowledgment of the executive-order reservation's water right, based on riparian rights and beneficial use.¹⁶

During the Progressive reform era at the turn of the century, honest and capable federal personnel renewed their commitment to Indian interests. Although the Indian Office's efforts were underfunded, it labored to bring irrigation to western Indian reservations and to perfect Indians' individual water rights through beneficial use. According to McCool, the decade from 1910 to 1920 was a time "acutely important for Indian water rights."¹⁷ Within the Mission Indian Agency, the Indian Office added land to several Mission Indian reservations, among them Capitan Grande, with an aim to protect watershed and promote farming. Improvements made in the irrigation at

¹⁴Tanis Thorne, "Remembering William Pablo: Man of Malki" (unpublished ms.). Agency farmers working to secure the water rights and encourage full-time agriculture were viewed skeptically by the Capitan Grande Indians, who dared not risk changing from their reliable forms of survival based on off-reservation wage labor. Thorne, *El Capitan*, 67, 88.

¹⁵Pisani, *Water and American Government*, 162.

¹⁶Thorne, *El Capitan*, 50–61.

¹⁷McCool, *Command of the Waters*, 122–24 and chs. 2, 3, and 5. The expansion of reclamation activities, general population growth, and the dwindling amount of unappropriated water were prominent causes for an approaching crisis. The *Winters* decision of 1908 prompted the BIA to introduce a bill to have Congress recognize the reserved rights of Indians. The *Winters* case principle was applied at Pipe Spring, Kaibab Indian Reservation, by Scattergood. See National Park service site: http://www.nps.gov/history/history/online_books/pisp/adhi/adhi4c.htm.

select Mission Indian reservations buoyed Indian Office confidence and purpose. At the Morongo Reservation, specialty crops like apricots flourished from 1890 to the 1940s. There were enthusiastic reports that the Pala Reservation along the San Luis Rey River would be "a model" and an "ideal village." From 1909 to 1911, the federal government funded expenditures at Capitan Grande to enable the Indians to use the full allowance of water to which they were entitled by the 1892 agreement: Indians had used only a fraction of this water because of the faulty delivery system.¹⁸

Optimism that these successful Indian farmers would soon be liberated from federal guardianship was short-lived. Skeptics doubted that the Cuyamaca Flume Company (successor to the SDFC) could be pressured to provide the Indians their full water allowance, as its paying customers were already underserved. Entanglement of Capitan Grande water rights with those of a private company yielded an unanticipated legal glitch. An astute federal employee at Capitan Grande discovered in 1911 that once the federal trust relation ended, so too would the guaranteed rights under the flume company agreement. The agent informed the commissioner of Indian Affairs, "It will be obvious that the lands at Capitan Grande proper should NEVER be conveyed to these Indians in fee simple . . . [because] the water right will be extinguished. The land would always have to be held in trust."¹⁹ Coincidentally, the commissioner sent a circular to all Indian agencies nationally, dated October 16, 1913, explaining to Indian Service personnel that the reserved right would dissolve when an allotted Indian accepted the title in fee, a narrow view that virtually foreclosed any chance for Indians to prosper in the new, post-reclamation West.²⁰ The water supply to even the most promising Mission Indian communities with federal contracts guaranteeing "ample and sufficient water" had become so seriously degraded by the second decade of the twentieth cen-

¹⁸Regarding the land additions, see Thorne, *El Capitan*, 62–63; Akins, "Lines on the Land," 155, 161; Lowell Bean, "Morongo Indian Reservation: A Century of Adaptive Strategies," in *American Indian Economic Development*, ed. Sam Stanley (The Hague, 1978): 159–236.

¹⁹Thorne, *El Capitan*, 89.

²⁰McCool, *Command of the Waters*, 114–15; W.H. Code, head of the Indian Irrigation Service, to subordinate, cited in Pisani, *Water and American Government*, 166. According to this theory, if a reservation was intact, the federal government could protect Indian water, but once the land was allotted, state water laws would apply. Pisani, *Water and American Government*, 166; Thorne, *El Capitan*, 87–88.

ture that even small populations could not be self-supporting with agriculture.²¹

In the brief span from 1900 to 1920, the Indian Office's difficulties implementing the allotment policy were complicated by legislation greatly accelerating non-Indians' political leverage to control the lion's share of water in the West. The Reclamation Act (1902) provided federal funds for dam construction so western farmers could have access to affordable water for irrigation. The Reimbursable Debt Act (1914) supplied credit to prospective beneficiaries in arid western lands to pay for needed improvements in water delivery infrastructure. The Act of June 25, 1910, gave the Interior Department authority to reserve lands within Indian reservations for power and reservoir sites. These acts served non-Native users at the expense of Indians. Without Indians' consent, tribal money and lands were used to construct dams and irrigation works in the West, of which non-Indians were the main beneficiaries.²²

In 1912, the city of San Diego, the Cuyamaca Flume Company, and others began a fierce and prolonged competition for the waters of the San Diego River and a reservoir site at Capitan Grande. The city sued to establish its paramount right to the river under the pueblo doctrine and tried unsuccessfully to buy out the Cuyamaca Company (and later its water district successors), which had a prior appropriations and beneficial use claim.²³ A major water battle ensued. Five years of state and federal hearings, surveys, investigations, negotiations, and court rulings followed the city's 1912 application for the reservoir site. During this period, the federal guardian gave much attention to doing right by the Capitan Grande Indians. Congressman William Kettner, who introduced the El Capitan bill for the city of San Diego in 1914, said that he had "never known a department go into a matter more thoroughly than the Department of the Interior had in

²¹Ibid., 96; Akins, "Lines," 184-90; Bean, "Morongo Indian Reservation."

²²"In this case the benefits are concentrated, but so are the costs," McCool concluded. *Command of the Waters*, 133. Pisani presents a trenchant argument that the Bureau of Reclamation undermined and coopted the Bureau of Indian Affairs in order to "limit Indian agriculture and water rights." *Water and American Government*, 155 and ch. 6ff.

²³For an abbreviated version of the water war, see Thorne, *El Capitan*, 62-63, 89-93; for a more detailed version, see Frank Adams, "Irrigation Districts in California, 1929," *State of CA Public Works Report*, Bulletin 21 (Sacramento, 1929), ch. 5, part 11, 316-18, PDF available online at http://www.water.ca.gov/waterdatalibrary/docs/historic/Bulletins/Bulletin_21/Bulletin_21-B_1930.pdf.

the Capitan Grande removal case."²⁴ The Department of the Interior soon capitulated to the "greatest good for the greatest number" argument and endorsed San Diego's application for the reservoir site. Commissioner of Indian affairs Cato Sells made personal visits to Capitan Grande from 1916 to 1917 to gain the residents' consent to the condemnation of their land and removal elsewhere. The band whose prime lands and improvements along the San Diego River would be flooded demanded that the price of their removal was that their community relations would be reconstructed elsewhere. Language was included in the 1919 El Capitan Act that promised new homes, churches, schools, a water system, and provisions for water rights at the place of relocation.²⁵

The Indian Office realized that this was a golden opportunity, for the costs of removal and rehabilitation of the Capitan Grande Indians would be borne by the city of San Diego. At the hearing before the House Public Lands Committee in 1918, the attorney for San Diego stated that the city was willing to pay whatever it took, because the purchase of the Indian bottomlands was "the best deal in town." Approximately one hundred persons (the Capitan Grande Band in the

²⁴Kettner's comment is in hearing on "Conservation and Storage of Water, San Diego," U.S. House Hearings on Public Lands, H.R. 4037, Jan. 28-29, Feb. 1, 1918 (65-2), available at <http://congressional.proquest.com/congressional/docview/t29.d30.hrg-1918-plh-0003?accountid=14509>; a copy of the hearings is in UCLA Special Collections, Phil Swing Collection, box 30, folder 6. San Diego attempted to buy the flume system at the price set by California Railroad Commission in 1914. There was an eleven-day hearing in Los Angeles in 1915-16 and another in Washington, D.C., in June 1916. Assistant commissioner of Indian affairs E.B. Meritt came to San Diego to investigate after the June 1916 hearing; then agent Tyrell, sent by the Indian Office, came three times. In 1921 San Diego brought suit against the Cuyamaca Flume Company to enforce its unexercised but paramount right to all of the water of the San Diego River. The suit was dropped and the effort of water districts to defend prior beneficial use resulted in transfer of the private Cuyamaca company to the water districts. C.R. Olberg, supervisor of irrigation, was prompted to produce a regional map, "Mission Indian Reservations of Southern California" (1914), UC Berkeley, Bancroft Library, Map Collection G4363 S24E1 1933 m5 case C.

²⁵Thorne, *El Capitan*, 97-101; 1919 Act, Sec. 3: "Provided further, That the Secretary of the Interior shall require from the city of San Diego in addition to the award of condemnation such further sum which, in his opinion, when added to said award, will be sufficient in the aggregate to provide for the purchase of additional lands for the Capitan Grande Band of Indians, the erection of suitable homes for the Indians on the lands so purchased, the erection of such schools, churches, and administrative buildings, the sinking of such wells and the construction of such roads and ditches, and providing water and water rights and for such other expenses as may be deemed necessary by the Secretary of the Interior to properly establish these Indians permanently on the lands purchased for them."

San Diego River bottomlands) were entitled to an estimated 40 miner's inches out of the 256 inches carried annually (or 15 percent) by the flume company to its 10,000 customers. In the successive revisions of the El Capitan bill from 1914 to 1919, the Department of the Interior and its advisors steadily drove up the price tag from the original compensation of \$100,000. In June 1921, the damages were set in San Diego Superior Court. Capitan Grande's loss of 194 irrigated acres to which water rights were attached was set at \$38.66 per acre, or \$75,000. Extensive field studies by the Department of the Interior determined that the value of the remaining lands that were rendered useless (virtually the rest of the reservation)—including personal damages and replacements costs—was \$286,428 on December 22, 1922. The two sums were added together by the court for the grand total of \$361,428. The city received title to roughly 10 percent of the reservation: a total of 1,940 acres. The Indians retained ownership of the rest of the reservation.²⁶ The *Winters* decision was not invoked, but rather the more generally accepted doctrines of riparian rights, beneficial use and prior appropriation.

The 1919 El Capitan Act was a triumph of statesmanship, since, seemingly, all parties would benefit. The Capitan Grande Indians were promised a better quality of life. The Interior Department assumed that the compensation fund would be more than adequate to buy a new San Diego County property with adequate water. Had the federal guardian failed to protect the Capitan Grande people's existing and future water rights by *not* insisting on explicit language in the legislation quantifying their riparian rights? At least in retrospect, Indian irrigation engineer Charles Olberg's sanguine 1914 comment—"Of course they [private developers] could not obtain the rights belonging to the [Mission] Indian reservations"—suggests naïveté. At least one watchdog agency raised the alarm that stronger guarantees were necessary to ensure the Capitan Grande Indians an "ample supply of water . . . without any doubt forever" in their new homes.²⁷

²⁶The quote regarding the "best deal in town" is from the hearing on "Conservation and Storage of Water, San Diego." The 1922 appraisal and report of supervising engineer Herbert V. Clotts was the final version of the Department of the Interior's research assessing the value of Capitan Grande's water and other resources. Other reports identified a larger number of the irrigatable and irrigated lands at Capitan Grande. A miner's inch was worth about \$1,000 in 1914; Capitan Grande's quantified share was estimated in 1910 at 40 inches. Thorne, *El Capitan*, 84, 87–88, 92, 99, 100, 102–103.

²⁷Olberg quoted in Akins, "Lines," 175; George Vaux, of the Board of Indian Commissioners, quoted in 1924 in Thorne, *El Capitan*, 203.

SWING AND COLLIER: INFRASTRUCTURAL
DEVELOPMENT AND THE "THIRD FORCE"
IN CALIFORNIA IN THE 1920S²⁸

During the 1920s, Phil Swing, congressman for California's eleventh district,²⁹ became a tireless advocate for Southern California's regional water infrastructural development. A visionary and an effective dealmaker, Swing is best known for his invaluable contributions toward the construction of the All-American Canal and the Boulder Dam (aka the Swing-Johnson Bill). Less well known is his effort to secure the waters of the San Diego River for the city of San Diego. As litigation dragged on through the 1920s, postponing the construction of the El Capitan Dam, the Southern California population increased, and water rights became more scarce and valuable. In late 1926, Representative Swing (then a member of the House Committee on Indian Affairs) mindfully acted in the city's interest by introducing legislation to extend the Capitan Grande trust patent for ten years beyond the five-year extension made in 1919. There were fears within San Diego that if the Capitan Grande people collectively owned their land patent, they would invite competitive bidding for their reservoir site based on rising land and water values. Swing's extension act benefited the city, not the Indians.³⁰

Also in 1926, Swing introduced another, less known "Swing-Johnson Bill" to transfer federal funds for the care and relief of the Indians of California to public agencies in the state. Establishing a contract whereby the state was reimbursed for services, the legislation was the brainchild of the American Indian Defense Association (AIDA) of Central and Northern California

²⁸Francis Jocelyn Fischer, "The Third Force: The Involvement of Voluntary Organizations in the Education of the American Indian with Special Reference to California, 1880-1933" (Ph.D. diss., University of California, Berkeley, 1980). McCool discusses the disruptions of the operations of the iron triangle by outside sources like reformers but says little about the impact of 1920s reform.

²⁹Phil Swing's district is called "7 come 11" because it was made up of seven counties and was the eleventh district (aka Mono to Mexico). Beverly Bowen Moeller, *Phil Swing and the Boulder Dam* (Berkeley, CA, 1971), 3, fig. 1. Swing was elected November 20, 1921, and ended his public career after finishing his term in March 1933; he withdrew from a bid for the U.S. Senate on June 22, 1933.

³⁰House Bill 14250 was introduced by Swing on December 7, 1926 (69-2) "[t]o authorize reimposition and extension of the trust period on lands held for the use and benefit of the Capitan Grande Band of Indians in California." It became law as PL 69-585; 44 Stat. 1061 on February 8, 1927.

and its brilliant analyst John Collier. (The bill's coauthor, California senator Hiram Johnson—formerly the nationally prominent progressive state governor—was largely a silent party in the Indian relief bill.)³¹

Using the AIDA as his base, Collier built his political career in the spirit and coin of Progressivism. The well-heeled intellectual elite of San Francisco's Commonwealth Club, whose membership overlapped with the AIDA's Northern California branch, provided the movement with respectability and authority. Members of the California Federation of Women Clubs and other Indian rights organizations served as the ground troops. A skilled organizer, Collier launched a national reform movement in California in the mid-1920s, which blamed Indian woes on the spoliation by the federal government's Indian Office and economic ruination by predatory whites. Collier exposed many shocking defects of Indian policy, which were diametrically counter to Indian interests, and he outlined a legislative agenda for sweeping reforms. He decried the policy thrust toward assimilation (calling it "racial extermination") through "individualization." Collier became the commissioner of Indian affairs in the administration of President Franklin D. Roosevelt and is renowned

³¹The bill authorizing the secretary of the interior to arrange with states for the education, medical attention, and relief of distress of Indians, and for other purposes, was introduced first on February 3, 1926, H.R. 8821 (69-1); Swing reintroduced it to the House on December 17, 1926, and Hiram Johnson to the Senate on December 19; the bill was revised successively, simplified, and shortened. S. 2571, introduced by Senator Johnson, became P.L. 73-167 in the 72^d Congress in 1934. It was drafted originally by Robert M. Searls, a lawyer, in cooperation with the Commonwealth Club. Senators LaFollette and Cooper introduced an identical measure affecting Wisconsin, which obtained the Department of the Interior's and the comptroller general's endorsement. Secretary of the interior H. Work stated in his annual report (p. 20) that state and local agencies "are in a position to assume these responsibilities for the Indians and perform them more promptly and sympathetically than the Federal Government," Bancroft Library, UC Berkeley, Merriam Papers, reel 88, AIDA folder, Indians, 1926.

for ushering the landmark Indian Reorganization Act (1934) through Congress.³²

As Progressive reformers fighting for efficient and honest government guided by educated professionals but serving democratic ends, Phil Swing and John Collier were on parallel courses: Swing to expand the water infrastructure dramatically through canal and dam construction to bring water to Southern California's Imperial Valley farmers and the Southland's coastal urban dwellers; Collier to bring bureaucratic reform to Indian social services by integrating Indians into state welfare bureaucracy. The policies of both men entailed a major restructuring of state and federal relationships, and required federal money and authority.

Collier and Swing shared common ground on California Indian welfare reform. In the 1920s, California was propelled toward broad-based political activism regarding Indian policy by two intertwining developments. The first was the *California Claims* case. In the wake of the rediscovery in 1905 of the eighteen unratified California treaties of 1851–52, public awareness was expanding about the injustices done and about the viability of a suit by California Indians against the federal government for redress and compensation. The second was the growing financial burden on county governments for health and welfare services for impoverished, landless California Indians who were not receiving federal services for health,

³²Primary sources for the AIDA's political activities and Collier's leadership, in conjunction with the San Francisco Commonwealth Club, are in the Bancroft Library's manuscript collections: the Chauncey Goodrich Papers, BANC MSS 79/59, and the C. Hart Merriam Papers, Bancroft film 1022 [aka BANC MSS 80/18c], reel 88, with some supplementary information in reels 80 and 8; all materials cited for the Merriam Papers are on reel 88 unless otherwise specified. See Merriam Papers, Indian Affairs: NS 1, no. 2 (January 1938). Kenneth R. Philp, "John Collier," in *The Commissioners of Indian Affairs, 1824–1977*, ed. Robert M. Kvasnicka and Herman J. Viola (Lincoln, NE, 1979), 273–83.

The AIDA, a mere handful of people in the mid-1920s, Collier wrote, would become a powerful national propaganda organization seeking "an ultimate revolution of Indian policy, and of method of administering Indian affairs." Merriam Papers, [Collier] Statement [n.d., c. 1924–25], AIDA folder, Indians, 1924–25; see also in same folder *AIDA Bulletin*, no. 2, June 1924. "The Indian Bureau admits that it is attempting to DESTROY the Indian race by breaking up the tribes," *AIDA Bulletin* 9, "Indian Reform Is A NATIONAL RESPONSIBILITY" (caps in original). See also "Program for [A]IDA director's meeting" [undated [1925?]], Goodrich Papers, carton 1.

education, or welfare.³³ Impoverished Indians included those with federal trust status due to the paucity of resources on the California Indian reservations. California Indians were "falling through the cracks" as an underserved population, as lawyer and Collier ally Chauncey Goodrich affirmed. Research by the AIDA revealed that the vast, centralized federal Indian Office administration consumed the lion's share (53 percent) of congressional appropriations. Collier's answer was to propose a major restructuring of state-federal relations. The "Indian population is part of the social fabric of the state,"

³³Oscar H. Lipps, Sacramento Indian agent, stated that there had been "numerous and persistent" publications from 1885 to 1920 about the "depths of distress and degradation" of the state's Native people. Lipps' sixty-nine-page report, "The Case of the California Indians on economic, education, health, and home conditions of landless CA Indians," was submitted to the commissioner of Indian affairs on June 15, 1920. A Christian organization, the Northern California Indian Association (NCIA), had begun the first systematic survey of the condition of landless California Indians. The NCIA spearheaded the drive to acquire land after 1908, when Congress made small appropriations to this end; 80 percent of the land purchased for the homeless Indians was worthless for farming or grazing. Approximately 8,000 California Indians were landless out of the estimated 17,350 total Indian population in the state. C.E. Kelsey, "California Indian Land Situation, 1914" (NCIA flier); see also L.A. Barrett, "Land and Economic Conditions of the California Indians," in UC Berkeley, Bancroft Library, Commonwealth Club folder, Goodrich Papers, carton 1.

The *California Claims* suit went forward with the passage of the California Jurisdictional Act in 1928, permitting the state of California to sue the federal government in behalf of the California Indians.

Addressing health issues, in 1921–22 a survey done by the California State Board of Health Report of Northeast California by Allen F. Gillihan, M.D., and Alma B. Shaffer, R.N., confirmed the alarming state of affairs regarding disease contagion among California Indians. "California's Hopeless Indians," *American Indian Life*, Bulletin No. 4 (Jan.–March 1926), quotes this report. Merriam Papers, AIDA folder of California.

Collier argued. The state's welfare bureaucracy could more effectively and cheaply serve the California Indians.³⁴

In his persistent lobbying efforts for the Swing-Johnson Bill from 1926 to 1930, Collier declared the interests of state citizens to be parallel to those of the Indians in the welfare reform bill as well as the *California Claims* bill.³⁵ This assertion can best be understood as Collier's artful political strategizing. California voters needed to be maneuvered into a more sympathetic frame of mind regarding Indian people, he realized. To awaken the public conscience, an image of Indians as deserving, industrious people, pillaged and repeatedly betrayed, needed to displace the image of Indians as shiftless incompetents. California citizens could be politically mobilized by shame—the specter of indigent, aging, and sick Indians in a time of general prosperity—and by apprehension about disease contagion and higher taxation. Collier sought to convince California voters to support the radical change of incorporating Native people into state welfare services by persuading the voters that they would gain local political control over Indian affairs but avoid major costs. Costs would be avoided by tapping congressional appropriations, but also by transferring the estimated \$10 to \$50 million the California Indians were expected to receive in the *Claims* case to the California state government for Indians'

³⁴"Wheeler Indian Bill" mimeograph, Merriam Papers, AIDA folder, Indians, 1926; Congressman John E. Raker estimated the administrative overhead at 75 percent in 1918. Hearing on "Conservation and Storage of Water, San Diego." Collier quoted in Commonwealth Club of California folder, Goodrich Papers, carton 1.

"[I]n California the Indian, even though he lives on a reservation, must work outside for a living." Chauncey Goodrich, "The Legal Status of the California Indian," *California Law Review* 14:3 (1926): 168. Further burdening the county relief system and creating taxpayer anxiety was the 1917 California Supreme Court decision, *Anderson v. Mathews* (174 Cal. 537, 163 Pac 902) (discussed in Goodrich, "The Legal Status of the California Indian," 164–68). The Indian who did not live a tribal life, the court ruled, was a citizen of the state and was entitled to vote even though he was a member of a group that received social services. Even reservation Indians were eligible for state services. A May 1926 report from the comptroller general of the United States confirmed state responsibility: "The scattering bands of Indians in California have, for some time, been considered as citizens and the responsibility for their care, when indigent, devolves upon local or state officials. . . ." Goodrich Papers, clippings folder, "Our Step-child, the Indian" (Dec. 18, 1926), carton 1.

³⁵Debate on Senate bills 336–37, c. 1926 in Commonwealth Club of California folder, Goodrich Papers, carton 1; cf. Merriam Papers, AIDA Indians folder, 1924–25.

social services. Successively debated and revised, the Swing-Johnson Bill became law in 1934.³⁶

The situation in California, with its increasingly overburdened county service agencies and its underserved, uneducated, indigent Indian population, graphically demonstrated what lay in store for the rest of the nation. The national policy outlined by the Dawes Act was bankrupt. Once freed from guardianship, Indians throughout the arid West would lose their fragile hold on water, default on their properties, and become dependent on local social services. California was on the cutting edge of change in the generative political movement to address the problems of serving an indigent non-reservation Indian population. Advocating for major experimentation and innovation in social service delivery, Collier and others called California "a demonstration state."³⁷

Collier drew a line between reform in social welfare and matters of Indian property, because in matters of property non-Indian and Indian interests were adversarial and this would not be politically popular. Swing and Collier had opposing agendas when it came to Indian water rights, and their differences would be manifested over the Capitan Grande removal. Swing and his Southern California constituency would take the self-interested position that "freeing" the Indians—and their resources—from federal trust management was long overdue. They opposed creating more reservation trust land within San Diego County for the relocated Indians of Capitan Grande, because more land would be withdrawn from the county tax base, putting a greater burden on non-Indian property owners. Alternately, Collier and his followers accurately read the historic record as demonstrating that Indians freed from federal trust became further impoverished and a burden to county welfare agencies.

Much as Collier wished to downplay conflicts over resources, his research led directly to a critique of the Indian Office for its failure to protect Indian water rights. Collier was an astute political analyst, and he sought answers for why Indian resources

³⁶Collier also proposed using the Indians' funds in tribal and personal accounts held by the federal government "as a working capital to put the Indians as groups and individuals on their feet industrially." Debate on Senate bills 336-37, c. 1926 in Commonwealth Club of California folder, Goodrich Papers, carton 1.

³⁷*American Indian Life*, Bulletin No. 8 (May 1927) in Merriam Papers, AIDA folder of California. Following a state supreme court ruling in 1925 that Indians have a compulsory right to state schooling, California began integrating more Indian children into public schools with subsidies paid by the federal government. Meeting of Indian Affairs, June 1, 1925, section outline, Commonwealth Club of California folder, Goodrich Papers, carton 1.

were steadily diminishing under federal guardianship. Why was even the most highly skilled and most motivated reservation Indian unable to succeed as a farmer under the current policy framework? At the heart of the problem was that a checks-and-balances system was absent: Native people were government "wards" until they took their properties in fee simple title. The Indian Office lacked accountability, creating an environment for extortion, fraud, abuse of power, and cloaked complicity with those seeking legal control of Indian resources.

Collier developed a sophisticated analysis of the dark and bloody ground of ongoing Indian property abuses, which later historians would confirm. The Dawes Act authorized sale of "surplus" reservation land; tribal money from these sales was put into government trust accounts, which were then manipulated by the Bureau of Reclamation to fund dam and irrigation projects primarily benefitting non-Indians. Collier found similar asymmetrical benefits and costs resulting from the Reimbursable Debt Act and the Federal Powers Act. A power generation reservoir on the Flathead Reservation was one target of an AIDA exposé of the 1920s: the Indians were not receiving payment for the lease on their lands.³⁸ Collier emphasized the need for immediate correction, such as requiring Indian consent for water projects on reservation land and use of tribal funds; creating stronger protections for resources on executive order reservations; and establishing Indian Office accountability.³⁹

By the late 1920s, the AIDA's activities included being a watchdog and informal legal counsel for Indian water rights in Southern California. In conjunction with county public officials and Indian affairs divisions of the Federation of Women's Clubs, AIDA conducted a flurry of field inspections and fact-finding research into the living conditions of the Mission Indians. During one of these field investigations, the resident Indian Office farmer at Torres-Martinez Reservation opined that the old days were gone when they "used to be able to keep a tight rein on the Indians and discipline them as they thought

³⁸AIDA of Central and Northern California to Charles J. Rhoads, 22 April 1929, Merriam Papers, AIDA folder, 1927-30. There were also problems regarding the Coolidge Reservoir on the San Carlos Apache Reservation.

³⁹*Ibid.*, *Legislative Bulletin* 5-A dated March 1, 1926, Merriam Papers, AIDA folder, Indians, 1924-25. See also Charles Elkus to Charles J. Rhoads, 22 April 1929, in Merriam Papers, AIDA folder, 1927-30, p. 8, regarding the need for Indian assent and compensation for water power sites. The Federal Water Power Act says proceeds from power development on any Indian reservation should be placed to the credit exclusively of the Indians on such reservation.

best when they needed it. . . . But now they dare not touch them because if they do the Women's Clubs land on them."⁴⁰

At Palm Springs, Chauncey Goodrich and other AIDA attorneys scrutinized a proposed water lease agreement between a private water developer and the Agua Caliente Indians.⁴¹ The Indian Irrigation Service was also defending Mission Indian water rights more vigorously in the 1920s.⁴² The AIDA offered advice to one of the Capitan Grande people, who was perplexed by the long delay in removal.⁴³ Characteristically, the Indian Office did not keep these soon-to-be-displaced Indians apprised of the legal developments delaying construction of the El Capitan Dam.

The Southland's Native people were among those Californians organizing, networking, and forging strategic alliances, and articulating their demands for reform. Their inquiries and demands were treated dismissively, as a petition from the Mission Indian captains to President Harding, dated May 24, 1921, reveals. In the petition, a coalition of leaders thoughtfully and clearly explained their opposition to allotment and their desire for tribal land patents and reservation schools for their children, their need for surveys to mark boundaries firmly, their wish for self-government through elected councils, and provision for water rights. The terse critique scribbled in the margin of the document by some federal official—saying these Indians were ignorant and reactionary, and were not following proper channels—speaks volumes about how Indian voices

⁴⁰AIDA report of December 18–22, 1925, trip of Jay Nash and Alida Bowler and an undated six-page preliminary report [1924] of a trip by Goodrich and Collier; these detail the water problems on Southern California Indian reservations. AIDA folder of Central and Northern California, Goodrich Papers, carton 1. No other reservation that they visited besides Pala had adequate water for agriculture; at Palm Springs, a white home was built to block water flow of an Indian ditch; there were liens of Indian holdings for reimbursable debts for wells, pumps, and ditches. Nash and Bowler reported unfair distribution of water at Soboba.

⁴¹Goodrich Papers, correspondence folder, outgoing, 1925, box 1.

⁴²Herbert V. Clotts, supervising engineer, Indian Irrigation Service, protest of July 1922 in behalf of the Indian Irrigation Service against Coachella Valley Water District application for 94,500 acre-feet from the White Water River and other streams as this will adversely impact forty-seven of the Indians' artesian wells. Indians folder, legal notes, Goodrich Papers, carton 1.

⁴³Jim Banegas appealed to Stella Atwood, an AIDA affiliate, for information. Goodrich to Jim Vanga [Banegas], 16 March 1925. Goodrich Papers, correspondence, outgoing, 1925, box 1.



The AIDA offered advice to Jim Banegas, above with his children, after he asked for information about the removal. (Courtesy of the San Diego History Center)

were silenced.⁴⁴ Long-suffering under the yoke of the Indian Office's neglect, paternalism, and mismanagement, the Indians of Southern California became outspoken critics of Indian policy in the 1920s. As in the northern part of the state, the demand for restitution for the lost treaties was a stimulus for pan-Indian cooperation.⁴⁵

Southern California Indians were drawn into a grassroots organization, the Mission Indian Federation, in part because of the increasingly desperate water situation. The wells were going dry at the Torres-Martinez Reservation, forcing Indians out of farming their allotments and into wage labor, while the resident agency farmer and white neighbors enjoyed an adequate water supply. The dissidents at Capitan Grande, who opposed removal, also joined the federation. A banner federation issue in 1920–21 was the effort to prevent San Diego from “stealing

⁴⁴Mission captains to President Harding, 24 May 1921, Mission Indian Agency, RG75, NA-Laguna Niguel [now Perris]. In the Goodrich/Collier report, c. 1924, p. 5, blame is placed on the Indian Office for not educating and informing Indians or acting for them in courts. AIDA folder of Central and Northern California, Goodrich Papers, carton 1.

⁴⁵In the preface to *Water and the West* (Berkeley, CA, 1975), Norris Hundley, Jr., calls for additional historical studies, including those “approaching river development from the point of view of the Indian, whose interests are often at stake and just as often overlooked” (p. xviii).

the Capitan Grande Reservation from the Indians." Luiseno Indians were aggrieved by the enormous debts incurred under the Reimbursable Debt Act.⁴⁶

THE NEW ERA OF INDIAN POLICY

Facing a barrage of criticism from both Indian critics and non-Indian reformers throughout the 1920s, the Indian Office was thoroughly discredited. With the election of Herbert Hoover, the birth of a "new era" of bureaucratic efficiency and integrity was anticipated. Old Guard commissioner Charles Burke was ousted, and Quakers Charles Rhoads and Henry Scattergood were appointed in 1929. The AIDA forged an alliance with the Indian Office. Commissioner Rhoads agreed with John Collier on key issues of revoking the Indians' reimbursable debts and an eventual state government takeover of Indian welfare services.

The new commissioners endorsed a more realistic approach to Indian problems.⁴⁷ The outdated formula of making successful farmers of Indians died hard,⁴⁸ but there was the growing awareness that other creative approaches were needed, since affordable and well-watered agricultural land was simply not available in California. In 1929, the AIDA recommended that Commissioner Rhoads consider an experimental plan to place "migrant Indians, or . . . those Indians not yet migrant, who desire and are equipped[,] . . . into the white industrial world."⁴⁹

Rhoads and his assistant, Scattergood, broke with Collier and the AIDA in 1930–31 because of differences over ends and means. Secretary of the interior Lyman Wilbur appointed Rhoads commissioner of Indian affairs with the clear expectation that

⁴⁶Thorne, *El Capitan*, 107 and 105–12ff. On Torres-Martinez with Joe Pete, founding federation member, as spokesperson, Goodrich/Collier report. Akins, "Lines," implies that water rights are a major cause for federation organization. An argument can be made, along the lines of his nascent analysis, that Mission Indian federation members were those most imperiled by federal water policies, while those gaining some positive benefits of federal intervention—allotments, government jobs, and promises of an improvement in quality of life, as at Capitan Grande—were anti-federation.

⁴⁷"Indian Defense Association Hears Executive Secretary," *Santa Barbara* (California) *News*, January 11, 1930. Clipping in Merriam Papers, AIDA, Indians folder, 1924–25.

⁴⁸In 1926, AIDA itself was advocating this approach as the ultimate solution for self-support. "Our Step-child, the Indian." Lawrence Kelly, "Charles James Rhoads" in *The Commissioners of Indian Affairs, 1824–1977*, 263–73ff.

⁴⁹AIDA letter to Charles J. Rhoads, 22 April 1929.

Rhoads would work himself out of a job. The "Indian problem is the elimination of the guardianship of the Government over the Indian and the transformation of the native Americans from wards to independent and self-sufficient citizens," Wilbur stated.⁵⁰ Pressured to fulfill Wilbur's mandate to move Indians toward termination, Rhoads believed the application of modern irrigation practices could make the individualization of Indian lands feasible, with ultimate taxation by local, state, and federal governments. Collier opposed individualization; he favored collectivism and was against allotment and taxation.⁵¹

Capitan Grande would be a testing ground for the Hoover administration's "new era," a window into how Indian water rights were being reconfigured in this transformative time: farming versus wage labor, individualism versus collectivism, assimilation and termination versus an ongoing federal trust responsibility. After years of litigation postponing the construction of the El Capitan Dam, on October 13, 1930 the Supreme Court sided with the city of San Diego (282 U.S. 863). Assistant Commissioner Scattergood arrived at Capitan Grande in spring 1931 to initiate the removal process.

A "no urgency" approach was publicly announced. No properties would be purchased for the Capitan Grande people's relocation until Indian preferences were ascertained. Each person on the reservation would be eligible for an estimated \$2,000 share of the total distribution from the city. In June, Scattergood wrote to John Randolph Haynes, a prominent AIDA member in Los Angeles, about the desirability of "ending of tribal life and location [of the Capitan Grande Indians] on individual plots of land near population centers."⁵² Embracing an experimental approach, Scattergood offered the Capitan Grande people three possible options: to put their shares toward collective purchase of a new property; to remain on the Capitan Grande Reservation in homes not inundated by the new reservoir; or to "scatter"—that is, to spend their shares for purchases of properties closer to jobs in urban areas. For these detribalized Indians, individual properties would be subject to local, state, and federal taxes. "We want to know what all the

⁵⁰"Wilbur Has Plan to Set Indians Right," *San Francisco Chronicle*, March 29, 1929, in Goodrich Papers, carton 1; *American Indian Life*, Bulletin No. 4 (Jan.-March 1926) in Merriam Papers, AIDA folder of California.

⁵¹Kelly, "Charles James Rhoads," 266; Philp, "John Collier"; June 4, 1931 minutes, Goodrich Papers, AIDA of Central and Northern California folder, carton 1.

⁵²J.H. Scattergood to John R. Haynes, 20 June 1931, John Randolph Haynes Papers (Collection 1241), University of California, Los Angeles, Charles E. Young Research Library, Department of Special Collections, box 81, folder 19; Thorne, *El Capitan*, 117-23ff.



The city of San Diego, the Cuyamaca Flume Company, and others engaged in a fierce and prolonged battle for the waters of the San Diego River and a reservoir site at Capitan Grande, shown above in 1917. (Courtesy of the San Diego History Center)

Indians themselves want," he stated.⁵³ Since one-fourth of the Capitan Grande people were already living off the reservation, it was expected that many would choose to scatter.

Scattergood's chief concern was providing equities so that all Capitan Grande members would experience economic betterment. We have here a large sum of money for a small group of people (approximately 150), he said; all should be guaranteed a better life. Scattergood aimed to help "these Indians to help themselves in the making of a living in the community so that they may not become a charge upon the public."⁵⁴ The Conejos Band lived in an isolated location on a tributary of the San Diego River. They, too, might be tempted by the offer of individual shares of \$2,000.

Meanwhile, Scattergood was slow to respond to the urgent and united demand by the Ames group (the people along the river whose homes and improvements would be flooded) for purchase of the Barona Ranch property. The Indian Office

⁵³Rhoads repeated a statement from Lipps' "The Case of the California Indians" that Southern California Indians were little different from Mexicans, p. 64; Thorne, *El Capitan*, 116-18. News release, July 20, 1931, UCLA, Phil Swing Collection, folder 4, box 30; cf. documents in, Goodrich Papers, Phil Swing folder, box 4.

⁵⁴Thorne, *El Capitan*, 117.

hesitated to give approval, because Barona lacked adequate water, so the Indians likely would not succeed in becoming self-supporting.⁵⁵ In his annual report for 1931, Commissioner Rhoads described San Diego's November delivery of \$361,428 to the federal treasury as the "outstanding development" of the year; he reiterated the need for a cautious and considered approach, which would balance what was acceptable to the Indians with bringing about maximum improvement.⁵⁶

NEGOTIATIONS OVER WATER: THE 1932 AMENDMENT TO THE EL CAPITAN ACT

More or less simultaneously, the city of San Diego and the Indian Office recognized the need for Congress to amend the 1919 act. The Department of the Interior did not have the discretionary authority to distribute the money as it deemed fit among all of the Capitan Grande members, not just to those forced to relocate because their homes would be flooded. In late 1931, the city attorneys were discussing the city engineers' recommendation to raise the height of the dam by 197 feet and to acquire another 920 acres of the reservation to allow for an enlarged reservoir.⁵⁷

Alarmed that the Indian Office was ignoring Indian wishes in refusing to buy the Barona property and suspicious that its cloaked motive was to remove trust status from some, if not all, Capitan Grande Indians, the AIDA went into action. Haynes began negotiations for purchase of the Barona property, and Collier wrote a detailed report excoriating Scattergood for misunderstanding the 1919 act, the intent of which clearly was to move the Indians as a group and to reconstruct their community relations. He contested the Indian's Office's claim that many of the Capitan Grande people were favorably disposed to dispersal. A congressional amendment was needed to create the equities Scattergood sought.⁵⁸

A four-month period of discussions over several controversial issues followed between the city and the Indian Office, with Congressman Swing playing the role of negotiator and

⁵⁵Ibid., 120–21; 127 of 147 reservation members were resident according to the Annual Report of the Commissioner of Indian Affairs, 43.

⁵⁶Annual Report of the Commissioner of Indian Affairs, 35–36.

⁵⁷Amount deposited in treasury following U.S. Supreme Court decision of October 1930 (282 U.S. 863).

⁵⁸Thorne, *El Capitan*, 122–23.

cosponsor of the bill to amend the 1919 El Capitan Act. The city's lawyers insisted that there be no additional charges to San Diego for the additional 920 acres of Capitan Grande Indian land, nor any further concessions by the city. They claimed that the \$361,428 covered the value of the entire reservation, including all Indian water rights.⁵⁹ After San Diegans voted the funds to build the dam in early December 1932, city engineer Hiram Savage and Congressman Swing were in Washington, D.C., lobbying for the bill. They brought with them an easy-to-read, color-coded map prepared by city attorneys as a visual aid for congressmen.⁶⁰ They were adamant that no other water right doctrines challenge their paramount pueblo rights. Referencing the 1922 Clott Report on the value of the assets of the Capitan Grande Reservation, city auditors argued that the 17,597 acres remaining at Capitan Grande were not irrigated or irrigatable and had been valued at \$5 per acre. The Department of the Interior maintained that the \$286,428 was merely a "severance charge" for damages to the Capitan Grande people for having their best agricultural lands taken; the city had not purchased the whole reservation and its water rights, but only 1,940 acres and a right-of-way. The Indian Office and the Department of the Interior insisted that San Diego pay for the additional 940 acres it required for the taller dam and larger reservoir.⁶¹

Most importantly, the Indian Office used the city's request for additional acreage to leverage a clear legal definition of the Capitan Grande people's existing and future water rights. Without such a provision, the drive to make the Capitan Grande people self-supporting would be illusory. "It is perfectly manifest that these Indians in this dry country must have water," Scattergood testified, "and they must be moved to new locations where water is provided for them."

⁵⁹Details of the negotiations and meetings are in Swing's correspondence and some in clippings from San Diego newspapers; many, undated, are in the Phil Swing Collection, folders 4-5, El Capitan Grande Indian Land Transfer Bill (HR10495) and folder 6, El Capitan H.R. 228, box 30; also in hearing reports on the amendment and bills. Swing introduced House Bill 229 in early December, and Hiram Johnson introduced it to the Senate on December 14, 1931. Special Water Counsel T.B. Cosgrove attended a November 4, 1931, conference with the city mayor and attorney C.L. Byers. Swing to Hiram Johnson, 9 Dec. 1932, reporting Byers' letter of 7 Dec. 1931, saying the city paid \$361,428, and Congress should grant additional land for free. Phil Swing Collection, folder 5.

⁶⁰C.L. Byers to Swing 7 Dec. 7, 1931; *San Diego Tribune*, Jan. 29, 1932; Byers reported that the BIA insisted on an additional \$35,000 and "that restrictions regarding supplying water to Indians are such that the city could not afford to make the deal." Phil Swing Collection, folder 5, box 30.

⁶¹Swing to Hiram Johnson, 9 Dec. 1932, Phil Swing Collection, folder 5.

The Indian commissioners recognized that inasmuch as there had been a vast amount of litigation over the water rights to the San Diego River, the federal government had to define its legal position. Rhoads made the federal view of the matter explicit in his 1932 report to the Public Lands Committee: The Department of the Interior was not a party to and was not bound by the Supreme Court decision affirming the city's paramount rights; the Indians and the United States in their behalf held a water right to develop and use water from the San Diego River; the city had to make a concession to the paramount right of the U.S. government.

In combative discussions from January to February, the city considered withdrawing its application entirely in the face of what it viewed as the Indian Office's unreasonable demands. These demands included that the city deed back Indian water rights granted in 1919; that Indians have the right to San Diego River water either above or below the reservoir; that the Indians be guaranteed the right to 917,000 gallons of water per day (based on their previous agreements with the flume company); and that the Indians have storage space for their water in the El Capitan Reservoir. Significantly, there was a serious attempt to quantify the aggregate sum of Capitan Grande water at 10 percent of the total 10 million gallons the city stood to acquire when Indians comprised one-tenth of 1 percent of the San Diego population.⁶²

In his final report in early March 1932, Commissioner Rhoads declared that all of the Capitan Grande Reservation members had water rights that should be protected. Because the city needed a favorable report from the Indian Office to get action in committee and in Congress, the city officials and the Indian Office came to a compromise in spring 1932. Phil Swing introduced a revised bill. San Diego agreed to pay for the additional 920 acres at \$38.33 per acre, the price set in 1922.

⁶²Scattergood quoted in Report 805 (72-1) includes Scattergood's March 3, 1932, report, Phil Swing Collection, folder 6, El Capitan H.R. 229; cf. Rhoads Report. Newspaper clipping (possibly *San Diego Sun*, n.d.), "Federal Bureau Water Demands Block Deal for El Capitan Land." The city was thinking of abandoning its request for more acres/a higher dam unless the BIA abated its requests for water rights concessions, the "latest move" by the Indian Bureau being to develop 917,000 gal./day along the river and collect \$38,000. A memorandum from Savage says the BIA is insisting on a side agreement regarding water for Barona from tributaries flowing into the San Diego River below the dam. Details in another undated clipping (unnamed San Diego newspaper) say the bureau wants the right to develop an unspecified amount of water above the 1,000-ft. elevation on the San Diego River watershed and 185-acre feet, or about 160,000 gallons a day, on the lower reaches of the river. Phil Swing Collection, folder 5.

The Interior Department gained the authority to use discretion to equalize the benefits of the city's money. The Indian Office succeeded in including language protecting and preserving the Capitan Grande people's not inconsiderable existing water rights. Scattergood testified that the agreement "means that we can proceed to develop water wherever we may elect to put these Indians, without interference from the city, because of that paramount water right." Explicit language subjected San Diego to these terms even if the Capitan Grande Indians did not use these water rights; the Indians had the right to transfer water rights to lands purchased or to acquire water rights in a new location, as long as the quantity did not exceed the aggregate total quantity of water they had the right to develop. The 1932 amendment did not terminate or limit the rights of the Capitan Grande Indians or of the United States in or to the lands or waters flowing in or along the lands remaining and forming part of the Capitan Grande Reservation.⁶³

The city celebrated its victory with passage of the amendment on April 21, 1932.⁶⁴ A San Diego newspaper exulted, "The bureau stood strongly on points relative to the protection of interests of the El Capitan Indians. But it finally was convinced that its points were not well taken, because our acquisition of the land in no way takes from the Indians any rights they now have." Key points on which the Indian Office backed down were the inclusion of specific language quantifying the Indians' water entitlement and the right to storage space at El Capitan Dam. Representative Swing proudly telegraphed San Diego mayor Walter W. Austin, saying, "I was successful in getting the city's El Capitan [R]eservoir bill passed by the house today in the form recommended by the committee." The 1932 amendment was one of Swing's last accomplishments as a Congressman.⁶⁵

As events unfolded, the Indian Office's intent to make Barona Ranch a flagship for Southern California Indian termination became manifest. The Department of the Interior was heavily invested in engineering the Capitan Grande people's rehabilitation. The application of modern scientific expertise by the Indian Office would enable Barona to become a self-supporting agricultural/ranching community whose individual members could be assimilated gradually into the larger population. As a demonstration state, California would be the forerunner of the termination movement of the 1950s. South-

⁶³Rhoads Report, 16, H.R. 10495 revised bill.

⁶⁴P.L. 72-119, Statutes-at-Large, 47 Stat. 146, ch. 165.

⁶⁵Clipping "San Diego Wins Hard Fight for El Capitan Land," unnamed San Diego newspaper, April 1932?, Phil Swing Collection, folder 4.

ern California Indians quickly organized to block this with a "water rights first platform" as one of its principal demands before it would agree to termination. The U.S. Justice Department initiated litigation for the Luiseño Indians' water rights to the San Luis Rey River in these years.⁶⁶

CONCLUSION

The Capitan Grande experience reveals a doggedly consistent path by the Indian Office to realize its mandate under the ill-conceived Dawes Act. The Indian Office fought diligently to maximize water rights for the Capitan Grande Indians to make them self-sufficient, so they could be terminated. The events at Capitan Grande unfolded in an era of rapid transformation in California, where Indian policy reform, water infrastructural developments, and Indian water rights converged. In the politically volatile 1920s, critics were assaulting the Indian Office for its failures, and Southern California Indians' acute crisis over water came into the spotlight.

Tellingly, the Indian Office's enhanced political leverage in the 1930s brought success, if qualified, in countering the "iron triangle." The Indian rights struggle at Capitan Grande anticipated and paralleled later developments of the 1960s and 1970s, ushered in by an Indian reform movement and Indian political activism. Indians were viewed as legitimate stakeholders in a negotiated settlement among competing groups: deals were cut, relationships among polities were restructured, and water was reallocated.⁶⁷

⁶⁶"Mission Indians Problem in San Diego County," unpublished hearing; Max Mazetti, another person giving testimony before the committee, demanded adjudication of water rights before the courts as one of the preconditions to passage of a termination bill; Mazetti adopted a "water rights first" platform with the slogan "Remember the Bishop Indians." Heather Daly, "American Indian Freedom Controversy" (Ph.D. diss., UCLA, 2013), 109, 134. Litigation was introduced in 1951 for Southern California Indians of the San Luis Rey River drainage, resulting in the San Luis Rey Indian Water Rights Settlement Act (P.L. 100-675). After twenty-three years of negotiations, on April 25, 2012, the tribes, the city of Escondido, and the Vista Irrigation District reached an agreement, still not approved by the Department of the Interior, which sets as a condition the price of settlement for the United States is termination of its trust responsibility for all of the bands' rights to the San Luis Rey water. cf. Mike Lee, "No End in Sight for 43-year Water Saga," *Union Tribune*, <http://www.utsandiego.com/news/2012/jun/15/no-end-sight-43-year-water-saga/>.

⁶⁷Thomas McGuire, "Getting to Yes in the New West," in *State and Reservation: New Perspectives on Federal Indian Policy*, ed. George Pierre Castile (Tucson, AZ, 1992), 224-25.

Placing this case study within the larger political context of Indian policy reform and Southern California water projects provides insight into the overall historical development of regional Indian water rights.