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Enhancing Tribal Water Sovereignty

**THE UNIVERSITY OF DENVER WATER LAW REVIEW
ELEVENTH ANNUAL SYMPOSIUM: FORGING SOVEREIGNTY, SELF
DETERMINATION, AND SOLIDARITY THROUGH WATER LAW**

Denver, Colorado

March 30, 2018

ENHANCING TRIBAL WATER SOVEREIGNTY

The second panel of the symposium included four attorneys who work with American Indians to secure their water rights. Retired Colorado Supreme Court Justice Gregory Hobbs moderated the panel. Hobbs opened the panel by giving a brief history of the Ute Tribes in Colorado before introducing the first speaker, Ernst House Jr., to talk about what tribal sovereignty means in the context of modern water rights.

Ernst House Jr., the Executive Director of the Colorado Commission of Indian Affairs and member of the Ute Mountain Ute Tribe, works with state agencies to ensure that tribes have a voice in state decision-making. House briefly discussed the history of the Ute Tribes' reservations and emphasized the importance of water in tribal life. He then covered the Ute Water Right Settlement Act of 1988 ("1988 Act"), which was signed by Chris Baker, President Reagan, and House's father, Ernst House Sr. Prior to the 1988 Act, no home on the reservations had running water—instead, water was delivered daily to the reservations by trucks. House gave an example of the Ute Mountain Farm and Ranch, a sustainable farm growing alfalfa and corn, to demonstrate how water rights lead to economic development for tribes and allows tribes to have a seat at the table.

House next discussed the difference between wet and paper water rights. For example, on paper the Ute Tribes have water rights in the Lake Nighthorse reservoir, but since the lake is a two-hour drive from the Ute Mountain Reservation, the Tribes might not see any of that water on the reservation anytime soon. House said that this is hardly uncommon, as only thirty-six tribes have had their federally approved water rights quantified. He noted that collaboration is needed for large federal water projects—such as the huge lobbying effort required to get the Dolores Project passed—and that the involvement of young people is vitally important. House closed by urging listeners to consider tribal perspectives and visit reservations.

Peter Ortego, General Counsel for the Ute Mountain Ute Tribe, worked on the Animas La Plata Project and spoke about tribal sovereignty and federally reserved tribal water rights. When the Ute Mountain Reservation was created, the government understood that the Ute Tribes would need water in order to settle the barren land, so the government implicitly reserved enough water for the Tribes to make those lands hospitable.

However, in the context of the Animas La Plata Project, issues outside of the traditional tenets of tribal reserved water rights became apparent. Lake Nighthorse is located directly over an ancient tribal burial site, which is obviously of large cultural significance to the Tribes. The Bureau of Reclamation allows for four percent of a project's budget to go toward cultural mitigation, but this figure fell well short of the amount needed to repatriate the remains. The Tribes ended up agreeing to leave the remains where they were, and cement

over them to protect those remains from disturbance. Additionally, as evidence of the attempted collaboration between the city and the Tribes, when the Tribes objected to planned trails that were to surround the reservoir due to concerns about looting of cultural artifacts, the city listened by moving the trails back from the water's edge.

However, not every issue surrounding Lake Nighthorse has been resolved regarding the tribes and the use of Lake Nighthorse. When the non-Indian community around the reservoir applied for permits to use the water for recreation, the Tribes warned that such activity would disturb their ancestors. Ortego pointed out—in an echo of House—that if we look at this issue from the Tribes' perspective, we would not allow recreation on the lake. According to Ortego, we would never build Disneyland over the World Trade Center and would not have to tell our children not to do so or put a law in place to prevent such action because the tragedy of the World Trade Center is part of our cultural story and identity. If we viewed Lake Nighthorse through the Tribes' perspective, the same understanding would apply and the site would certainly be protected. Ortego closed by saying that while he is not a tribal member, he does his best to present their concerns in a way that adequately conveys the Tribe's perspective and respects tribal interest.

Scott McElroy, an attorney at McElroy, Meyer, Walker & Condon, P.C., who represents the Southern Utes and Ute Mountain Utes on natural resources issues, spoke about the Colorado Ute Indian Water Rights Settlements. McElroy noted that the settlement of tribal water rights is often a long, drawn out process. He used, as an example, another settlement he is working on in New Mexico which was started in 1966 and should be settling the final issue this year. McElroy further stated that negotiated settlements have not historically worked out well for tribes. While McElroy advocates for settlements over litigation, tribes may meet such a suggestion with skepticism.

McElroy next discussed the amendments made to the 2000 Colorado Ute Indian Water Rights Settlement Act ("2000 Settlement"). The 2000 Settlement amendments eliminated some irrigation components of the Animas La Plata Project, limited depletions, and added an additional pipeline to deliver water to the Navajo Nation. McElroy also mentioned that there are two big planning efforts relating to tribal water rights pending—the Bureau of Reclamation's Tribal Water Study and the Water Reservation Planning Document being spearheaded by the Ute Tribes, which aims to determine how the Tribes can best maximize the use of their water rights.

The final speaker was Steve Moore, a senior staff attorney at the Native American Rights Fund who represented the Agua Caliente Band of Cahuilla Indians ("Agua Caliente Tribe") in the Ninth Circuit case aimed at resolving the question of whether federal reserved tribal water rights extend to groundwater. Moore gave a presentation about the exercise of tribal sovereignty in the context of groundwater and groundwater management. Tribes have survived for millennia in the deserts around what is now Palm Springs, California by being stewards of the natural resources in the area. The Agua Caliente Tribe, who have inhabited Coachella Valley from time immemorial, dug walk-in wells to access groundwater long before the tribe encountered white settlers in the area. However, once the settlers moved into the area, they filled in these wells. By 1900, the wells were gone.

There were eighteen treaties made with tribes in this area of California, mainly during the California Goldrush of 1849, but none of them were ever ratified. However, Presidential Executive Orders issued in 1876 and 1877 officially created the Agua Caliente Reservation, which originally consisted of over 30,000 acres. However, as is the case with nearly all Indian reservations, the acreage has since been greatly reduced. In this case, land grants given to the railroads resulted in a checkerboard patterned reservation.

When the reservation was created, the United States understood that access to water would be an absolute necessity for the reservation's establishment. Due to the arid climate of the Coachella Valley, those living in the region are highly dependent on water from the Coachella Valley Groundwater Basin aquifer. However, the quality and depth of that aquifer, part of which is below the Agua Caliente Reservation, has been steadily declining due to water mismanagement by the Coachella Valley Water District and the Desert Water Agency (collectively "Water Agencies").

After two decades of complaining about the over-drafting and degradation of the water quality in the Coachella Valley, the Tribes brought suit against the Water Agencies in 2013 to establish and quantify their federally reserved rights to groundwater. In order to establish federally reserved tribal water rights, a tribe must prove that water was considered a necessary component for the purpose of the reservation. By demonstrating that water was thought of as needed for the reservation, and by providing evidence of the historical use of walk-in wells by the Tribe, the Agua Caliente Tribe successfully argued before the Ninth Circuit that it had a federally reserved right to the groundwater below their reservation. This holding is significant because it was the first time a circuit court has extended federally reserved tribal water rights to groundwater resources. The parties are currently undertaking court-ordered mediation, but the next phase of the case is scheduled oral arguments to decide issues like pore space, water quality, and what standard shall be used to quantify the Agua Caliente Tribe's water rights.

The panel concluded by taking questions from the audience. Ortego responded to a question about how to maintain momentum in the face of worsening water problems by reiterating the importance of cooperation among tribes, state actors, and local governance. He emphasized the importance of the tribes having a seat at the table to ensure that projects executed around tribes and projects on reservations work together, rather than working at odds with each other.

Another audience member stated that an EPA Administrator had accused the Animas La Plata project of "riding an Indian pony" to gain approval and wondered what the panel's response to that might be. McElroy handled that question by pointing out that contrary to what might be said, the Tribes had input on the Animas La Plata project from the start. He stated that the tunnel planned from the lake to the Ute Tribes was removed from the project due to opposition to the project as a whole. McElroy also noted that the Tribes were willing to compromise by downsizing the project's benefits to the Tribe in return for increased storage and avoiding additional litigation.

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