About The U.S. Federal Government; *A Brief Overview*

The Constitution of the United States divides the federal government into three branches to ensure a central government in which no individual or group gains too much control:

1. **Legislative** – Makes laws (Congress)
2. **Executive** – Carries out laws (President, Vice President, Cabinet)
3. **Judicial** – Evaluates laws (Supreme Court and Other Courts)

Each branch of government can change acts of the other branches as follows:

- The president can veto laws passed by Congress.
- Congress confirms or rejects the president's appointments and can remove the president from office in exceptional circumstances.
- The justices of the Supreme Court, who can overturn unconstitutional laws, are appointed by the president and confirmed by the Senate.

The U.S. federal government seeks to act in the best interests of its citizens through this system of *checks and balances*.[1]

1 https://www.usa.gov/branches-of-government

The *History & Purpose of* The Army Corps of Engineers

George Washington appointed the first engineer officers of the Army on June 16, 1775, during the American Revolution, & engineers have served in combat in all subsequent American wars. The Army established the *Corps of Engineers* as a separate, permanent branch on March 16, 1802, & gave the engineers responsibility for founding & operating the U.S. Military Academy at West Point.

Since then the U.S. Army Corps of Engineers has responded to changing defense requirements *and* played an integral part in the development of the country. Throughout the 19th century, the Corps built coastal fortifications, *surveyed roads & canals, eliminated navigational hazards, explored & mapped the Western frontier, * constructed buildings & monuments in the Nation's capital.*

From the beginning, many politicians wanted the Corps to contribute to both military construction *and* works "of a civil nature". Throughout the 19th century, the Corps supervised the construction of coastal fortifications *and* mapped much of the American West with *the Corps of Topographical Engineers*, which enjoyed a separate existence for 25 years (1838-1863). The Corps of Engineers also *constructed lighthouses, helped develop jetties & piers for harbors, & carefully mapped the navigation channels.*

In the 20th century, the Corps became *the lead federal flood control agency, & significantly* expanded its civil works activities, becoming (among other things) a major provider of hydroelectric energy *and* the country's leading provider of recreation. Its role in responding to natural disasters *also* grew dramatically.

Assigned *the military construction mission* in 1941, the Corps built facilities at home *and* abroad to support the U.S. Army *and* Air Force. During *the Cold War*, Army engineers managed construction programs for America's allies, *including* a massive effort in Saudi Arabia. In addition, the Corps of Engineers *also* completed large construction programs for federal agencies such as NASA *and* the postal service. The Corps *also* maintains a rigorous *research & development* program in support of its water resources, construction, *and* military activities.

In the late 1960s, the Corps became a leading environmental preservation *and* restoration agency. It now carries out natural *and* cultural resource management programs at its water resources projects, *and* regulates activities in the Nation's wetlands. *In addition*, the Corps assists the military services in environmental management & restoration at former *and* current military installations.

When the Cold War ended, the Corps was poised to support the Army *and* the Nation in the new era. Army engineers supported 9/11 recovery efforts, & *currently* play an important international role in the rapidly evolving *Global War on Terrorism*, including *reconstruction* in Iraq and Afghanistan.[2]

The U.S. Army Corps of Engineers has approximately 37,000 dedicated Civilians & Soldiers delivering engineering services to customers in more than 130 countries worldwide.

"With *environmental sustainability* as a *guiding principle,* our disciplined Corps team is working diligently to strengthen our Nation's security by building & maintaining America's infrastructure, & providing military facilities where our service members train, work, & *live*. We are also researching & developing technology for our war fighters while protecting America's interests abroad by using our engineering expertise to promote stability *and improve* quality of life.

We are energizing the economy by dredging America's waterways to support the movement of critical commodities, & providing recreation opportunities at our campgrounds, lakes, & marinas.

By devising *hurricane & storm damage reduction infrastructure*, we are reducing risks from disasters.

Our men & women are protecting & restoring the Nation's environment *including critical efforts in the Everglades, the Louisiana coast, & along many of our Nation's major waterways.* The Corps is *also* cleaning sites contaminated with hazardous, *toxic or radioactive waste and material* in an effort to sustain the environment.[3]

2 **The U.S. Army Corps. Of Engineers; A Brief History:** http://www.usace.army.mil/About/History/Brief-History-of-the-Corps/Introduction/

3 **Army Corps, *"About":*** http://www.usace.army.mil/About/

The *History & Purpose of* The U.S. Forest Service

March 3, 1849, *the last day of the 30th Congress*, ***under President Zachary Taylor,*** **a bill was passed to create the Department of the Interior to take charge of the Nation's "internal affairs"**, a division of a law enforcement agency that investigates incidents, *possible suspicions of law-breaking*, & *professional misconduct* attributed to officers on the force, *including* criminal behavior of police officers.

"**The Department of the Interior protects and manages the Nation's natural resources and cultural heritage**; provides scientific and other information about those resources; and honors its trust responsibilities or special commitments to American Indians, Alaska Natives, and affiliated island communities."[4]

On May 15, 1862, President **Abraham Lincoln signed legislation to establish the United States Department of Agriculture** ("USDA"), & two and a half years later in his final message to Congress, Lincoln called USDA "The People's Department".

"The USDA provides leadership on food, agriculture, natural resources, rural development, nutrition, & related issues based on public policy, the best available science, & effective management, while *maintaining a* vision to provide economic opportunity through innovation, helping rural America to thrive; to promote agriculture production that better nourishes Americans while also helping feed others throughout the world; *and* to preserve the Nation's natural resources through conservation, restored forests, improved watersheds, & healthy private working lands."[5]

In 1876, ***under President Ulysses S. Grant,*** **Congress created the office of *Special Agent* in *the Department of Agriculture*** to assess the state of the forests. In 1881, the office was expanded into the newly formed ***Division of Forestry***. **The Forest Reserve Act of 1891 authorized *withdrawing land from the public domain* as "forest reserves", managed by the Department of the Interior.**

In 1901, ***under President Theodore Roosevelt,*** **the Division of Forestry was renamed *the Bureau of Forestry***. The Transfer Act of 1905 transferred the management of forest reserves **from the General Land Office of *the Department of The Interior* to *the Bureau of Forestry*, henceforth known as *the US Forest Service***.[6]

In 1911, ***under President William Howard Taft,*** **Congress passed *the Weeks Act*, authorizing the government to purchase private lands for stream-flow protection, & *to maintain the lands as national forests*.** This made it possible for the national forest system to expand into the eastern United States.

4 **US *Department of The Interior,* "Who We Are":** https://www.doi.gov/whoweare/Mission-Statement

5 ***About* the USDA:** http://www.usda.gov/wps/portal/usda/usdahome?navid=ABOUT_USDA

6 **Williams, Gerald W. (2000). *The USDA Forest Service --- The First Century*. U.S. Department of Agriculture. Retrieved 2011-10-19.**

The US Forest Service, *a division of The Department of Agriculture,* is a multi-faceted agency that manages & protects 154 national forests & 20 grasslands in 43 states & Puerto Rico. The agency's mission is to sustain the health, diversity, U productivity of the nation's forests & grasslands to meet the needs of present & future generations. The Forest Service maintains an elite wildland firefighting team *and* the world's largest forestry research organization, where experts provide technical *and* financial help to state & local government agencies, businesses, private landowners, & work *government-to-government* with tribes to help protect & manage non-federal forest *and* associated range & watershed lands.[7]

The US Forest Service's *agency goals* include:

- Providing Tribes equal opportunity & access to Forest Service programs.
- Eliminating barriers to Tribal participation.
- Improving overall knowledge of Tribes *and* Tribal cultures.
- Developing partnerships & accomplishing *common goals* in accordance with the Forest Service mission, the National Tribal implementation team report, & Regional priorities.

In working with Tribes, the Forest Service will:

- Redeem its trust responsibility and protects American Indian and Alaska Native reserved rights as they pertain to agency programs, projects, and policies.
- Leverage partnerships with Tribes to maximize mutual success.
- Promote integration and utility of the Tribal Relations Program throughout the agency.[8]

Whereas the U.S. Forest Service's origin is rooted in *The Department of the Interior,* whose *primary duty* includes "protecting & managing the Nation's natural resources and cultural heritage", it is *no wonder that the U.S. Forest Service has worked more directly with tribes in such a way as to thoroughly investigate & define* the U.S. government's "Treaty Rights and Forest Service Responsibilities" *moreso* than the Army Corps of Engineers. *Research* of such responsibilities are shown throughout *the following pages,* & can *also* be found via the following URL:

http://www.fs.fed.us/people/tribal/trib-2.pdf

Sections throughout the Forest Service's *treaty research* which are especially relevant to *this* case*, and* which are be integrated into the Department of Defense's *new policy (see "Redress of Grievances" section of case)*, & which need to be honored & brought into context with *this* case, & which *should* have been integrated into *all* decisions of the Department of Defense *prior* to establishing their *illegal* " **Department of Defense American Indian and Alaska Native Policy"** (see pages 6-13), are *highlighted in yellow* throughout the upcoming pages.

7 **US Forest Service, *"About":*** http://www.fs.fed.us/about-agency

8 **US Forest Service, *"Tribal Relations":*** http://www.fs.fed.us/working-with-us/tribal-relations

Section 2: Treaty Rights and Forest Service Responsibilities

Implement Forest Service programs and activities honoring Indian treaty rights and fulfill legally mandated trust responsibilities to the extent that they are determined applicable to National Forest System lands (American Indian/Alaska Native Policy (FSM 1563)).

- Visit our tribal neighbors. Learn about their treaties and rights.
- Talk with them about areas of mutual interest.
- [Endeavor to] reconcile Indian needs and claims with the principles of good management, multiple use, and national forest laws and policies.
- Attempt reasonable accommodation without compromising the legal positions of either the Indians or the Federal Government.
- Work together to develop ways to accomplish the goals of this policy.

This section includes information about—

- Treaties
- Treaty Rights on National Forest System Lands
- Characteristics of Treaty Rights
  - Grazing Rights
  - Hunting and Fishing Rights
  - Gathering Rights and Interests
  - Water Rights
  - Alaska Native Subsistence Rights
- Trust Responsibilities
- National Environmental Policy Act (NEPA) Consultation
- Cooperation in Management

The United States obtained the vast majority of public domain land in the lower 48 States by signing treaties with Indian tribes. Approximately 60 of these tribes have treaties that contain some rights to off-reservation lands and resources. Other laws define Alaska Natives' rights to subsist from the natural resources of the land (described in this section under Alaska Native Subsistence Rights). *Treaties are Federal law.*

The Federal/Tribal relationship is one often described as a guardian/ward relationship. Under differing laws, different departments, executive branches of government, and agencies have different responsibilities. The Secretary of the Interior, for example, has specific trust-holding responsibilities not delegated to any other department or agency. The Federal trust

- It made provisions for addressing the Bureau of Indian Affairs (BIA) or their delegated trust responsibilities for Indian-owned land and resources.
- Alaska Natives were not signatories to the act; American Indians were signatories to treaty documents negotiated by the U.S. before 1871.

The resolution of ANCSA provided a battleground for two dissimilar value systems—that of the Alaska Natives, whose tribal perspective viewed land and its resources as something of value to be passed on to future generations of tribal members, and that of Congress, which viewed Native corporation land as an asset that could be sold or even lost in risky commercial ventures.

Nonetheless, ANCSA provided for the grant of title to about 44 million acres to the Alaska Natives and provided for continued efforts to protect Native subsistence rights (Conference Committee Report).

ANCSA is the product of two Federal Indian policies:

- The Termination Policy of the 1950's
- The Self-Determination Policy of today

While the language speaks of self-determination, the overall goal of ANCSA was termination and assimilation. Alaska Natives were given full control over their land and money; however, Congress assigned control not to tribal governments, but to State-chartered Native corporations.

Federal courts generally support the special political status of Alaska Natives. However, complexity, ambiguity, and contradiction have not been eliminated from Indian law and policy. Even where policy seems consistent, there is still room for dispute.

Given the ambiguity of the record and political resistance to claims of "sovereignty" in Alaska, Alaska Natives have turned to practical political and social actions to strengthen their special status and cultural identities. Alaska Natives' special status is ultimately a political question, not a legal one, in which status depends less on what Federal policymakers say, than on what Alaska Natives choose to do.

The Secretary of the Interior has defined which Alaska Tribes and groups are Federally Recognized. A full listing of Federally Recognized Indian Tribes is found in the Federal Register/Vol 51, No. 226/Wednesday, November 13, 1996/Notices (pp 58211–58216). A copy may also be found in Appendix C.

Treaties

Treaty Language

Indian land title was recognized in varying ways when European countries arrived in the Western Hemisphere. The U.S. Government negotiated treaties with Indian tribal governments for western expansion, to keep the peace, and to add new states to the Union. *American Indian treaties were not a grant of rights to tribes, but rather a grant of rights from tribes, with the Indian tribes retaining all of the powers and rights of sovereign nations granted by the tribe pursuant to the treaty or taken from the tribe by Federal statute.* Extinguishing Indian title made it possible for the U.S. Government to govern former Indian lands.

Treaties between the United States and Indian tribes involving grants or cessions of land were not ordinary land transactions where the seller conveys all rights to the property sold to the buyer. In many treaties, however, Indians ceded (relinquished) title and interests to the United States Government, while *reserving* certain use rights to themselves.

The term "ceded lands" has at least two definitions. This term was first used in the Treaty of the Wyandots, 1789. Since that time, many treaties have referred to land cessions made by tribes to the United States. Most Federal agencies and Indian tribes prefer to use "ceded lands" to describe areas that a tribe did "cede, relinquish, and convey to the U.S. all their right, title, and interest in the lands and country occupied by them" ... at treaty signing or when reservations were established. This does not mean that tribes ceded all their rights. Many tribes reserved rights on ceded lands—there are places where rights remain intact and protected. The U.S Court of Claims qualified the legal definition of ceded lands in 1978 when it said that, in effect, "only lands actually owned by a tribe could be ceded to the U.S."

Sixty tribes negotiated and reserved their treaty rights on the public domain. After tribal representatives and U.S. officials signed treaties, they were then ratified by the U.S. Senate. Although some treaties were signed by unauthorized people, the treaty rights and provisions within them remained a matter of law.

Treaty provisions in the lower 48 States varied depending on the lands and the tribal groups involved in the negotiations.

The Supreme Court has found that treaties are superior to State laws, including State constitutions, and are accorded equal status with Federal statutes.

Treaty Rights on National Forest System Lands

The U.S. Constitution (Article II, Section 2, Clause 2) provides that treaties are equal to Federal laws and are binding on states as the supreme law of the land.

From 1777 to 1871, United States relations with individual Indian Nations were conducted through treaty negotiations. These "contracts among nations" created unique sets of rights for the benefit of each of the treaty-making tribes. Those rights, like any other treaty obligations of the United States, represent "the supreme law of the land." As such the protection of treaty rights is a critical part of the Federal Indian trust relationship.

Off-Reservation (Property) Rights. Off-reservation (property) rights reserved by treaties on National Forest System lands are very important to Indian tribes. *The United States has a duty to protect these treaty rights, as these rights are agreed upon by government-to-government agreement, or as defined by statute or court decision.*

Generally—

- The scope and allocation of treaty rights depends upon the language in each treaty.

Off-Reservation Rights. Off-reservation hunting and fishing rights vary depending on treaty language, subsequent legislation, and court decisions.

Treaty rights may extend to fish and wildlife habitats, including how the Forest Service manages those habitats and how those habitats relate to national forest timber harvest, recreation, water, grazing, and minerals exploration. Some tribes believe that the U.S. Government is obligated to manage wildlife and fish habitats to protect the tribes' treaty rights.

Court decisions have confirmed that tribes are entitled to 50 percent of harvestable salmon and steelhead in certain waterways covered by treaties as long as escapement goals are met (*U.S.* v. *WA*, 1974, Dist Ct WA; U.S. Supreme Court, 1979; also *Lac Courte Oreilles* v. *Wisconsin*).

In some treaties in the Pacific Northwest, the U.S. Government is obligated to protect the tribes' right to access *"usual and accustomed grounds and stations"* and must assure that Forest Service actions do not prevent tribes or their members from accessing such locations, exercising tribal rights, and protecting treaty resources. Courts have held that if *either* hunting or fishing rights are mentioned by treaty, *both apply.*

Gathering Rights and Interests

The traditional way of life for many American Indian and Alaska Native Tribes involves gathering and using products from their natural surroundings. In some treaties, these rights were included under the term "gathering rights."

In negotiating treaty terms, many tribal governments reserved off-reservation rights to gather miscellaneous forest products such as berries, roots, bark from trees, mushrooms, basketmaking materials, tepee poles, cedar for totem poles, and medicinal plants.

These products were often bartered, traded, or sold between tribes for fuel, transportation, food, shelter, clothing, and cultural utilitarian items. In some western treaties, tribes reserved the right to cut fuelwood and firewood for domestic purposes on off-reservation land.

An example of the treaty language that refers to gathering rights and interests is "the right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing, together *with the privilege of hunting and gathering roots and berries on open and unclaimed lands*" (Article V, Treaty with Dwamish Suquamish, 1854).

Water Rights

Indian Reserved Water Rights. Most western and midwestern states have used the *prior appropriations doctrine* to allocate water. It is based on the notion of "first in time, first in right." Basically, under State law, a water user obtains a right senior and superior to all later users if he or she appropriates the water by (1) diverting water out of a watercourse, and (2) putting it to a beneficial use for such purposes as irrigation (a major water use in the West), mining, industrial, municipal, or domestic use. Once these conditions are met, the water user has established an appropriation date.

Although Indian reserved water rights are not expressed in treaties, they are inherent or implied rights. Ordinarily, State law applies to water rights on Federal lands; however, Federal law applies to American Indian water rights on reservation lands; their extent depends on the purposes for which the reservation was established.

The *reserved water right as applied to Indians* is derived from *Winters* v. *U.S.*, 1908. This landmark Supreme Court case held that *"sufficient water was implicitly reserved to fulfill the purposes for which the reservation was established."* This *Doctrine of Federal Reserved Rights* established a vested right (a right so completely settled that it is not subject to be defeated or cancelled) whether or not the resource was actually put to use, and enabled the tribe to expand its water use over time in response to changing reservation needs. The quantity of water was determined by evaluating the purposes for which the Indian reservation was established and applied to all uses—including irrigation of lands that were not currently serviced with a water supply. This analysis includes information about current and planned (future) reservation uses such as municipal, industrial, and natural resources. The Winters Doctrine provides that tribes have senior water rights and the national forests have junior rights. Some recent court decisions have given Indian reservations priority water rights on Federal lands, including national forests.

Both the Forest Service and Indian tribes have mutual interest in water rights and claims since these rights and claims often occur in the same geographic area and involve flows from the same stream for fish populations and their habitats, as well as maintenance of stream channels, maintenance of wildlife populations, and maintenance and protection of riparian areas.

Alaska Native Subsistence Rights

Congress enacted the *Alaska Native Claims Settlement Act* (ANCSA) in 1971. To this day, some acclaim it as an outstanding settlement, while others view it as the beginning of the end for Alaska Native people. While earlier versions of ANCSA, at the insistence of Native spokespeople, contained subsistence provisions, the law that was ultimately passed, which granted Alaska Native people title to 44 million acres, remained silent on the matter of subsistence. The accompanying Conference Committee Report stated that the Interior Secretary possessed sufficient authority to protect Native subsistence rights and that Congress wanted the Secretary and the State of Alaska to do just that.

Because ANSCA failed to address subsistence, Congress included it under the *Alaska National Interest Lands Conservation Act (ANILCA)* Title VIII, which was signed into law in 1980.

Subsistence has many definitions depending on whom you speak to and in what context. To the Western/European culture, subsistence means the gathering and preparation of resources for nutritional purposes. To others, it represents a lifeway. To Alaska Natives, subsistence represents the very core of their existence as a people. It is a spiritual, cultural, physical, and economic means of continuing their heritage. It is the essence of their being.

People living in remote rural villages are totally dependent on subsistence activities to feed their families and to barter or perhaps to make some cash through the sale of handicraft articles. In rural Alaska, a cash economy is seasonal. Most money made by rural residents is spent on heating fuels, snow machines, skiffs and outboard motors, ammunition, and clothing. A majority of the food rural Alaska Natives consume is gathered through subsistence activities. These activities include, but are not limited to hunting; fishing; berry picking; canning, drying, and smoking fish; collecting and processing plants; and manufacturing arts and handicrafts.

Culturally and socially, subsistence activities are intertwined in the very existence of village life. Celebrations, stories, songs, dance, and spirituality are derived from subsistence activities. These activities teach skills that determine the future success of younger tribal members as providers and productive members of the village to ensure the perpetuation of the culture for generations to come. Through subsistence activities, children learn respect for the wildlife and fish that present themselves for use. They also learn to share, respect, and provide for their elders, care for the land, and coexist with other human beings and cultures.

Protection of subsistence activities is of vital importance to the Alaska Native. Elimination of subsistence is viewed as the termination of the Alaska Native culture.

Historically, as long as the waters and lands used for subsistence purposes were not used by others for other purposes, there was no conflict with subsistence. During the 16th, 17th, and 18th centuries, there was intense international competition for the wealth of the New World. Alaska was claimed under the "Rule of Discovery" by Russia. Alaska Natives lived harmoniously within their ecosystems and did not experience a threat to their way of life until Russia began commercial exploitation of Alaska's natural resources.

The "Rule of Discovery" held that the nation first arriving on the land in the New World acquired complete title and domination over the land and its inhabitants exclusive of other nations. The rule also included the taking and exploitation of natural resources. Russian commercial activity had a limited effect on Alaska Native subsistence. Russia's activities were focused on sea otters and Russian settlements were few and widely dispersed. Russian activities ended with the Treaty of 1867, in which Russia sold all its interest in Alaska to the United States for the sum of $7.2 million.

The U.S. Government's concern for Alaska Native subsistence is not a recent issue. Congress has dealt with subsistence as a distinct part of Alaska Native policy for at least the last 45 years. When the Indian Reorganization Act of 1934 (IRA) was originally passed, it did not fully take into account the unique needs of Alaska Natives. In 1936, the Indian Reorganization Act was amended to do so. With the signing of the Migratory Bird Treaty, and since 1936, Congress has provided for Alaska Native subsistence by way of exception to wildlife conservation treaties and statutes. There have been problems with this process, however. Exceptions have many times been ineffective and rendered useless by the restrictive provisions of other treaties. Exceptions themselves can also be a problem. An

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example is the *1966 Fur Seal Convention* whereby the "method" exception for harvesting of animals was rendered useless because the treaty makers failed to recognize that Native subsistence culture depended on the "use" made of wildlife and not on how the wildlife was harvested. However, this does not mean that Congress's early attempts to protect Alaska Native subsistence were all failures.

The *Walrus Protection Act*, the *Endangered Species Act*, and the *Marine Mammal Protection Act* all recognize the importance of Alaska Native subsistence use. These acts allow Alaska Native subsistence activities for the specific purposes of food, clothing, and handicrafts. To ensure this protection, Congress has restricted the Secretary of the Interior's authority to regulate subsistence under the *Marine Mammal Protection Act*, and the *Endangered Species Act* only if the taking "materially and negatively" affects the "endangered or threatened" species.

When Congress passed ANILCA, Title VIII, it sought to "preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values" (P.L. 96–487 Sec.101(a)).

ANILCA also provided an opportunity for rural Alaskans engaged in a subsistence way of life to continue to do so. Fish and wildlife subsistence activities were to be managed in accordance with recognized scientific principles. In Title VIII, Congress found that:

> *The continuation of the opportunity for subsistence uses by both Native and non-Native rural residents of Alaska, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;*
>
> *The situation in Alaska is unique in that, in most cases, there are no practical alternative means to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;*
>
> *Continuation of subsistence opportunities on public lands and other lands in Alaska is threatened by Alaska's increasing human populations—with resultant pressure on subsistence resources, by sudden declines in populations of some wildlife species which are crucial subsistence resources, by increased accessibility to remote areas containing subsistence resources, and by fish and wildlife being taken in a manner inconsistent with recognized principles of fish and wildlife management;*
>
> *In order to fulfill the policies and the purposes of the Alaska Native Claims Settlement Act (ANCSA), and as a matter of*

> *equity, it is necessary for the* Property and Commerce Clause of the Constitution *to protect and provide the opportunity for continued subsistence uses on public lands by Native and non-Native rural residents; and*
>
> *The national interest in the proper regulation, protection, and conservation of fish and wildlife by residents of rural Alaska requires that an administrative structure be established to enable rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on public lands in Alaska. This is a statutory right which can be regulated and Congress chose to regulate it to the benefit of the rural user.*

Section 804 of ANILCA declares:

> *Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes.*

Relative to how subsistence rights affect land use decisions, ANILCA, Section 810, states:

> *In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his/her designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would produce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes.*

Section 810 requires the head of such a Federal agency to:

> *Give notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to Section 805; (See P.L. 96-487, Section 805,(a),(b)&(c)).*
>
> *Give notice of and hold a hearing in the vicinity of the area involved; and*
>
> *Determine that:*
>
> *(a) Such significant restrictions of subsistence are necessary, and consistent with sound management principles for the utilization of the public lands;*

(b) The proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition; and

(c) Reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

Section 811(a) of ANILCA directs the Secretary of the Interior to ensure that:

Rural residents engaged in subsistence uses will have reasonable access to subsistence resources on the public lands.

Federal and State agencies will undertake research on fish, wildlife, and subsistence use on public lands.

Data will be sought and local residents consulted to gain special knowledge from those engaged in subsistence uses.

Findings and results will be made available to the State, local, and regional councils and other appropriate persons and organizations.

ANILCA Section 805(3)(D)(d) empowers the State of Alaska to implement laws of general applicability which are consistent with, and provide for the definition, preference, and participation in subsistence specified in ANILCA, Sections 803, 804 and 805.

In 1989, the Alaska Supreme Court ruled that the subsistence priority for rural Alaskans violated the State constitution. This holding prompted the State of Alaska to discontinue its subsistence program on Federal lands. In response, the Secretary of the Interior promulgated regulations for subsistence hunting and fishing on Federal lands in Alaska. In effect, the Federal Government took over the management of subsistence on Federal lands in Alaska. Both the State of Alaska and Alaska Natives filed suit, challenging the legality of these regulations. The Ninth Circuit Court of Appeals upheld the Federal Government's exercise of regulatory authority over "subsistence uses on Federal lands, waters, and interests therein in Alaska, including waters subject to Federal reserved water rights."

Trust Responsibilities

The trust responsibility is the U.S. Government's permanent legal obligation to exercise statutory and other legal authorities to protect tribal lands, assets, resources, and treaty rights, as well as a duty to carry out the mandates of Federal law with respect to American Indian and Alaska Native Tribes.

Federal Indian Policy and "trust responsibilities" have developed from court decisions, congressional laws, and policies articulated by the President.

The trust responsibility is a legally enforceable obligation, a duty, on the part of the U.S. Government to protect the rights of Federally Recognized Indian

Tribes. In several legal cases discussing the trust responsibility, the Supreme Court has used language suggesting that it entails legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of dealings between the U.S. Government and Indian tribes.

For the Forest Service, trust responsibilities are essentially those duties that relate to the reserved rights and privileges of Federally Recognized Indian Tribes as found in treaties, executive orders, laws, and court decisions that apply to the national forests and grasslands. For Forest Service activities, the trust responsibilities are defined primarily by the authorities listed FSM 1563.01 (a copy of which is in Appendix A), and by treaties which may apply to specific areas of the National Forest System. Treaty rights on National Forest System lands are interpreted and applied by the Court.

One of the Forest Service duties is to consult and coordinate land and resource projects and activities on National Forest System lands adjacent to or adjoining Indian tribal lands to—

- Consult with Federally Recognized Tribes with whom the United States has a government-to-government relationship. (See Appendix C for a list of Federally Recognized Tribes.)
- Gain knowledge of adjoining Indian tribes' interests and rights. Seek this knowledge from within the Forest Service and from Indian tribes.
- Determine if a tribe(s) has reserved rights by treaty or other interests upon National Forest System lands. Work with your Lands staff to determine if treaty rights apply.
- Honor rights that apply to National Forest System lands, consistent with other Federal laws.
- Seek the advice of other Forest Service staff or of OGC in applying treaty rights.
- Consult with Indian tribes on plans, projects, programs, or activities that may affect the tribe's reserved rights on the National Forest System lands.
- Incorporate the information from such consultations into planning documents and the decisionmaking process.
- Show tribes how their information was used.
- Facilitate access, consistent with Federal law, so that tribal members may exercise rights reserved by treaty.
- Recognize that some, but not all, occupancy and use regulations related to National Forest System lands may apply to tribes and their members in the exercise of treaty rights.
- Consult between tribes, the Forest Service, and other parties as necessary to resolve conflicts that may arise.

Chapter II—Alternatives Including the Proposed Action

A. Whenever a proposed action may potentially affect lands that support treaty resources—more than environmental considerations are at issue. Treaty or other tribal rights may be a part of the underlying need for the proposal, or there may be a significant issue related to the treaty or other tribal rights; Chapter II of the NEPA document should clearly indicate that the proposed action and all alternatives meet Forest Service requirements and comply with American Indian treaties, executive orders, or statutory rights and address individual Indian interests.

B. Where the alternatives use different means to assure that treaty or other tribal rights are protected, Chapter II of the NEPA document should include a comparison of these differences.

Chapter III—Affected Environment

A. Introduction: The first few paragraphs should include a short reference to the treaty resources potentially affected by the proposed action.

B. Trust, treaty, or subsistence resources and their location:

Discuss in general terms, what, if any, areas, sites, or streams have or support treaty resources. This section can be brief yet illustrate that more than environmental considerations are at issue. In the case of programmatic documents such as EIS's for forest plan revisions, it should also include a map of any land ceded to the United States via treaty or other document.

There should be a discussion of overall Forest Service land management goals, including duties to honor treaties or acts of Congress for subsistence use of resources.

Where possible, include the extent of the rights identified and where these rights occur on the forest. The existence of a treaty reserved right may hold a priority for a specific site or location over a proposed action.

This discussion may also include certain cultural resources that would have a direct effect on the proposed alternative and, consequently, the Forest Service's ability to maintain confidentiality of the information gathered about cultural sites or resources.

C. Environmental Components within the Project or Planning Area—Each of these resources, if they are related to the proposed action, needs to have associated with it, a discussion of a trust duty that may impose upon the Forest Service a need for special

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As found on pages 46-47, "Most western and midwestern states have used the prior appropriations doctrine to allocate water. It is based on the notion of "first in time, first in right." *Basically, under State law, a water user obtains a right senior & superior to all later users if he or she appropriates the water by (1) diverting water out of a watercourse, and (2) putting it to a beneficial use for such purposes as irrigation (a major water use in the West), mining, industrial, municipal, or domestic use.* Once these conditions are met, the water user has established an *appropriation date."*

Although Indian reserved water rights are not expressed in treaties, they are inherent or implied rights. Ordinarily, State law applies to water rights on Federal lands; however, Federal law applies to American Indian water rights on reservation lands; their extent depends on the purposes for which the reservation was established. The reserved water right as applied to Indians is derived from Winters v. U.S., 1908. This landmark Supreme Court case holds that "sufficient water was implicitly reserved to fulfill the purposes for which the reservation was established." This Doctrine of Federal Reserved Rights established a vested right *(a right so completely settled that it is not subject to be defeated or canceled)* whether or not the resource was actually put to use, and enabled the tribe to expand its water use over time in response to changing reservation needs. The Winters Doctrine provides that tribes have senior water rights, and the national forests (Federal Government) have junior rights," ***which brings us to the origin* of *The Prior Appropriations Doctrine and* its *direct relation* to *The Treaty of Fort Laramie of 1851:***

"Discovery of gold in the west proved to be problematic, if not catastrophic, for Native Americans. The California Gold Rush of 1849 created a need for the United States to establish safe passage for its citizens to travel westward, through Indian country to northern California & southern Oregon. The presence of miners, trappers, hunters, & fur traders in the Fort Laramie area raised the concerns of Indian Agent Thomas Fitzpatrick, who recommended to his Superintendent, D. D. Mitchell, that the United States meet with the Plains Indians to discuss the proposed right-of-way through their country. Congress responded in February 1851 by allocating $100,000 for treaty negotiations with the Plains Indians. The primary motive of the U.S. citizens to travel through central north America by way of the Oregon Trail, which wound its way through the plains, hills, & mountains, was the final destination of the *gold fields of northern California*. By making the treaty with the Plains Indians in 1851, the United States formally recognized that the various Indian Nations in the area held a valid (ab)original title to the land they owned & occupied. The fact that the United States had "purchased" the area in 1803 from France did nothing to diminish the legality of the (ab)original title held by the various Indian nations occupying the land. The Fort Laramie Treaty of 1851 would include virtually *all* of the mid-western Native Nations."[9]

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9 **Tribal Laws, Treaties, and Government, A Lakota Perspective by Patrick A. Lee & Christopher K. Baker, ISBN 978-1-4759-8656-0 (sc) ISBN 978-1-4759-8687-7 (ebk)**

Evolution of U.S. Water Policy: Emphasis on the West

women in NATURAL RESOURCES

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By Daina Dravnieks Apple

When water is plentiful for everyone, people are not concerned much about water policy, but when droughts occur in different parts of the nation and there is less water to go around for many uses, the rights to who has access to the water and how they came to have it are very important.

Eighty percent of the Nation's water is used in the West—most of it for agricultural use (Case and Alward 1997). Both population and water demand have increased substantially since 1971. Water tables have dropped, resulting in increased costs for food and energy production. Urban areas are experiencing water shortages as their populations expand and compete with agricultural irrigators for limited water supplies (Case and Alward 1997). Downstream user demands for clean water are often in conflict with upstream user impacts on water quality.

In addition to increasing demands for drinking water, conflicts are arising between agricultural uses and demands for adequate in-stream flows to maintain aquatic species. The Klamath River, which originates in Oregon and flows into Northern California, was the site of threatened violent conflict in the spring of 2001 when, following several years of drought, the U.S. Fish and Wildlife Service ruled that water diversion for agricultural use would leave inadequate flows for the endangered suckerfish, a species resident in this river. Indian tribes also claimed that water diverted for farming left insufficient flows to sustain the salmon population, and thus deprived the tribes of their right to fish for salmon. While the Klamath River conflict appears to be caused by competing uses of water by farmers, Indian tribes, and protection of endangered species, it is more fundamentally caused by a lack of clear water policy and unclear property rights.

Although many previous studies have documented the West's chronic water problems (Frederick 1988; Guldin 1989; Anderson and Snyder 1997; Bell 1997; Riebsame 1997; Kenney 1999; Glasser 2000; Pisani 2000), in 1992 Congress established a commission to investigate and review Western water policy and institutions. Section 3{3003} of The Act of 1992 directed the President "to undertake a comprehensive review of Federal activities in the nineteen Western States which directly or indirectly affect the allocation and use of water resources, whether surface or subsurface, and to submit a report to Congress on the President's findings, together with recommendations." No specific actions were intended, though this information would be used to develop proposed legislation. Thus, the Western Water Policy Review Advisory Commission was established.

Among Congress's reasons for forming the Commission was its determination that current federal water policy suffered from unclear and conflicting goals, was implemented by a maze of agencies and programs, and that the resulting lack of clear policy and coordination

created gridlock that could not be resolved without addressing fundamental changes in institutional structures and governmental processes.

To better understand the origins of these complex institutions and different legal doctrines governing water resources in the United States, this paper will first explore:

The origins of the riparian and appropriation doctrines of water rights, including historic influences of Spanish and English law,

How the California Gold Rush changed historic water use patterns,

How the prior appropriation doctrine developed; and,

Why there is no federal water law.

It will conclude with a brief overview of major findings and recommendations of the Western Water Policy Review Advisory Commission, and some alternative proposals to provide answers to the dilemma of how best to manage water resource issues in the western United States.

Brief History and Evolution of U.S. Water Use

The Spanish explorers of the sixteenth century brought with them their experience in diverting water from natural water courses to make arid lands productive. In their efforts to "civilize" native populations in what is now California, they collected and settled Indians into central communities that were often built around Catholic missions. Another goal of Spanish settlement was to mine the rich ore bodies of the New World, and collecting Indians at missions was in large part designed to assure adequate labor forces for the mines. Production of food and fiber in quantities beyond those required by the farmers themselves was necessary to support the mines, as well as the military bases that accompanied Spanish development. Irrigation was essential to accomplish these tasks, and the diversion of water for irrigation became widespread around Spanish towns and missions (Wilkinson 1992; Gillilan and Brown 1997).

The mines themselves required substantial quantities of water, often more than half a dozen towns or missions needed. Mining was a new water use in the West, and after mines became prevalent throughout New Spain by the eighteenth century, one that had significant potential to affect both water quantity and quality for downstream users (Gillilan and Brown 1997).

The use of water in the Spanish West was governed by the same laws enforced in Spain. Water was owned by the Crown and was available to all for purposes such as drinking, fishing, and navigation. Spanish law in the New World continued to protect public uses of water, giving first priority to its use by communities as a whole. Water was allocated to individuals only after sufficient quantities had been secured to meet the needs of the town. The law included protections for private water uses. Grants of water for specific purposes were generally associated with grants of land—but were issued separately. A land grant by itself entitled the grantee to the use of water only for domestic purposes. The grantee's right was to use the water, while the state retained actual ownership (Wilkinson 1992; Gillilan and Brown 1997).

Spanish water law emphasized the need for fair division of the available water. While the water rights of individuals were to be protected, in the Spanish and Mexican judicial systems, the rights of the corporate community weighed more heavily than those of the individual.

In the East, the American colonies were established under the auspices of the English Crown, and were subject to English laws. English water law was relatively simple and undeveloped, having unfolded in a land where water was abundant and conflicts over its use were correspondingly rare. The navigable waters of England belonged to the Crown and were available to the public for the purposes of navigation and fishing. The Crown's ownership prevented these important economic activities from being monopolized by individuals, thereby reducing the potential for conflict. Rights to the use of waters not being used for navigation were held by those who owned the banks of the streams, and were therefore known as riparian rights (Wilkinson 1992).

Water resource conditions in the American colonies were similar to those in England, and there was not much incentive to adopt a different set of water use rules after American independence from England. Water use conflicts were so rare in England and in the original American states that a body of water law was not well developed in the first decades of this country's history.

Riparian Doctrine

The heart of the original riparian doctrine as developed in Europe as the idea that rivers had value primarily as an amenity. Rivers enhanced the value of surrounding land, and each landowner along a river was entitled to receive the benefit of free-flowing water. This came to be known as the "natural flow" interpretation of the riparian doctrine. It held that landowners were allowed to remove water from streams only for basic domestic purposes such as drinking, bathing, cooking, and watering of limited numbers of livestock. Landowners were otherwise required to leave rivers in an undiminished and unpolluted condition (MacDonald 1990). This doctrine made sense where water was abundant and there were few out-of-stream uses of water. The natural flow doctrine often gave way, however, when advances in technology made rivers valuable as a source of energy for turning the wheels of industry and then as a waste disposal or coolant in next generations of industrial processes (MacDonald 1990; Anderson and Snyder 1997).

The riparian doctrine was modified during the Industrial Revolution to allow riparian landowners to make reasonable use of the waters flowing over their lands. This "reasonable use" interpretation gave each landowner the right to the use of water flowing over the land without diminution or obstruction. The landowner did not own the water itself—the right was solely to the use of the water. When water flows were insufficient to meet all uses, the deficiencies were borne as a common loss, with each user cutting back by the same proportion. The extent to which any particular use was allowed was determined by the potential injury to other riparian landowners should that use occur (Gould 1990).

The features of the reasonable use riparian doctrine were:

1. Only riparian landowners could have rights to the use of water.

2. Owners of non-riparian lands and any others wishing to preserve free-flowing waters could not have any legal rights to the water.

An exception to this general rule was the development of water rights under the riparian doctrine through direct appropriation. Appropriation of water for out-of-stream uses was legal under the English-American common law system if the new water user was able to obtain the consent of all affected riparian landowners. Consent was explicit, but may have been assumed, if the new water use negatively impacted riparian owners, but was nevertheless allowed to continue without interruption or objection usually for 20 years. Rights developed through implied consent were often referred to as "prescriptive" rights.

3. As the water right is a consequence of land ownership rather than a separate piece of property, the right is not lost simply because it has not been exercised.

4. The relationship among riparian landowners is one of "parity" rather than "priority," and the doctrine allows the entry and accommodation of new water users. Water rights are relative rather than absolute; riparian rights do not attach to a fixed amount of water.

As conditions change, riparian rights for specific water uses may not be secure in situations where there is not enough water to accommodate all desired uses.

The riparian doctrine of water rights originated in lands with humid climates where precipitation easily supported agriculture and plentiful water supplies made conflicts between water users infrequent, and where the legal tradition was based on English riparian use. Much of the American West did not fit this description. As settlers moved west, the aridity of the land bore little resemblance to the eastern climates they had left behind. Politically, westerners were far removed from the national government in Washington D.C., and other sources of governmental authority were rudimentary or nonexistent. The new rules that they created with respect to water were often very different from those they had lived with in the East.

How the California Gold Rush Changed Historic Water Use Patterns

Miners provided the primary impetus for changing the rules under the Spanish system allocating water in the American West, especially after gold was discovered in California in 1848. The population of California, and later the entire West, increased enormously after gold was found and as mining became the principal industry in with respect to water the West.

The first gold deposits were found primarily along streams, and early miners usually established claims along the stream banks, where they could pan for gold directly. Those arriving later, after the streamside locations had all been claimed, were forced to establish "dry diggings" some distance removed from the streams and then haul gravel in sacks or wheelbarrows to the water to be washed. As mining operations grew in size and sophistication, instead of bringing gravel to the water, streams were diverted from their natural channels to bring water to the claims (Gillilan and Brown 1997). Hydraulic mining

utilized water pushed through hoses under great pressure to wash entire hillsides directly into wooden sluices. This mining method became widespread in the 1850s, and it required the diversion and delivery of huge volumes of water to sites often far from natural channels (Wilkinson 1992).

The use of water was so basic to the production of gold that enterprising miners discovered that they could make more money providing water to the mines than they could from mining the gold itself. Private companies were organized to build dams and canals. The size of the companies and the scale of their waterworks was huge, and reservoirs impounded billions of gallons of water.

The Prior Appropriation Doctrine

Spanish colonists settled the West in the sixteenth century under sponsorship of the Spanish Crown, which provided the colonists with established systems of government and law. Three centuries later when the miners and other migrants moved to California, no government awaited them. The Gold Rush occurred near the end of the U.S.-Mexican War, after the Mexican government had been expelled, but before the region had been officially transferred to the United States. There were no rules to define property rights in the gold fields—either between individual miners or between miners and the federal government (Fischer and Fischer 1990).

The miners did not own the land they were occupying, the minerals they were seeking to remove, or the water they were using. It was not even clear what rules should eventually apply—those of the federal government, which owned the land, or those of the state government, which had not yet been created, but was widely anticipated. Rather than waiting for clarification of the rules by some level of government, the miners treated the problem as an opportunity. As there were no existing rules to guide their use of land and its resources, they made their own.

The miners' rules were created independently in each mining camp and administered by committee. Adjudication of disputes and enforcement of rules was undertaken by committees–if not by the aggrieved individuals themselves. The miners' greatest need was to establish rules governing access to the gold. Because they did not own the land or minerals, the usual rules of property ownership did not apply. Instead, the miners adopted the "first come, first served" principle already in wide use on the public domain, where rights were based on occupation rather than ownership (Gillilan and Brown 1997).

The miners also needed rules to govern the allocation of water. The first to arrive at the gold fields, in the earliest months of the rush, often had their choice of land to claim and water to use. The later arrivals often were able to find promising, previously unclaimed land, but discovered that there was not enough water available to work the claims. Water was frequently the limiting factor in the production of the region's mineral wealth.

The riparian principles used to allocate water in the East would have been of little use to the miners even if they had been inclined to use them. Water allocation principles based on plentiful rainfall, numerous streams, and the need to leave water in the stream for downstream users made little sense in regions where rainfall and streams were less

abundant. Instead, the miners applied the same rules they used to govern access to mining claims. When applied to water, these rules became known as the prior appropriation doctrine.

The miners staked a claim to water by physically taking, or "appropriating," what they needed. Construction of the diversion necessary to take the water served as notice to other miners that the water was being appropriated. The first miners to appropriate water had the best right to continue using it. Subsequent appropriators were required to make do with what was left, if anything. Even if located upstream from a prior user's diversion works, a subsequent "junior" water user was required to allow enough water to pass to meet the need of the downstream "senior" appropriator.

The "use it or lose it" principle was also incorporated within the prior appropriation system, so that miners not making beneficial use of their water were forced to surrender it to those who would. Limits were seldom placed on the amount of water that an individual could use. A miner or company was free to appropriate as much water as could be put to use, even if that meant there would not be any left for those who arrived later, or to sustain the integrity of the stream and its biota (Anderson and Snyder 1997).

California gold soon attracted investments from all over the world, and the gold fields became dominated by increasingly larger and more sophisticated mining and water supply operations. In the absence of definitive guidance from federal or state legislatures, the task of defining uniform principles fell to the California state courts.

The California courts faced a difficult task. The courts had been organized following California's admission to the Union as a state in 1850 and derived their jurisdiction and powers from the California state constitution. The mining camps, however, were located almost exclusively on federal land and it was not clear whether the state or the federal government had jurisdiction over activities occurring there. The courts had also been given conflicting directives from the state legislature. In 1850, California's first legislature had adopted the common practice (or common law) as the state's legal foundation, and this meant that the allocation of water would be governed by riparian principles. But just one year later, the legislature adopted a statute that sanctioned the use of prior appropriation (Gillilan and Brown 1997).

The uncertainty of their jurisdiction and the conflicting guidance given by the state legislature made it difficult for the early courts to define a uniform set of water allocation principles. Occasionally the courts developed hybrid doctrines that merged aspects of both the competing doctrines. Over time, their rulings increasingly reflected the precepts of the prior appropriation doctrine that prevailed in the mining camps. In 1855, the California Supreme Court clearly set forth its justification for adopting priority principles to resolve water disputes on the public domain. The court reasoned that the federal government had implicitly validated the new legal system by failing to object to it. *Irwin v. Phillips* (1855) is often cited as marking the birth of the prior appropriation doctrine (Gillilan and Brown 1997). By the 1860s, the use of the prior appropriation doctrine was firmly established as the mechanism by which the California courts would resolve water conflicts occurring on the public domain.

Miners were not the only ones to divert water from rivers and streams. There was a massive infusion of settlers of all kinds to the West throughout the latter half of the

nineteenth century, and many of these settlers needed to divert water out of natural channels to sustain their livelihoods. Those who were able to claim land near rivers and streams were able to raise crops with the aid of relatively primitive diversion and irrigation works. But more widespread settlement required more sophisticated irrigation methods. Irrigation soon became the dominant water use in the West, far exceeding mining in terms of number of locations in which it was practiced and the total volume of water used.

By the beginning of the twentieth century, the principles of the prior appropriation doctrine had been widely adopted throughout the West. The basic features of the prior appropriation doctrine were:

1. The right to use water could be obtained by taking the water and putting it to beneficial use.

2. The right was limited to the amount of water that was beneficially used.

3. First in time was first in right.

4. The water must be used or the right was lost.

These rules had a major impact on the uses of western rivers and streams. For instance, to take water and put it to a beneficial use, one had to exercise some form of physical control over it. Control was exercised by building storage and diversion dams or otherwise "developing" rivers, thereby altering natural patterns of water flow. The allocation of water to those who took it first provided incentives for settlers to take and put to use all the water that they could possibly use as quickly as possible, rather than leaving it for instream use or for potential out-of-stream use by future settlers. Furthermore, beneficial use requirements had the effect of excluding some water uses—such as many of those that took place instream—that were not considered beneficial at that time. Leaving water in streams was widely considered to be a waste of water (Wilkinson 1992).

Allocation of water according to the principles of the doctrine of prior appropriation was consistent with the cherished American ideal that individuals, not society, should control their destiny. It soon became apparent that there were a number of problems with the operation of this system. One of the greatest problems was the prevalence of claims for excessive amounts of water. These problems eventually led people to call for adoption of new administrative systems to control the allocation and distribution of water.

In the prior appropriation system, to ensure that water was distributed in accordance with the priorities of the rights, any water user not receiving their legal share of a river's flow could place a "call" on the river. In response to the call, agents of the state required any water users with rights junior to those of the calling water user to curtail their diversions until the senior right was satisfied. Diversions of the most junior water rights on the watercourse were shut down first, the next most junior, and so on until enough water was left in the stream to fulfill the senior right.

The shift to the prior appropriation doctrine was handled differently by each state. Some states, particularly those where rainfall was more abundant, saw no reason to completely eliminate the riparian doctrine as they expanded the appropriation doctrine, and so made great efforts to accommodate both doctrines. The Pacific states of California, Oregon, and

Washington, and the states of North and South Dakota, Nebraska, Kansas, Oklahoma, and Texas all tried to take advantage of the developmental benefits of the new prior appropriation doctrine without upsetting the expectations of citizens who based their water claims on the common law riparian doctrine (Fischer and Fischer 1990).

The accommodation of both doctrines was largely accomplished by applying each within its own limited sphere of influence. For example, in California, the state best known for its adoption of both doctrines, the State Supreme Court decided in an 1886 case that common law riparian rights—authorized by the state's first legislature in 1850—would prevail on lands the federal government granted to the state or to private individuals, whereas appropriative rights—as authorized by the federal General Mining Law of 1862 and the state legislature's adoption of appropriative principles in 1872—would prevail on the public domain (Wilkinson 1992).

Texas, on the other hand, segregated the domains of the two doctrines through geography, passing legislation that authorized appropriative rights only in the arid western half of the state, leaving the riparian doctrine as the sole method of establishing water rights in the more humid eastern half of the state (Gillilan and Brown 1997).

Over time, most of the mixed doctrine states took steps to ensure the supremacy of the appropriation doctrine, and that has become the primary means by which the western states allocate and administer property rights in water.

The Lack of Federal Water Law

Before 1890, the federal government's primary emphasis was on settling the West and public land disposal. The transfer of public lands to private ownership generated concern about the application of the riparian doctrine to those lands. Under the assumption that there would be no lands retained in federal ownership, Congress addressed this issue through a series of laws passed in the 1800s that rejected the riparian doctrine, but did not develop an independent, federal system for allocating water on federal lands. Through laws such as the General Mining Law of 1862, the Act of 1870, and the Desert Land Act of 1877, Congress passed the allocation of water to the states (Rogers 1993).

Beginning in approximately 1890, Congress changed its public land policy and began to retain and develop federal lands by passing laws that established the Forest Reserves, National Monuments, and added more National Parks. It also started managing water resources and conducting large-scale water development and allocation projects through the 1902 Reclamation Act and the 1920 Federal Power Act. Congress's new policy for retaining federal lands and actively managing them in a manner that required water was not in keeping with its previous policy of leaving water allocation to states and local users (Wilkinson 1992).

A fundamental tenet of water law widely ignored or misunderstood was that a water right gave someone the right to use water *rather than actual ownership of water*; ownership resided with the public. As states adopted water administration systems, many chose to clarify this fact. In general, the creation of such administrative systems, though supported by reformers, seems to have been more of an effort to make existing priority systems work better, rather than to make substantive changes in such systems. However, the shift to public administration of water rights did result in some changes in the way water was

allocated. These changes were accomplished through the use of public interest or public welfare requirements in state constitutions and statutes. Constitutions or statutes of many western states emphasize the fact that appropriations will no longer be valid just because they benefit someone; rights will be granted only if proposed water uses are also consistent with the public interest.

However, "the public interest" is very difficult to define. Most states have left questions of the public interest to the discretion of administrative officials. Many of the western states have also established water use preferences among beneficial uses.

Presently, water for domestic and for municipal needs receives the highest priority in all of the states that have established preferences, although there is considerable variation in other preferred uses among the states. For instance, the use of water for agriculture is favored over all but domestic uses in most states because agricultural interests usually dominated state legislatures in the early part of the twentieth century, when preference statutes were written. Industrial, manufacturing, and electrical generation purposes are usually less preferred, and the use of water for recreation, fish, and wildlife purposes is usually at or near the bottom of preference lists, if listed at all. The order of these preferences may have changed with the implementation of the Endangered Species Act of 1973 (Wilkinson, 1992).

Maintaining supplies of clean water and protecting watersheds were major reasons why public domain forests and rangelands were reserved by the federal government at the end of the nineteenth century. Use and development of water resources of the United States underwent major changes at that time in response to the growing demands of a population that had increased nearly twenty-fold since the founding of the country. Westward expansion and the use of navigable rivers, canals, and harbors for transportation transformed the nation's economy. As the nation experienced this period of massive development, major problems emerged from overuse and poor management of its water resources: Urban water supplies were a major source of disease; the capacity of many lakes and streams to assimilate wastes was exceeded; the survival of people living in arid or flood-prone areas depended on unpredictable precipitation patterns (Sedell et al. 2000). The 1897 Organic Administrative Act said these forest reserves were set aside to protect and enhance water supplies, reduce flooding, secure favorable conditions of water flow, protect the forest from fires and depredations, and provide a continuous supply of timber. At that time, few federal forests were designated in the East because of the relative lack of public domain lands. Public demands for eastern National Forests resulted in passage of the 1911 Weeks Act, authorizing the acquisition of federal lands to protect the watersheds of navigable streams. So, it was the headwaters of the western rivers and the cutover and eroded lands in the East that became the National Forest System.

Increasing population and demographic changes in the U.S. will intensify public concern about adequate future supplies of clean water. The population of the West has increased 50 percent in the last 20 years and is expected to increase another 30 percent by 2040 (Case and Alward 1997). The U.S. population will nearly double within the next 50 years. While irrigation remains the major use of water, especially in the West, the population surge in the West is increasing diversion and consumption use of water and, at the same time, the demand for water-based recreation (Brown 1999). This trend will continue and intensify. Most recreation in the U.S. takes place on National Forests and is associated with some body of water such as lakes, reservoirs, or streams. Recent publications (e.g., Gillilan and

conclusion: *That the geographic, hydrologic, ecologic, social, and economic diversity of the West would require regionally and locally tailored solutions to effectively meet the challenges of 21st century water management* (Report of the Western Water Policy Review Advisory Commission 1998).

The Commission's recommendations included employing participatory decision-making and emphasis on local implementation, innovation, and responsibility (Riebsame 1997, Rieke and Kenney 1997). Federal, tribal, state, and local cooperation toward achieving national water standards should be the basis of water policy, and where possible, responsibility and authority for achieving these national standards should rest with non-federal governing entities. The Commission also recommended organizing around hydrologic systems—natural systems such as watersheds and river basins—that would require conflicting jurisdictions to integrate their institutional missions, budgets, and programs.

Seeking the goal of sustainable use of water links the diverse elements of the water use community together and provides for common dialogue and problem solving; and seeks to achieve a balance between a system's capability to meet social needs and its biological and hydrological capacity. For example, increased public awareness of the damaging impact of massive water development in places such as the Sacramento River in California, the Everglades in Florida, and others, is resulting in listings of aquatic species as threatened or endangered. This is prompting the federal government to file suits against regional management agencies for lax enforcement of water quality standards, and reaching settlements that call for mitigating impacts of excess nutrients from farmland runoff, and increasing instream flows during critical times for sensitive species. When Congress asked the U.S. Army Corps of Engineers (the original builders of the massive water projects that led to ecological degradation of the Everglades) to develop a plan for recreating original water patterns, it prompted sugarcane growers and other agricultural interests to become involved in developing alternative strategies (Postel 1997).

Conclusion

The Nation needs to complete and implement a policy framework and operating system that regularly and periodically integrates shifting water use priorities as American megatrends evolve, measures changes in priorities when and where they occur, and then creates and incorporates a concomitant learning system that anticipates and makes changes in policies and practices to meet newly emerged needs and uses. The new system must find ways to prevent most current obstacles and conflicts along the path toward new and more fitting policy—such as by assigning only a few, or perhaps one, agency and committee in each body of Congress to have jurisdiction over water. It must be able to modify, diminish, or escape the constraints of historic priority uses as they become obsolete or less significant and it needs to be a be able to correct itself with sound hydrologic data and set sustainability and renewability as its absolute constraint to prevent depletion of fresh water supplies or damage to watersheds.

Solutions to these problems need to be coordinated so that hydrologic, ecological, social, and economic issues are appropriately addressed and tailored to meet the water management challenges of the coming decades.

The 21 aforementioned tribes, *all* civilians, *and* all organizations *who reside downstream from* the trajected *flowage easement* for the Dakota Access Pipeline Project (among *both* easement locations), *and* who utilize water *from* The Missouri River[10] *for subsistence, utility, and commercial purposes for the sake of survival ,* are considered to have "Senior Water Rights" according to The Prior Appropriations Doctrine, *inalienable* Rights which are *reaffirmed* under The Winters Doctrine. Dakota Access L.L.C. (Energy Transfer Partners)[11], Morton County[12], The State of North Dakota[13], *and* The Army Corps of Engineers OMAHA DISTRICT[14] are considered to have *Junior Water Rights* to The Missouri River under the 1868 Treaty of Fort Laramie *and* Article , *however, according to the Article VI of The Treaty of Fort Laramie and Article VI of The Constitution of The United States (page 46),* The Great Plains Tribes hold *rights downstream* to where *both* flowage easements were approved*, & also upon the real property (land and water)* to which *both* flowage easements for the development of the Dakota Access Pipeline Project, by *Todd Sando and John Henderson,* were illegally Authorized through acts of EXTORTION, *whether knowingly or unknowingly,* on the dates of 4-1-2016 *and* 7-25-2016, *respectfully.*

EXTORTION, *Black's Law Dictionary:*

"**Any oppression by color or pretense of right, and particularly the exaction by an officer of money, by color of his office, either when none at all is due, or not so much is due. or when it Is not yet due.** Preston v. Bacon, 4 Conn. 4S0.

Extortion consists in any public officer unlawfully taking, by color of his office, from any person any money or thing of value that is not due to him. or more than his due. Code Ga. 1882."[15]

10 https://www.nps.gov/mnrr/index.htm
11 http://www.energytransfer.com/ops_copp.aspx
12 http://www.co.morton.nd.us/
13 http://www.nd.gov/
14 http://www.nwo.usace.army.mil/
15 http://thelawdictionary.org/extortion/

Article V of The Treaty of Fort Laramie of 1851 describes *in detail the agreed boundaries* for the various Native Americans of The Great Plains of North America:

The aforesaid Indian nations do hereby recognize & acknowledge the following tracts of country, included within the metes & boundaries hereinafter designated, as their respective territories:

The territory of the Sioux or Dahcotah Nation, *commencing the mouth of the White Earth River*, on the Missouri River: thence in a southwesterly direction to the forks of the Platte River: thence up the north fork of the Platte River to a point known as the Red Butte, or *where the road leaves the river*; thence along the range of mountains known as the Black Hills, to the head-waters of Heart River; thence down Heart River to its mouth; & thence down the Missouri River to the place of beginning.

The territory of the *Gros Ventre*, *Mandans, & Arrickaras Nations*, commencing at the mouth of Heart River; thence up the Missouri River to the mouth of the Yellowstone River; thence up the Yellowstone River to the mouth of Powder River in a southeasterly direction, to the head-waters of the Little Missouri River; thence along the Black Hills to the head of Heart River, and thence down Heart River to the place of beginning.

The territory of the Assinaboin Nation, commencing at the mouth of Yellowstone River; thence up the Missouri River to the mouth of the Muscle-shell River; thence from the mouth of the Muscle-shell River in a southeasterly direction until it strikes the head-waters of Big Dry Creek; thence down that creek to where it empties into the Yellowstone River, nearly opposite the mouth of Powder River, and thence down the Yellowstone River to the place of beginning.

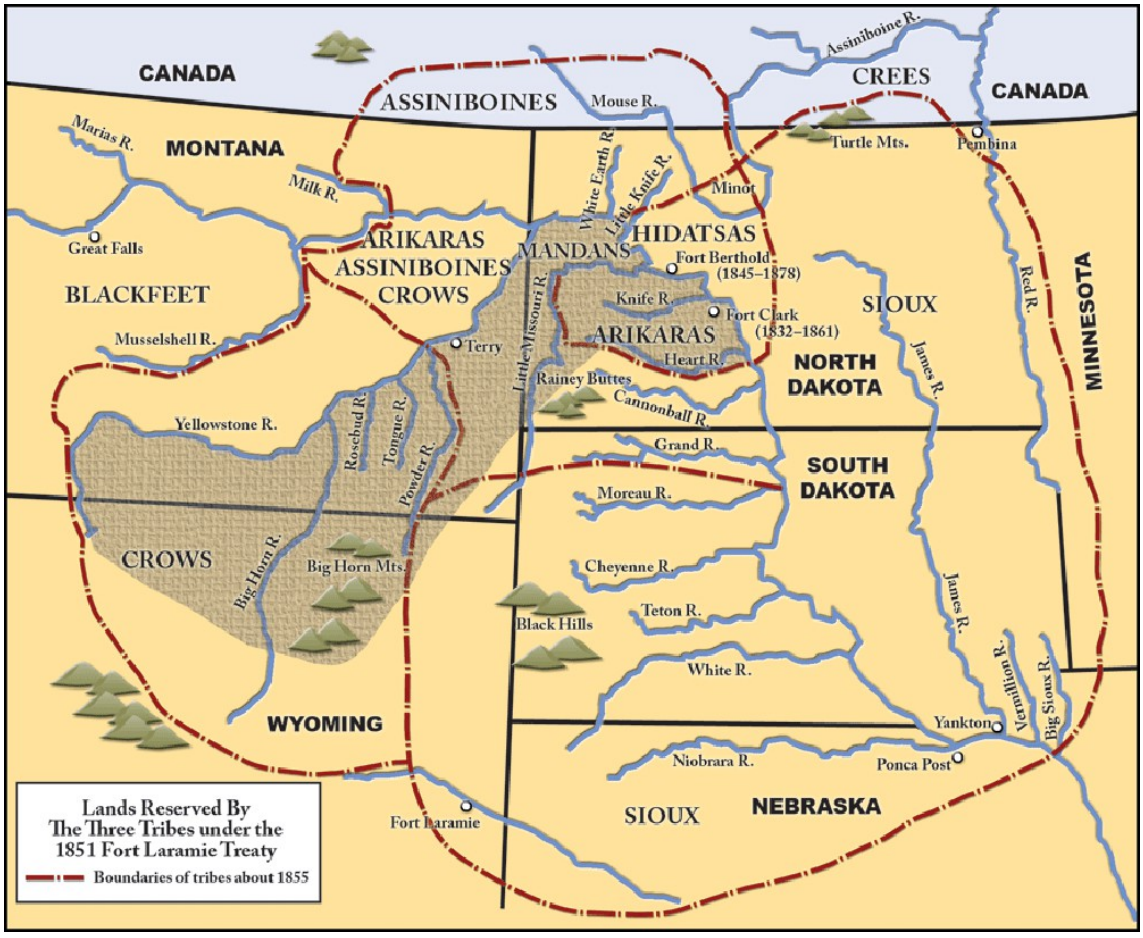
The territory of the Blackfoot Nation, commencing at the mouth of Muscle-shell River; thence up the Missouri River to its source; thence along the main range of the Rocky Mountains, in a southerly direction, to the head-waters of the northern source of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence across to the head-waters of the Muscle-shell River, and thence down the Muscle-shell River to the place of beginning.

The territory of the Crow Nation, commencing at the mouth of Powder River on the Yellowstone; thence up Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek, and thence to its mouth.

The territory of the Cheyennes and Arrapahoes, commencing at the Red Butte, or the place where the road leaves the north fork of the Platte River; thence up the north fork of the Platte River to its source; thence along the main range of the Rocky Mountains to the head-waters of the Arkansas River; thence down the Arkansas River to the crossing of the Santa Fé road; thence in a northwesterly direction to the forks of the Platte River, and thence up the Platte River to the place of beginning.

It is, however, understood that, in making this recognition and acknowledgment, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; & further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.

Map of 1851 Agreed Treaty Boundaries



From "The History and Culture of the Mandan, Hidatsa, and Sahnish" from Official Portal of The north Dakota State Government website: http://www.ndstudies.org/resources/IndianStudies/threeaffiliated/historical_laws.html