



## The Transition of Water Claims: *From Moral to Legal Native American Water Rights Claims*

*Andrea R. Semlow*  
Grinnell College  
semLOWAN@grinnell.edu

The legal domain of water in the United States is complex and permeated with conflict. In the case of Native Americans, it has been a long road to claim water rights since European colonization. The only resource legal claim that Native Americans wield are their reservation treaties, Steven Treaty rights, and Winters Doctrine rights. These claims provide legal protection of quality and quantity of water. These are the only defense against non-Indian irrigators and large corporations encroaching upon their land and water rights. Without these rights, the tribes are losing their right to self-sufficiency as a sovereign political body because they can't sustain themselves without outside support. However, Native Americans still presently face challenges to their need for water due to the majority population's view of water as a biological necessity and not a sacred symbol.

According to Levi-Strauss's model of kinship, "water connects domain of life such that water used in one way will affect the water used in others" (Orlove 2010). The use of water is a bridge between all people in an area. If Native Americans are using it for fisheries it will affect how non-Native Americans use water for irrigation and vice versa. This relationship

intertwines the fates of both peoples in a metaphorical sense as well as in a political

sphere, and this theory ties them in a social sphere on the most basic level of kinship in terms of necessitating the most basic need of water. The bridge between the legal and moral claim also bridges the political and social spheres in regards to the conflicts of water between Indians and non-Indians. This same kinship model also ties individual Native

American tribes together in their sameness of collective water use. Water is understood differently in various social settings and the essence of water is varied among cultures (Orlove 2010). Native Americans view water as a part of their spiritual being and in turn it is part their moral responsibility to protect the water on their land for very different reasons than simply conservation like non-Native Americans. Thus the claim to water is not only physical, it is a moral claim that needs to be addressed.

If a Native American tribe used the moral claim that the sacredness of their water needed to be protected under the law the court would not be able to use the law to take action in their favor due to the first amendment prohibition against government establishment of religion. Jeffery's explains, "Legal processes disempower "outsiders" by rejecting their stories based on backgrounds, worldviews, and experiences not understood by the judges and jurors" (Jeffery 2006). The United States legal system cannot translate the semantic memory of water as sacred and the historical narrative of a collective water based origin story into a legal claim due to the constitution. The semantic memory, a person's abstract, timeless knowledge of the world, according to Tulving, would be like the knowledge of the Native American tribes that water is sacred. Jeffery's notion of the collective narrative can be implemented with Native American by the retelling of origin stories and the histories of the water's supposed healing power. The sacred power of water stems from Native American cultural roots: respecting the land as part of them because they originated from the land and water. This is their unique moral claim to water.

An example of how water is sacred to Native Americans is the Hopi tribe. The Hopi have a strong culture tie to the land of the Black Mesa. All Native American tribes have an origin story, and in the case of the Hopi, their origin story gives them a strong spiritual bond with the Black Mesa land. They have the belief that their tribe stemmed from the four worlds of the universe and they came into being by the power of the Grandmother

Spider Woman who represents the European notion of Mother Earth. Thus treating the land respectfully is honoring the spirit of the Grandmother Spider Woman (Wall and Masayeva 2004). The Hopi also rely strongly on annual cycles, such as the growth cycle of cultivated plants and occurrence of precipitation which ties in strongly with another spiritual figure in their beliefs, Maasau. Maasau is a powerful spirit and ancient farmer that gave the Hopis permission to use the land in the Black Mesa region and specifically to use it well (Zarsky 2006). This aspect of the Hopi culture enforces a strong sense that the Black Mesa is sacred and the resources, specifically concerning the major coal resource and pure water aquifer on the land, are sacred.

The Winters Doctrine arises out of the Supreme Court case, *Winters v. United States*. The case decision was made in 1908 to clarify water rights of Native American reservations. The court decision was the United States government's acknowledgements of the vitality of Native American water rights, and how they relate to the continuing survival and self-sufficiency of Native American people (Thorson 2006). *Winters v. United States* addressed the 1888 treaty that established the Fort Belknap American Indian Reservation in Montana which neglected water rights for their main water resource, the Milk River (Osborn 2010). Non-settlers began building dams and reservoirs upstream of the reservation, resulting in not enough water for agricultural purposes or sustainable living on the Belknap reservation. Indian agent William Logan and local U.S. attorney Karl Rasch pursued the safeguarding of these disrupted water rights for the Native American residents on the Fort Belknap Reservation. The Belknap Treaties of 1851 and 1896 referenced the tribe as "pastoral and agricultural people" and this term was interpreted to imply that the treaty stated the use of the land is for agriculture. Thus the treaty was found to require enough water must be allocated to maintain the treaty rights pasture and agriculture.

The Winters Doctrine also includes a middle ground for the allocation of water based upon the traditional allocation of land in the western United States. The laws regulating mining land were used as a precedent for allocating Indian Reservation resources in the western United States during the late 1800s to early 1900s. Mining rights were based on a riparian system, the owner of the land bordering the source of goods is entitled to its primary use. (Welch 2002). This concept is also known as a priority date, in other

words, the landowner who has had claim the longest is the rightful owner of the land. In the case of water,

Native Americans have priority date because the date of most reservation treaties predates non-Indian water development, or development of state-permitted water use (Osborn 2010). The current challenge with this system is the arid climate of the western United States, recent drought conditions, and the growing population combined to increase demand for the already limited water supply.

The other practice of land claims, or in this case water right claims, is the appropriative system. This system grants rights to the first person who puts water to beneficial use and maintains this use. Native Americans thus can claim priority because they were on the land before Europeans, utilizing it for agriculture and other basic rights as well as spiritual wellbeing (Osborn 2010). The Winters Doctrine developed a combination of riparian rights and appropriation of water rights by “providing primary rights of whatever water was needed currently-or in the future- to make agriculture viable” (Welch 2002). The Winters Doctrine lay dormant after 1908 until revived in 1963 in the *Arizona v California* Supreme Court case. Once the case had become a precedent, it became a major part of the modern water disputes in the Western United States.

The decision of this case set a precedent from 1963 to the present on the ruling of Native American water right cases in the western United States. The exact ruling of the court’s decision was based on the “implied’ treaty rights for Native American reservations (Welch 2002). The implication of water rights from treaty rights is based on Native American’s ability to be self-sufficient bodies that subsisted as “pastoral and agricultural people” as they were referenced to be in most treaties in the western United States (Welch 2002). Many Native American tribes subsisted upon nomadic lifestyles, but this was considered “savage’ by European civilization and thus with colonization came the European want for Native Americans to assimilate to small plot farmers (Welch 2002). Thus Congress passed the Dawes Act intended to fragment Native American reservations into individual land holdings that broke up the collective land and weakened power of the tribes as sovereign, diverse bodies. Similarly The Winters Act passed to force the assimilation of Native American subsistence to small plot agriculture. This is clearly demonstrated by how water rights are allocated to Native American reservations. The Winters Doctrine decision

ruled the intention of allowing the tribal reservation to become self-sufficient and self-reliant requires a sufficient allocation of water as an implication of the treaties creating the reservations (Thorson 2006). Reservation of water must go along with the reservation of the land, hence the implied water rights of treaties.

There are six major Supreme Court cases that have built upon the Winters Doctrine precedent. The Arizona v. California cases had resolved the question of determining the quantity of water sufficient for irrigating reservations (Native American Rights Fund 2009). The Nevada v. U.S. case ruled non-Native Americans did not have control over tribal reservation water based on the appropriative system. The United States vs. New Mexico case resolved the United States does not have reserved rights to recreational purposes of water (NARF 2009). The Cappaert vs. United States case begins to go into the fishing rights of the water rights claims of Native Americans. The Devils Hole cavern on the reservation is home to a rare species of desert fish. Non-Native American began using the cavern water supply and the water level lowered dangerously. The case brought protection to cavern, limiting water usage and preserving the water as well as the fish for the tribe (Native American Rights Fund 2009). The United States v. Powers case stated the water rights of reservations pass along to the new owner in the case of selling tribal land.

These cases are the Winters v United States precedent. : a more fishing rights focused application of the Winters Doctrine are the Stevens Treaty water rights. The Stevens Treaty Water Rights stem from treaties made by Governor Isaac Stevens of the Washington Territory 1853 granting aquatic habitat protection to the surrounding tribes. The exact words securing Native American historic fish sites, even off reserves were in nine treaties:

The exclusive right of taking fish in all the streams, running through or bordering said reservation, is further secured to said confederated Tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places... (Osborn 2010).

This right is exemplified in Yakima Basin on the Colville Indian Reservation. The fishing right is another example of the translation of Native American cultural values into a legal claim The claim to continue traditional ways of subsistence is through the vein of the Steven Treaty

Water Rights, and the underlying moral claim of the right to maintain a way of life and cultural practices are simultaneously granted. This is similar to Laura Jeffery's "Historical Narrative and Legal Evidence: Judging Chagossians' High Court Testimonies" article because it discusses the intertwined nature of legal and moral claims and the legal team's ability to transfer to the two distinct claims into causes of action (2006).

The Colville Indian Reservation case granted fishing and water rights to the reservation; however, conflict arose between the tribe's need for fresh water maintenance of Omak Lake for trout spawning and non-Indian irrigation diversions because the saline for the irrigation was killing the trout spawn due to seepage upstream (Osborn 2010). Thus the current focus of tribal water rights has shifted from claiming water to maintaining the quality of their water to maintain their subsistence.

The quality of water takes precedence over quantity: water rights are meaningless if the quality is so poor it cannot fulfill its purpose. The Clean Water Act ("CWA") is another legal weapon tribes have tried to use to protect against water quality degradation, but it does not offer protection against water quality degradation from upstream diversion and uses (Royster 1997). The CWA regulates and manages the quality of surface water within reservations. However, the CWA does not reach water uses authorized by state-water allocation systems that results in depletion degradation and pollution migration. Depletion degradation leaves less water in the stream to dilute pollutants and pollution migration is the polluting of other bodies of water (Royster 1997).

Thus the government that regulates these systems has ignored its responsibilities to those in the margins, in this case Native Americans whose rights are on the fringe of the government and are often seen as invisible. In the case of the Black Mesa Peabody Controversy, the Navajo and Hopi have struggled against big corporations polluting the pure water of the Navajo aquifer, the main source of water of the entire area of the Black Mesa region (Zarsky 2006). To combat destruction of their sacred land, the Hopi has directly fought against the Peabody Western Coal Company (PWCC) and the Salt River Project (SRP), energy corporations, to shut down the use of the Navajo aquifer to slurry coals as well as damn farther up the valley. These enterprises have degraded the quality of water as well as depleted the quantity of water available to Native Americans on the reservation. Numerous studies conducted, such as the "Drawdown: Ground

Water Mining on Black Mesa, "have refuted Peabody's insistence that they have not depleted the aquifer beyond agreed limits (Halberstadt 2001)". The title of the study, drawdown, refers to the effect of excessive water pumping. In this case,

52% of water taken from the aquifer a year is being depleted at the rate of pumping exceeds the rate of recharge (Halberstadt 2001). The CWA did not follow through with its responsibilities for maintaining the consumption of the Navajo aquifer and is thus a poignant example of ignorance of the margins. The degradation of life caused by the depletion of the Navajo aquifer as well as surrounding surface water has violated basic human rights, such as access to drinking water, of the indigenous population in the Black Mesa area. The seepage of poor-quality water, falling water tables, and depletion of the sacred springs are clear misuses of water and violations of the agreements with the Navajo and Hopi people that they treaties in place are supposed to be protecting. Another insistence of degraded water quality leading to poor living conditions and reduction of life is the San Carlos Apache Tribe.

The San Carlos Apache tribe holds 6000 acre/ft of water from the Gila River during the irrigation season to support their traditional salt sensitive crops (Royster 1997). The saline content began to exceed the environment's ability to support these crops resulting from water use by non-Native American irrigators who supplemented with ground water, has a naturally higher saline content, which also took away from return flow of the Gila River stream water (Royster 1997). This example is also similar to the Navajo aquifer dilemma because there is an underlying aquifer that has now seeped in the lower saline aquifer that the tribe uses for irrigation. The other issue was that irrigators upstream sometimes divert the entire flow of the Gila River and the river is recharged only from agricultural return flow, which has much higher saline content (Royster 1997). This case determined that Winters Doctrine rights also cover water quality. The degraded quality of water takes away from the livelihood of those on the reservation creating everyday violence due to lack of water. It should be noted that all Supreme Court cases focus on quantifying water for the purpose of fishing and agriculture, and neglect to step into the religious/spiritual space of the social domain to identify water as a human right within the United States.

The only way for Native Americans to maintain water rights legally is to make a claim to water based their physical subsistence, or the allocation

of water for agriculture and fishing, rather than on their moral claim of the sacredness of water. The legal claim is the translation of moral claims into an action that the United States government can understand under the law and act upon using the law. Kristen Hastrup has suggested that by framing "justice" in a legal framework that neglects moral agency, in this case the Native Americans right and moral claim to water, human rights laws reveal the "inherent schism between morality and law" (Jeffery 2006). The tensions between moral and legal claims is increasing salient in the discourse of Native American water and land rights. Native Americans must make the legal arguments that seem logical to the United States "outsider" government and this neglects the cultural importance of water to Native Americans. Moral to legal claim translation oppresses cultural significance by putting water in the same lens as the majority of the population that views water less as a symbol embedded in their collective identity, but rather a material good that can be utilized.

Water resides in both legal and social domains. It is regulated by the state, whether it be the majority state or the authority of the marginal Native American sovereignty, and it brings people together in a variety of activities. It is a universality in its physical biological form, but the essence of water changes in the diverse domains of culture. The United State's corporations who see water's essence as an irrigation tool and lack the relationship with water's essence as a form kinship and morality. Native American tribes value water's essence uniquely because it is rooted in their historical memory. The Winters Doctrine supplemented by the Stevens Treaty, Clean Water Act, and the individual tribal treaties allow some of the moral claims to be translated to a legal claim so that that law may take action to protect the legal claim to water as a human right while simultaneously protecting the Native Americans moral claim to water that is unique and not capable of being protected by law. The legal claims provide legal protection of quality and quantity of water; however, Native Americans still presently face challenges to these claims because the majority population views water as a biological fact and not as a sacred symbol.



## References

- Eriksen, Thomas, H. 2001 *Between Universalism and Relativism: A Critique of the UNESCO Concepts of Culture*. In *Cultural Rights: Anthropological Perspectives*. Jane Cowan, M-B Dembour and R. Wilson, eds. Pp. 127-148. Cambridge University Press.
- Jeffery, Laura 2006 *Historical Narrative and Legal Evidence: Judging Chasgossians' High Court Testimonies*. *Political and Legal Anthropology Review* 29(2):228-253.
- LaDuke, Winona 2013 *Monster Slayers: Can the Navajo Natoin Kick the Coal Habit?* *Indian Country Today*.
- Lyuba, Zarsky 2006 *Black Mesa and the Navajo Aquifer*. *Indigenous Religious Traditions*.
- Native American Rights Fund 2009 *Native American Water Rights Settlement Database*. Electronic document, [www.narf.org/water/2011/presentations/24-bushnell-final\\_scope.pdf](http://www.narf.org/water/2011/presentations/24-bushnell-final_scope.pdf) 2013.
- Orlove, Ben, and Steven C. Caton 2010 *Water Sustainability: Anthropological Approaches and Prospects*. *Annual Review of Anthropology* (39):401-415.
- Osborn, Rachael, P. 2010 *Native American Winters Doctrine and Stevens Treaty Water Rights: Recognition, Quantification, Management*. *The Journal of Water Law* 20(5):224.
- Royster, Judith V. 1997 *Water Quality and the Winters Doctrine*. *Journal of Contemporary Water Research and Education* 107(1):50.
- Thorson, John, Sarah Britton, and Bonnie G. Colby, eds. 2006 *Tribal Water Rights: Essays in Contemporary Law, Policy, and Economics*. University of Arizona Press.
- Welch, Glen 2002 *Indian Reserved Water Rights: The Winter Doctrine in its Social and Legal Context, 18802-1930s (Review)*. *The American Indian Quarterly* 26(4):675-677.