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2007 HOUSE NATURAL RESOURCES

HB 1025

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1025

House Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: January 11, 2007

Recorder Job Number: 930

Committee Clerk Signature Sherry Openstad

Minutes:

Chairman Porter opened the hearing on HB 1025. The bill was read by the Committee Clerk.

Representative Chet Pollert opened the hearing. He indicated that he was chairman of the House Natural Resources Interim Committee. He indicated that one of the studies that they had done was the study on reserved water rights. This was one of the biggest subjects that they had to deal with. After lots of study and research on this, what you see before you now is HB 1025. There were three or four bill drafts. There will a number of people that will know a lot about this subject as far as technicalities. He read a paragraph out of the interim study. Pages 52 & 58. He read a paragraph from that study. "A member of the Committee noted that the bill draft should not limited to a single tribe and as drafted is discretionary that allows those tribes that wish to negotiate their reserved water rights, an opportunity to do so but does not force any tribe into negotiations with the state to quantify it's water rights. A member of the committee noted that the committee did not recommend the bill draft to the Legislative Council for submission to the Legislative Assembly and the Committee is saying that the Legislative Assembly should not be involved in approving reserved water rights treaties. However, if the committee forwards the bill draft to the Legislative Council, it is making the strong statement that it believes the Legislative Assembly should have final approval over any reserved water

right agreement negotiated between the State and a tribe. A member of the committee noted it is clear that the Governor has authority to negotiate reserved water right agreements under current law. However if the Legislative Assembly is to have a voice in the process, by requiring that an agreement be submitted to the Legislative Assembly for approval, then the bill draft before the committee should be approved and recommended to the Legislative Council. That is what we did. What we also found out during that process, they did not realize that the government had authority until the 11th or 12th hour, or more towards the end of the study. I also felt it was the opinion of this committee and that is why we wanted to go along and approve the bill, not only because we thought the Legislature should have some policy authority in the process, but because we also had to have more time to study the issue because this is something that does not get solved in a year. In testimony, it came out that this process takes somewhere from five to ten years. We did not just want to kill the subject and not even bring it up as we thought it was important that people come forward. I am sure you will have the Governor's Office and I do agree with them that they do have the authority. We didn't find out until darn near the end of the study. Maybe that was my problem because I didn't search into that fast enough. There are plenty of people from the State Water Commission and Jeff Nelson has the technical background as far as what the committee wanted at that time as well. With that, he would try to answer any questions. He is trying to figure out dollars and not policy. There were no questions for him. He recommended that Jeff Nelson go over what they did.

Mr. Jeff Nelson, staff attorney for the Legislative Council came to the podium. Mr. Nelson served as Committee Council for the interim Agriculture and Natural Resources Committee. The interim committee of the Legislative Council is recommending HB 1025. As chairman Pollert mentioned, the Agriculture and Natural Resources Committee was assigned three

studies this past interim. One of which was required by Senate Bill 2115. This bill directed a study the process and negotiations and to quantify reserved rights. HB 1025 authorizes the Governor to negotiate reserved water rights of the United States and federally recognized Indian tribes. Section 1 authorized the Governor of the Governor's designee to negotiate with any federally recognized Indian tribe claiming a reserved water right in this state and representatives of the federal government as trustee for a federally recognized Indian tribe to define the scope and attributes of rights to water claimed by the Indian tribe. The governor or the governor's designee may also negotiate with the federal government to define the scope and attributes of non-Indian reserved water rights claimed by the federal government. We are talking about two different types of reserved water rights; those claimed by Indian tribes, or Indian water rights or those claimed by the federal government in the state or Federal Reserve water rights. Subsection 2 of Section 1 on page 1 contains a notice requirement and how the governor is to provide public notice. Section 2 concerns the agreement itself and provides that once an agreement is completed, the state engineer is required to give written notice to the owner's water rights permits including the holders of conditional permits who may be affected by the agreement that they may file an exception to the agreement. The remainder of that subsection contains the notice of time and requirements. Subsection 2 of Section 2 provides that if no exceptions to the agreements are filed, then the agreement must be signed by the Governor on behalf of the state and then authorized representatives of the tribe and the federal government as trustee for the Indian tribe or by the governor on behalf of the state of ND and by authorized representatives of the federal government. Subsection 3 says that if an exception is filed, the state engineer is required to make a determination on the exception. If the determination by the state engineer is not contested, then the agreement or the amended agreement will be submitted to the negotiators for signature. Subsection 4 address if there is a

contest to the agreement, the proceedings is deemed to be an adjudicative proceeding of chapter 28-32 the administrative practices act, and the provisions of chapter 28-32 apply to proceedings to sustain or reject exceptions. The state engineer is required to apply to the administrative law judge or request the office of administrative hearings to designate an administrative law judge to preside over the proceedings. Subsection 5 addresses if the administrative law judge sustains the state engineer's determination, then the state engineer is required to submit the agreement or the amended agreement to the negotiators for signature. Subsection 6, if the administrative law judge does not sustain the state engineer's determination, the administrative law judge shall remand the agreement to the governor or the governor's designee for further negotiation if desired by the parties of the agreement, Within one hundred eighty days after the administrative law judge remands the agreement, the governor or the governor's designee shall file with the administrative law judge an agreement without alteration, an amended agreement, a motion to dismiss the proceedings without prejudice, or a motion for continuance. Unless a motion for continuance is granted, the agreement must be submitted to the negotiators for signature. Subsection 7 and 8, as Chairman Pollert mentioned, upon signature by all required parties, the agreement must be submitted to the legislative assembly for approval by concurrent resolution. Upon approval of the resolution by a majority vote of the members-elect of each house of the legislative assembly, the state engineer shall incorporate the agreement in a final order. The agreement is effective upon issuance of the final order. That concludes my comments. As Chairman Pollert mentioned, I do have a substantial history of the reserved water rights doctrine and the description of the different bills that the committee has considered, and the steps that the committee went through to recommend this bill. I should also add that as I close, my

comments should not be construed as being in favor of or opposed to this bill. I am here simply to review the bill.

Chairman Porter asked for questions.

Representative Keiser asked Mr. Nelson what the problem is here. I understand what you have described here, but I still am wondering what the problem is here?

Mr. Nelson said he didn't know if he would characterize this as a problem. Under federal law, under what is called the Winters Doctrine, federally recognized Indian tribes are entitled to a water right on their reservation. Many western states have entered into negotiations or litigation with the Indian tribes to adjudicate or quantify that reserved water right. SB 2115 last session, the Turtle Mountain Band of Chippewa Indians prior to last session had expressed interest in doing just that, quantifying and adjudicating reserved water rights at that reservation. The state engineer's office admits SB 2115 which would authorize the state engineer to negotiate those reserved water rights. Last session there were numerous questions regarding that bill and the legislative assembly at that time recommended the study which was prioritized by the Agriculture and Natural Resources Committee recommending this bill. I think the United States Supreme Court defined what a reserved water right is best and I can read an except from that report that this court has long held "that when the Federal Government withdraws it land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water than unappropriated to the extend needed to accomplish the purpose of the reservation. The Unites States acquires a reserved right that on the date of the reservation and superior to the rights of future appropriates. Reservation of water rights empowered by the commerce clause the federal regulation for navigable streams and the property clause which permits federal regulations to relax. As far as why a tribe or state would want to quantify its reserve right, I will read an exert from a water rights reserve by

John Shertz, and he states that the rational for the adjudificaton and quantification for Indian reserved water rights is that the prospect of expensive litigation and uncertain outcomes has lead certain Indian groups, federal government, state and local governments and other water users to focus heavily on negotiating agreements to confirm and quantify reserved rights; agreements Congress has asked or will be asked to ratify. An unusual situation, a particular Indian nation has been asked by the other parties to relinquish its indefinite and potentially expandable reserved rights to a definite quantified amount of water plus an amount of money or an agreement for assistance in bringing water to reservation lands or both. That kind of describes what the reserve water rights doctrine is and the rational why Indian tribes desire to quantify this reserved water rights.

Representative Keiser said so if we pass a bill that says from the state's perspective, we are giving the Governor the authority to do it, the state engineer can go through these processing and take it through out court systems, won't it still go back to the Federal court if the tribes says that this is unacceptable. You can take it through this process but it is not a state issue, it is a federal issue and it goes to the Federal court.

Mr. Nelson said that brings up another aspect of reserved water rights doctrine, that the Federal government has waived its sovereign immunity in this area and authorized states to settle these in state court. Under the McCarran amendment it waives sovereign immunity of the United States and allows the United States to be named as a defendant in state adjudication and proceedings so these types of litigation are heard in state court and also allows the states to set up the negotiation process. Whether it is the governor or state engineer, or a commission, is what some of the other states are using.

Representative Damschen asked Mr. Nelson said he had probably heard all the discussion on the interim committee, but he understood that right now most of what this bill does is get approval by the legislature. Is that correct?

Mr. Nelson said both yes and no. He thinks the committee learned during the interim that the governor does have authority under existing law, both statutory and under the constitution. However, this bills sets up the process that the governor is to follow, just as Chairman Pollert said. This involves the Legislative assembly in the final approval once the agreement is reached. The governor has authority under current law.

Representative Damschen said under this they don't have the power change, and they don't want to change, is the tribes right to appoint their own designee or tribal representative to negotiate with the governor on this issue. I think that is right and it doesn't change that right that already exists, right?

Mr. Nelson indicated absolutely. This bill again does not require the tribe to negotiate and again one must also remember under current law, a tribe that wishes to quantify or adjudicate their water right may do so.

Chairman Porter asked **Mr. Nelson** about page 2, subsection 2, that if no exceptions are filed, the agreement must signed by the governor, so in this piece of legislation, we are pretty much telling the governor and the executive branch that if there no exception, than you don't have a choice. You have to sign the agreement.

Mr. Nelson indicated that was right. What that is simply stating is that the agreement has already been reached between the governor and the tribe, so they are comfortable with the agreement. We wait to see if there are exceptions, and then the governor can go ahead and sign it.

Representative Charging said that when you talk about the study, and I know this is something the tribes have been working diligently on, something that is needed, especially in the case of the Turtle Mountain Chippewa Tribe, when you say tribe, I hope this committee understands that they are speaking on behalf of five independent nations. In that study, how much work was done with those five nations?

Mr. Nelson said all five nations were certainly informed and were invited to attend. The Turtle Mountain Chippewa and the Standing Rock Sioux were involved. You are correct in saying there is no consensus of agreement with the tribes, but again the bill is discretionary and it allows any tribe to negotiate.

Representative Charging said as you mentioned, the exception clause puts teeth into that bill. There is no amount of time described under that section either.

Mr. Nelson referred to subsection 1 the exception is for people holding existing water rights, that they could be adversely impacted by this. They are going to file an exception to the negotiated agreement and then in subsection 1, section 2, it states that the notice must include the time and manner for filing an exception to the agreement and the telephone number or address at which a copy of the agreement may be requested. I don't think for example, if the three affiliated tribes would request that the state enter into negotiations to quantify that tribes reserved water rights and another tribe is opposed to that agreement, only people that have would be affected by that agreement would file the exception.

Representative Charging asked if in fact they are filing an exception, what will happen; does it just fall away and is no longer a part of the negotiation process?

Mr. Nelson said he thought then they would drop down to subsection 3, on page 2, that if the exception is filed, the state engineer will make a determination on the exception and then the state engineer is going to say yes, we agree with that exception and it should be incorporated

into the agreement, or no, we do not think that exception is valid and they are going to disallow that. At that point, the person filing the exception can either contest the determination of the state engineer and the agreement moves forward. If that determination is contested, then you move into the administrative receivers.

Representative Charging said that one of the things that I know you brought up and this is very complex with many laws involved, like the Winter's Doctrine and McCarran Amendment is yet another, but isn't it not true that the federal government still will be the trustee on behalf of the Indian tribe themselves? Based on those treaties, this appears to me to be far reaching in a legislative intent that we may not have the power to stand up to.

Mr. Nelson said he didn't know if that was a question or a statement, but certainly the Federal government is involved as trustee. The Federal government is trustee along with the tribe. In the McCarran Amendment, the government has waived its sovereign immunity, so theoretically in some states, the states are authorizing the legislative assembly or the legislative assembly has authorized the states to sue the federal government as trustee for an Indian tribe to adjudicate reserved water rights. Montana is an example of that. In the Montana legislation, once it was enacted, it invited each of the tribes in Montana to negotiate with the state and said that by a certain date, if the state had not received anything from the tribe, then the state would begin negotiations, because Montana wanted to quantify these reserved water rights. Montana may be in a little different situation. The McCarran Amendment has authorized states the right to negotiate.

Representative Keiser said that as he reads this, it is very permissive language saying we may, and apparently Montana says they shall negotiate apparently. What happens if parties think this question should be addressed and the tribes, or the state, or any of the three parties said we are not interested, what happens at that point? We can't sue, nor can we?

Mr. Nelson indicated yes. You must always remember this only sets up the negotiation process. The tribes have the reserved water rights under this doctrine, and if they want to quantify that right, then the tribe can litigate at any point. The state could too. Usually it is the tribe that that initiates.

Chairman Porter asked that if the tribe takes that route and goes the litigation route, who has jurisdiction then? Is it the district courts systems or the federal courts systems?

Mr. Nelson indicated that it would be the state courts.

Representative Charging going back to Representative Keiser's message, you stated that the negotiations ability is there. It is currently there today. I am just concerned that while you may have given notice to the tribes throughout the interim session, that the study was short, two years I guess. Do we have all the information we need from you? This is a statement from me, being a native in the assembly, and the purpose negotiating and not litigating is our goal. I feel that this is headed in the wrong direction. If we have that ability already, why do need to take this or put teeth into it and address the litagative revenues when maybe we are not ready for that yet.

Chairman Porter reminded everyone that Mr. Nelson was not here presenting this as something that he wants. I think when we get further testimony from the parties interested like the executive branch and the governor's office and the water commission, we will find out what their views of why we would or would need this.

Representative Damschen said to clarify things, if we were in a situation where one of the tribes requested negotiations, and we had a governor that did not respond to that, if this bill said "shall negotiate" that would require him to respond to the request.

Mr. Nelson said that was correct.

Chairman Porter asked for any testimony in support of HB 1025. He also reminded people to be sure to sign in on the clipboard so that we have record of those here to testify.

Dale Frank said that he was the state engineer with the State Water Commission. He is here in support of the bill. He said that he would have a couple of his staff members go through the process a little more. He said he wanted to make a couple of comments himself after listening to the testimony. My first comment is that this is just a process and we are plowing new ground here in North Dakota. I think has been very much of a learning experience with us. Other western states, most of them, have been involved in this and have a lot more history with it. One of the things I want to you to know is that it is a very important piece of legislation and the Winter's Doctrine is the tribe's priority based on the time that their tribe was born. In North Dakota, they varied, but all pre-date any existing water rights that we have. If we do agree that these Indian tribe's water rights would be senior to all the existing water rights in the state, you have to keep that in mind. It is very important for all of us. On the other hand, the tribe doesn't have to go through this process. They could litigate and history from these other states show that if you can possibly negotiate these things, do it. Don't slug it out in court. That is the purpose of this bill. The Turtle Mt. Band of Chippewa made the request so we only have one tribe at this point. I know that a couple of others are thinking about this, and a couple are very cautious. It is just a process that if both sides agree to negotiate, one of the outcomes typically ends up in Congress. It works a lot better if the states and the tribes go into Congress together rather than fighting each other. The purpose is to try to negotiate these water rights. They are very important.

Chairman Porter asked Mr. Frank if we do nothing with this bill, and it would go away, what process would the state engineer's office have if a tribe requested negotiations, rather than the

expense of litigation. If they came forward and said they wanted to start the negotiations. How would the process be done without this piece of legislation?

Mr. Frank said to him, it would pretty much be the way the bill is laid out, with the exception that we would not come back to the legislation. When the bill was first introduced, just as the state engineer I can tell you that before the session, this is bigger than what one person wants. This will be your choice as a committee. I believe that the governor and the state engineer could sit down with a tribe and negotiate this out.

Chairman Porter asked Mr. Frank if that at any point in time whether the bill passes or not, at any point in time, the tribe could say no we are going to litigate and we will see you in court.

Mr. Frank said he thought that was correct.

Mr. Robert Shaver, from the ND State Water Commission presented his comments regarding HB 1025. See attached testimony. He discussed the flowchart attached to his testimony. This is what the state engineer follows in dealings with allocating and allocation of water rights and dealing with the water permitting process.

Chairman Porter asked for further testimony in favor of HB 1025.

Mr. Tom Davis, the water resources director for the Turtle Mountain Band of Chippewa. He indicated that his tribe wanted to negotiate a water settlement with the state of ND. He said he comes with good will and good intentions on behalf of his people and his government.
He wanted to inform the committee does not want to litigate this issue. He said he came as a partner to the state. The population of Rolette County is about 70% Indian. For a number of years, there has been an enormous amount of flooding. It has been declared a disaster area 5 of the last 6 years. There has been millions of dollars in road damage because of the uncontrolled water coming from the land that is elevated above the prairie land. It has caused serious concerns to his tribe as their hospital, the community of Belcourt, their banks, their

homes, are all in that flood plains and that is being controlled by two small dams that hold thousands acre feet of water. They have seen permit processes that at times being done the tribes. He can go back to the early 80's the US government sent letters to the state of North Dakota asking them to intercede with the water rights. We as a good neighbor have allowed our government to file for a state water permit. Rolette County has always been economically dependent on the native and non-natives. They depend on one another. They are tied economically to Rolette County. They sometimes see water being sent out of the county. Some day when it comes time to quantify their water, there may not be enough for the future generations. There are some serious concerns here. He has been involved for the last three or four years and it seems to him that people like Dale, Mr. Shavers and Representative Charging are the spokes of the wheel and they are all on the same page about reserved water rights. The decision makers appear not to be on the same page. They do not understand that we have unique treaties, unique obligations from the US government. We are different as far as water concerns. When they came and asked for a bill tailored to meet the specific needs of one tribe, that being the Turtle Mountain Tribe, they didn't ask for the three affiliated or Standing Rock. But through this process, we now find we are all in this mix and Turtle Mountain is stuck in the middle of loyalty to my fellow tribesmen. There is a desire to move forward with this to negotiate a settlement that is going to help the entire Rolette County and not just the Turtle Mountain tribe. Whatever we do in Rolette County, it will benefit everyone in the county. This bill, in its present form, if no change can be made to accommodate the Turtle Mountain Tribe, as you sit down with us government to government, and have a relationship with us, and the other tribes can participate, then I would ask not to pass this. It makes me feel very bad that we initiated this. It is unfortunate that that you have such little understanding of my people, or no understanding of how we can move forward. I see that

often when I come here and it is an unfortunate thing. Today, he is pulled by loyalty by his tribe and what can be done specifically for his people. How can we collectively come to some kind of agreement and reach something that can be beneficial to both parties? How do we do that? Do we amend this bill? Do we take out any federal tribe and put Turtle Mountain there? That is the way it should be. In his previous testimony, he had asked that the committee review and try to include what Montana has done as a state. Our tribes were in agreement with that. We felt that way we would have a fair way to negotiate. The way this is set up now, we do not. Water is one of the most precious resources that we have. It is a basic element of life to us; spiritually, economically, and socially to our culture. So how do we proceed? We need to protest these rights and manage them and make sure that our people to come will have this. Our tribe needs to advance and move ahead in areas of irrigation. Water is something that can do wonders for the tribe. They can start feeding ourselves. We want to become self sufficient. They need to be able to move waters to accommodate this. In its present form, he cannot support this bill.

Chairman Porter asked Mr. Davis if instead of a federally recognized tribe, you want it to be specific to the Turtle Mountain Band of Chippewa.

Mr. Davis indicated that would be the intention of his tribe. He thinks it is going to save a lot of litigation. He said he was at a hearing with the interim committee they brought a gentleman in from Idaho and he was a special appointee with the Attorney General's Office. The state of Idaho spent one hundred twenty one million dollars litigating against a tribe, which eventually came back to a water study and a compact decree by congress. That would have been one hundred twenty one million dollars they could have spent doing something positive for that tribe. It is a costly thing. It is a fruitless way to go and the tribes that I take a lot of direction from in the state of Montana have advised me that you should be allowing the Native

Americans from some tribes to be sitting at the table on this. Not only is this good for the tribe, but it is also good for the state.

Representative Solberg asked Mr. Davis if it was his understanding that in the present form he was opposed to HB 1025. Is that correct?

Mr. Davis indicated that was correct.

Representative Damschen said he appreciated Mr. Davis' testimony. He said that he was on the interim committee. It was his understanding of current situations that your tribe could go to the governor today if you wanted to and request that you negotiate the reserved rights with specifically your tribe and that you as the designee or someone from your government appointed could negotiate these rights.

Mr. Davis said they based that belief on the fact that the governor had the right to negotiate and we know that he has the statutory right to do that. It is not frightening, but it makes us stand back and take a look at this. The legislative process is going on four years and still hasn't given us a concrete position to negotiate. There are still come questions about the process with the governor having the authority and if he does not have the authority our tribe feels that is a dangerous move for my tribe to be involved in that kind of thing with the House of Representatives of this state. All we need is the clear part that we can do some business. As far as the tribe is concerned and he cannot speak for the other tribes, but their concern are different from Turtle Mountain. They have a unique situation from the other tribes of this state. That is how we would like to approach this. You will eventually have one tribe litigating against another. I know that time is short, but we need to sit down and look at some of this stuff. He said he only received this Monday night. He felt he needed more time to prepare for this. They need to get information in a timely manner. This is a very serious situation to their tribe. He said he very much appreciates the comments made by Dale. They are not a junior user or

secondary user in this state or secondary citizens of this state. The state court could hear under McCarran even though all of these cases ended up in Federal court. It is not on their radar to litigate.

Chairman Porter asked for testimony in opposition to HB 1025.

Mr. Steven C. Emery, representing the Standing Rock Sioux Tribe spoke to the committee in his language. He was glad to see all of his relatives, and in case you don't think we are relatives, you should check the holy Bible. At home they call him Big Bear. He is from South Dakota. He is here to represent the people of Mad Bear and Sitting Bull, the Standing Rock Tribe. He said when he signed up, he checked the box neutral. It is difficult to be neutral, but he has some questions. It has been stated here that the McCarran Amendment waives the sovereign immunity of the United States and that is true in so far as the joiner of the United States to a lawsuit in which Indian water rights are an issue. It certainly, either in the legislative history of the McCarran amendment, nor anywhere in the statue does it actually say can we give it all us. In a case Arizona vs. California, which you will find some place in the written testimony I have passed out, it is noted that the court seems to depart on general principals of law in interpreting the McCarran Amendment because there is not really any legislative history that says that we did everything on behalf of the United States. At any rate, what is puzzling to us at Standing Rock is the use of the word "claiming". We like to think that as relatives in this state, you should recognize that we have reserved water rights under our treaty and we hope that you recognize that we were here first. It is not really clear from the language of HB1025 that either of these things is recognized, and they surely ought to be. I was invited as a third year law student to come to UND in 1989 and I told a crowd of about 2500 people that I didn't come to celebrate North Dakota statehood. I came instead to celebrate the fact that my relatives had survived for well over 100 years. If we are going to

continue to survive as neighbors, it surely seems that in our government to government relationship with the state, how things ought to go, is that there needs to be some contact between executives. Certainly this past summer when we had dangerous fires, we saw the governor get into a helicopter and come on over. It was a great thing that we were able to work together and put out those fires. Similarly, it looks like for the future of all North Dakotan, at some point we are going to want to talk about this. But until the Standing Rock Sioux Tribal Government has decided to do so, we would like you to know, and I passed out sufficient copies so that the record has one, that even though this resolution is written to the Corp master manual, it does set forth the tribes position on its water rights. In that position, from the time the tribal council enacted this resolution it hasn't changed. I come to you today and I ask you to consider whether or not this is really the legislation you want to put forth. It seems like that intermediary or maybe it is the preliminary step of leaders contacting leaders was skipped, and having said those things, I want to say it is nice to be testifying in from of the North Dakota Legislature in a committee, as opposed to South Dakota, even though I am a native South Dakotan because frankly, in terms of many things, we get along much better here in North Dakota than we do in South Dakota and that is a wonderful thing. It is puzzling how something that started out as one of the North Dakota Tribes and is sort of being painted with a broad brush. Even though we are neutral, we ask is this really what you want to do. Having said that, I appreciate the Committees time and I understand you have another bill that you are going to get in very close order. I would like to say again, this is our position on these water rights. We have not consented to meet with anyone to quantify them and we are not looking to quantify them at the moment. If and when our Government changes that position, we will be the first to let you know. In the mean time, we hope that there won't be a "shall" in the bill not withstanding the interesting suggestion of Representative Damschen. Thank you very kindly

for your attention and I appreciate the opportunity to testify on behalf of the Standing Rock Tribe. (See attachment.)

Representative Charging asked Mr. Emery if he was an attorney. He indicated yes. When you mentioned about the McCarran Amendment, actually we have opened a window. Correct?

Mr. Emery said it is puzzling because unlike a blanket waiver of sovereign immunity, it merely says that the United States consents to be joined according to the United States Code Section 666, subsection a.

Representative Charging said her final question to Mr. Emery would be that may not be clear to the committee, but it requires Congress to act regardless of what should happen, is that a truth to the amendment?

Mr. Emery said he thought that in the event the tribes or a tribe and the United States would have to go through the interior solicitor and that would be reviewed by attorneys working for the Attorney General. They would surely have to review this to make sure that the tribe's rights are protected. There are some oddities to this bill that makes me wonder if under this legislation the tribes rights can be fully protected, but since I am not empowered to speak against it, I can only say that at least I am hoping you will ask yourselves whether in fact this is the way that you want to deal with your tribal neighbors.

Representative Damschen said that maybe with your legal background, I thought what we were trying to do with this bill is make sure that there is an opportunity for each individual tribe to negotiate water rights that pertain to their tribe and not mandatory say that one may negotiate those rights that it pertains to any other of the tribes. How could we word this to accomplish this?

Mr. Emery tribe should do this individually and there should be a piece of legislation for each tribe if the tribe wants the legislation. The other thing that I think you ought to know is on a regular basis your state engineer and water board are issuing permits for sub-terrain waters without doing anything except regular public notice. Frankly, at some point, we may have to come to terms with that. I know of at least one lady that has three center pit irrigators in a field very near her home and when they are all turned on, she has very little water pressure. Her water rights for domestic use should be superior to center pivots, the lovely things that they are. I guess we would have to say if we are going to negotiate such things in good faith, maybe one of the things we ought to do is sit down and have a bite to eat and say "golly, what are you folks trying to accomplish?" Here is what we are trying to accomplish. We want to make sure that because our homeland isn't going to move, we have enough water forever. Since we are talking about the safe sustainable use of a sacred resource, and I believe it is sacred to all of us. I think we really need to have those sorts of conversations as neighbors before we enact legislation and again that is a personal opinion.

Representative Damschen said that if he understood this correctly, each tribe wants, and I guess I believe they have the right now, to negotiate those water rights. Is that correct?

Mr. Emery said he thinks the history is perfectly clear but I think this bill makes the Missouri a little muddier than it was before by saying tribes who are claiming. Since we are all neighbors here, we are presuming you know that we are not just claiming, we own rights and that is the position of the tribe that is set forth in the resolution that is before you. I am a little puzzled because I think if the state of North Dakota were forced to negotiate water rights quantification with the statute like the McCarran Amendment somehow waiving the states sovereign immunity under the 11th amendment, and upsetting the balance of powers set forth in the 10th amendment, I think the state would have some very serious objection to negotiate under such

conditions, however in the infamous wisdom of congress, that is the situation that we are in. I would have to say if you were to read the statute, you would understand why none of us have rushed to quantify water rights. Does that answer the question?

Chairman Damschen said I guess.

Chairman Porter asked for further testimony in opposition to HB 1025.

Mr. Jessie Taken Alive spoke to us in his native language. He said he was a member of the Standing Rock Tribal Government. He thinks it is important for us to open our dialog with you as indicated by his relatives and friends. It is important to know that their perspectives and views of life are also somewhat different. I hope that my comments will be taken as such and if I offend any of you, I apologize. I am here representing as a tribal government member with Standing Rock since 1991. I humbly say that as a member of our tribal government it is imperative for me to capture and embellish our history and our culture. I want to be able to help set the stage for generations to come among our people. When we talk about water, we call it (spoke in native language) and that means water is life. So from that perspective, it is important that we share our concerns. Like I said earlier, I hope that they are taken with respect. You should know that in a recent United Tribes College board meeting, which you may or may not be aware of, there was a vote taken by the board membership and I was in attendance at that meeting. If you see the record of that meeting, I believe it was in September, there was discussion and a vote on water issues, and I am sure it was this particular bill that was being discussed, you will see a vote of abstaination or a neutral vote. Out of respect for our relatives, who sat at the table with us talking about water rights, collectively all of our water rights as indigenous equals, we cast a neutral vote because we don't know and still don't know what it is the state government, and I say it very respectfully, and this committee is looking towards for the future. I don't know that and we don't know that

so that is our position. You can see the documentation that we share with you on our position of water rights. The neutral vote at that United Tribes meeting was the Standing Rock vote. We also have concerns that one size fits all. We don't want to be put into that kind of position any longer. You may or may not know that the Bureau of Indian Affairs and the story and stereotypes and the outright lies if you will that we have had to live with that Indians get everything free. That is not the case, so please as you continue to foster relationships with the tribes in this great state of North Dakota, do not duplicate what the BIA has done for well over a century. Some people call the Bureau of Indian Affairs. In today's time of decolonization, amongst Indian Country, we call is boss Indians around, so please don't do that. Furthermore, we look at our relationship with our states with mankind in terms of government relationships as nation to nation, as we talk about our dealings with the United States government. It is a nation to nation relationship because only nations make treaties. I stand before you today I want to make certain that I do this in a very respectful way. This is nation to state relationship that we want to continue to foster. I must say some of my best friends are white guys. It sounds odd and there is an oddity to hear us called an American Indian, and the reason that started, is because of the racial connotations that flow with statements as such. They say we want control so that we can pick up some of these Indian guys and make them our best friends maybe because we want to lease their land or maybe because they have some other things that are going to help us in our lives. I say that with all do respect because a lot of my non-Indian friends are farmers and ranchers, and I certainly respect that. As you proceed further with laws that you are talking about, with regard to indigenous people s, I ask that you please take these things to heart. We are in the process of decolonizing ourselves and it is very important that we share this in a respectful way with you as government leaders in the state of North Dakota. Please don't turn them into racial things. Take a look at the laws and see how

we can work and be respectful of each other. You may not know that thousands of people at Standing Rock were left without water. If this happens somewhere else in the United States of America there would be in an uproar but in our view, it was looked at as "well, they are just Indians and the BIA will get everything free for them." We are still trying to figure out how to pay for the costs of getting water to our people. Because of our decolonization, many of us are afflicted with diabetes and other health related issues. This is the reality of what goes on this wonderful state. Finally, when we look at the Garrison Diversion Project and the process that has now evolved from that, our view of it is because of Indian water rights is how north and South Dakota can enjoy having water from the beautiful Missouri River. I will continue to call it that, but we continue to have questions about water quality and we will continue to have those. We believe that it is because of our working relationship with the states that allow these kinds of things to happen. In closing, I want to say thank you for this opportunity to speak in front of you today. As you can see, we still have our language, we still have a way of thought, and as we decolonize ourselves you will see many of our young people are learning and educational degrees from some of your institutions in North Dakota. Now we are going to be tackling the economics that affect our people. Please hear what we are saying and take those into consideration. By no means do we want to offend anyone and by no means do we want to offend any relatives who represent their peoples in the State of North Dakota that you call American Indians that we call our relatives. Please take these to heart. We will wait to see the direction that you take with this particular bill. We hope that it is a good thing. We are going to ask for your support if it makes it to the next level of your government.

Mr. Paul Banks, who was doing testimony for Marcus wells, chairman of the Mandan, Hidatsa, and Arikara nations. See attached testimony that was read.

Representative Charging asked Paul to share his opinion of this. You have been working directly with the water commission and this has been one of your charges. I would like to hear something from you on this.

Mr. Banks said he thought we had heard from many of the tribes that any type of legislation be specific to the tribe that is stepping forward to qualify their water rights. We feel that we don't want to impose anything, because we know that Turtle Mountain needs to do something up there so we don't want to impose any legislation that they would bring forward but we would like it to be specific to them. Of course, you know that all the tribes are sovereign nations and we all have different situations on our reservation. We feel that it should be different legislation for each tribe.

Archie Full Bear said that he is a member of the Standing Rock Tribe. He sits on the tribes Judicial Committee. He had the opportunity this week to get a copy of HB 1025. They have never sat down to review this bill at all but the tribe in the past has taken the position of opposition of any qualification whatsoever. In the past two years, he has attended the water board meetings and other hearings that were held in relation to the development of what Turtle Mountain has started. They were called at different times to attend different hearings because some of the language in past bills that were being proposed put everyone into the same nutshell. As stated today, our attorney stated that we are neutral because we haven't reviewed this bill with the whole tribe. I am sure that the way it is written now, when the whole council hears it there may be other action back stating further opposition. In today as to what has been said, if this is more tribal specific and deals specifically with what they are talking about with the aquifers and whatever is being discussed, that would be better for this committee to work with the governor, but to lump all the tribes into one statement is pretty hard to swallow. In its present form, it is not tribe specific. In the past, we have opposed it. I

believe you should have a copy of the resolution that was passed by the tribe and if you review it you will see on certain pages that the tribe has taken a strong opposition to this and made allowances for qualifications. Thank you for your time.

Representative Keiser said that if he could said he had a question for Mr. Shaver that occurred to him after he sat down. May I ask him that now?

Mr. Shaver came to the podium.

Representative Keiser asked that on the flow chart, on the very top line, and then on fourth line from the bottom there is a reference made that is similar. I will just use the top line "the tribe and/or U. S. Government". Does that mean that if we are talking about negotiating an agreement with the tribes, that the government can be negotiated with without the tribes or would the US require the tribes. It is the and/or that I am asking about.

Mr. Shaver said it was his understanding and maybe Jeff Nelson could comment on this, in this bill they are referring to both the United States and federally recognized Indian tribe water rights. The U.S. government water rights would be those that are associated with the U.S. Fish and Wildlife Service or the U. S. Park Service, or Forest service, and the federal government has entered into agreements to quantify those rights. It is my understanding, but maybe Mr. Nelson could comment on the either/or as it refers to those separate rights.

Representative Keiser said he thought that was what it was, but he just wanted to clarify that. So if it is involving the tribes, they will be part of the negotiations and not the U. S. Government unless it pertains to the game and fish or some other entity and then they would be involved without the tribes.

Representative DeKrey wanted to ask Mr. Nelson a question. Mr. Nelson is there a pitfall to make this bill tribe specific? What kind of president would be setting for the state if we went that route and how would that affect any future negotiations with another tribe?

Mr. Nelson indicated the only pitfall he could see would be running afoul with a constitutional revision prohibiting special and local law but again if there is legislation is carefully tailored to describe the Turtle Mountain Chippewa Band I think it could be done. We could make it tribe specific. If another tribe then wants to negotiate, they would not be able to use this process, but then would approach the governor under the governor's statutory authority or constitutional authority as chief executive.

Representative Keiser said what he sees here is not the agreement here that is involved. It is the process. The process might be there but the agreements will all be specific if this process is adopted. Is that correct?

Mr. Nelson indicated yes.

Representative Hanson said that this bill came out of a resolution. Do you have the number of that resolution or do you have a copy with you?

Mr. Nelson said it was actually SB 2115 last session. I think it probably came before this committee. That bill authorized the state engineer to negotiate Indian and federal water rights. That bill was amended down to just one sentence and that sentence said that the legislative assembly directs the legislative council to conduct a study of the process to negotiate and quantify reserved water rights.

Representative Charging said in regard to Representative DeKrey's question, maybe compact is a good word to use. There is a president set already so this would be much different than that.

Mr. Nelson said, yes that once the tribe requests to the governor under his existing authority it would speak like a compact or something like that.

Representative Charging said so this particular legislation could be tailored to that request to that particular tribe?

Mr. Nelson said the governor uses his general authority to negotiate gaming compacts, taxation agreements, and those are not tribe specific. It is just general authority to negotiate with a/or an Indian tribe. The legislation that authorizes the governor is not tribe specific. The compact agreement is.

The hearing was closed on HB 1025.

Part 2 to HB 1025 – January 11, 2007 – 10:36 on Recorder Tape 952

Representative Hanson asked the intern to get the history on this interim study. He was not sure if they would want to act on this bill today. Looking on the bill, it looks like we would have to spell out that it was just the Turtle Mountain Reservation or kill the bill. It looks the other sovereign nations do not want this.

Representative Porter asked **Mr. Robert Shaver** of the ND State Water Commission if he had some input on the issue that some of the other Indian tribes had issue with the word "claiming" on Page 1, line 6. Mr. Shaver was going to look into that while we were on the floor session. I don't know if you had anything to report on that?

Mr. Shaver said that they had looked at some references to Montana from the website regarding their reserved water rights compact commissions. They use the same wording. The reserved water rights compact commission was created by the Montana Legislature, 1979 and I quote "conclude compacts for the equitable division and apportionment of waters between the state and its people and several Indian tribes claiming reserved water rights within the state and between the state and its people and the Federal Government claiming non-Indian reserved water rights within the state" so the language has been used, it appears, in other

states. I was not able to get in touch with our legal council but just looking up the definition of claiming, and there are a number of definitions of claiming, one of which is in a lower order, strongly implies that you are claiming a right. The right exists. We were discussing this over the noon hour that maybe this is similar to a miner. You have already gone out and staked your claim, but you haven't formally established that claim. You kind of have this rights that you have established, but I think I would like to divert this to council and possibly even visit with Jeff and Tribal members on a suitable way that we could maybe remove the word "claim". I think it could be done and just looking over the wording, maybe it isn't a necessity to have the word "claim" in the wording. That is all that I was able to come up with in the short time.

Chairman Porter so inside of the very law that we were told to adopt, the word "claim" exists? If we were to just verbatim adopt the Montana compact language, the same language is in this?

Mr. Shaver indicated that was correct. I can leave you with these just as a reference. This may allude to another question that Tom had with the Turtle Mountain Band of Chippewa, that he was concerned that maybe the Governor had so much power that he referred to this compact emission. Maybe that is something to look at, although it seems that the Governor has the ability to designate, and it doesn't say one person or two people, so maybe that could that could be similar to this water rights compact emission. It is something to explore.

Chairman Porter asked if anyone had any questions for Mr. Shaver?

Representative Charging said that she understands and I know that you did reference Montana, but you also recall that you had a date of concurrence. I would be hesitate as a committee to adopt a law that somebody made mention of. I do have documentation of the compact and they do have the final authority. I do have that documentation here. I think there are so many windows here that we are not clear on. I think we would be remiss to make that decision today. (Special note: There were additional comments by Representative Charging that I was unable to hear on this recording, so this will be an incomplete statement from her.)

Representative Keiser indicated that this was obviously a very sensitive issue, but I just think the committee needs to establish what the purpose of this bill is; what it does and what it doesn't do. I also want to say at the onset, two different people, one Democrat and one Republican that are on this committee, were on the interim committee said that this very issue was discussed for the last two years. They indicated that the Tribes were involved and that they came in today saying...wow, this kind of caught us by surprise. Now the actual bill number caught you by surprise, but not the content. This concept was apparently out there for two years and so we need to recognize that. At first, I know I struggled with this bill as I heard the testimony. We have to decide and make some tough decisions about water eventually. We don't have to do it today, and we don't have to do it tomorrow, but we are going to be making tough decisions in this state and in every state in the country. The question is that this bill attempts to set up a process. The process is common. I don't care if there are 5 tribes and 10 government agencies, this process would be used for those entities. If I negotiate an agreement with Representative Porter, he and I can follow the same process. We can still have a different contract. If I go to Representative Danschen at a different time, we are still going to follow the same process within the court, and the legal system, but we can have an

entirely different element in the agreement. What I don't understand is where the tribes don't have a lot of authority in saying we don't like part a, or c, but I am happy with b & d, but I want a new part for us. That is the part that I don't understand is why they wouldn't have that kind of flexibility as they go into individual negotiations, not collective, and maybe someone could help me with that.

Representative Solberg indicated that he was on the interim committee and we studied this directive that we got from the Legislative Council. We studied the whole two year interim. I am a bit confused when I listen to come of the testimony. Mr. Tom Davis was at every one of our hearings when we addressed this in the interim. I never really did understand what he wanted, except that he was scolding us a lot. Mr. Davis stated today that he did not know the contents of this legislation. He was there every time we talked about it and so was Mr. Taken Alive so I am really confused. They are telling us one thing or another and it is totally confusing.

Chairman Porter said that one of things originally when this bill went through the system last session, one of the things that originally happened was mis-information back to Mr. Banks from an attorney at the Water Commission Office that there was not a process in place to take care of their request. As the bill came through last session, then that opinion changed; that with or without the actual process being in the century code, there is a process in place that the Governor and the Water Commission can follow to take care of the request from the Turtle Mountain Band of Chippewa. It has already been figured out so the information that a process was not in place or could not be done has been resolved. The question that is before us is do we want that process written into the century code or do we want to leave it the way it is today

where the Governor's office and the State Engineer have the ability to enter into negotiations and do the process when requested by an Indian tribe.

Representative DeKrey indicated that he thought Chairman Porter framed it for them very well. I will tell you why I believe it should be in statute and why the Legislature should involve itself. We are the peoples branch of the government and we have had instances in the past where the Governor has just gone and negotiated deals for the State of North Dakota when the legislature had no say in how they were done or had any say as to whether they would be ratified or not. Collectively as a legislature, we were pretty unhappy with the outcome. If we are going to inject ourselves in this process and I think as a legislative branch, I think we have every right to inject ourselves into this process and I think we should do this.

Representative Meyer indicated that she was extremely hesitant to vote for this when four of the five and their independent sovereign nations and part of the reason for misinformation is when these meetings are held, and I realize they were held over the course of two years, but what I have seen and with my dealings there, no one knows who is in charge. We don't know, I mean I don't know. I shouldn't say you don't but if the correct persons, the correct authority was contacted for that independent sovereign nation. We had 4 of them today here that all told us that they don't want this. They want what is going on now. It doesn't affect anyone on this committee except Representative Charging. I am just hesitant when people that it directly affects, when they are in here telling us that they don't want this to happen. I hate to say that maybe it should be studied for another two years. I understand it is a process, but I think we have a real problem here, because they don't understand that it is a process. To me there is a

huge miscommunication from what the bill is saying. It is a process and I understand that. But if the people it directly affects don't want this, I am hesitant to vote for this.

Representative Hanson indicated that he thought Representative Meyer was wrong. I think most of them got up and testified that they were neutral, but they testified against the bill. I think Mr. Davis was the first one up kind of supported it, but the rest of them were very wishy washy on the thing.

Representative Drovdal indicated that after all the talk he thought they understood this better than they wanted to come across. What I understand about this bill is what the bill does as it reads now is that it injects the legislature into the process and into the decision making period. I also understand by the testimony is that they don't want the legislature involved. Whether we want to be involved or not, that is the emphasis we have to put on the bill. That is what I understood.

Representative Keiser said that he would like to qualify that he thought it was unusual neutral. It was a neutral that we do not understand the feeling.

Representative Charging told Representative Keiser that they had talked to her and she wanted to explain that to him. They wanted to put their best foot forward here. That is what is about. I think all of you have tapped on something, that is something she has to deal with when she goes home or when the visiting Tribes come here, and that is they don't fully understand our process. You can say, why is that? They are North Dakotans. We have a very complex government structure which they are involved with every day so when the

committee was developed in the interim, they need a structure to follow them into that. There is something that you tapped into Representative Meyer that possibly that is why. He might be the Natural Resources Director, but he doesn't have the final say. He has to go back to the governing body, his legislative, his tribal chairman so that answers part of that. I sincerely feel that they did come here to put their best foot forward and point blank they came here to see where this is going to go. They didn't have a part in the process so they have nothing but a defensive position. I don't like to see this happen. I don't want to see them add a fiscal note to this bill, should it pass, that will enable the water commission to litigate.

Representative Solberg had a question for anyone that can respond. If this bill should pass, would it prevent litigation?

Chairman Porter said no. Litigation would always be an option whether this bill, currently right now, litigation can happen. If this bill passes and the two parties cannot come to terms in their negotiations, they can withdraw and go to litigation immediately.

Representative Danschen said that he agreed with Representative Meyer about the point of communication or lack of communication. The words have all been said numerous times, but I think there is a difference in understanding and I don't know how to get beyond that. I really think what they want is already in place. I am not sure that is clear from their understanding and their vantage point. I forgot to ask Mr. Davis if he has ever requested the Governor on behalf of the Turtle Mountain Tribe to negotiate.

Representative Porter told Mr. Danschen that he had asked Mr. Shaver after the hearing was done, and he stated no that once they were told that there was no process in place. Then it went to the bill form and then to the Legislature and they have just been doing that route through the interim until now. There has never been a formal request.

Representative Hanson asked if the Governor had the final say on gambling pacts. I remember back when it first came in the Governor signed off on it. I don't know if it has been changed since then.

Chairman Porter told Representative Hanson that there had been an attempt by the Legislature to change that and I believe the Governor vetoed that and he as the Executive Branch still has the power to enter into not only that compact, but taxing compacts, and the compact that we have with Standing Rock regarding fuel tax. Those are all executive branch compacts.

Representative Hunskor indicated that in their culture, those folks are looking at themselves as 5 sovereign nations so in my mind it is easy to understand that they think that Turtle Mountain is separate and Standing Rock is separate. My mind doesn't think that way but if I put myself in their shoes it does. And in my second thought has to do with whatever comes out of this bill for litigation, and the final end of that, state, federal or whatever, doesn't the state loose?

Chairman Porter said that if it was played out to the end with the Federal it would be up to the judge.

Representative Clark indicated that it was his conclusion from the testimony that he heard that every one of these tribes would rather see this bill dead than alive in its present form. As far as claiming water rights, they don't feel they have to claim them. They already have them.

Chairman Porter told Representative Clark that they had already had that discussion with Mr. Shaver and language of claiming is the same as the Montana language and it more or less goes back to quantifying that back to the establishment of that reservation and moving forward and then having the process of going through and looking at because you are taking something that was never quantified and then you have other existing permit holders that have to be then put junior. The whole system has to be studied in order to quantify that one claim. That is where the word claim comes in. When Mr. Frank stood up and talked, he explained the fact that when it goes back to, if they try, and if it says any Federal tribe, it is specific, it covers our entire state, not just one or any other one. It is voluntary if they want to come in and quantify that claim. If they choose to come in and quantify that claim, that is when the State Engineer's Office goes to work and stake out the area that is being quantified and start doing the work. That is when the negotiation process takes place. The end result would come back to the Legislature for the final stamp of approval. If you are Standing Rock and you choose not to quantify your claim, then you do nothing and it stays as it is right now. There is nothing that says that you are included or excluded by having the word any federally recognized Indian tribe in this particular piece of legislation.

Representative DeKrey said that he understood the concept of 5 separate nations. I understand that is what they believe, but the State of North Dakota is one entity and I see no

reason why that one entity wouldn't want to see up the rules on how we are going to engage these other nations and how we are going to settle something. We don't want to have to visit this 5 times every time each group comes back are going to do the rules differently. Then I think we set ourselves up to fail because everyone is not going to have been treated the same. Whereas if we say at the outset, these are the rules the State of North Dakota is going play by. If you want to come and negotiate with us, we are more than happy. If you don't, we are just as happy about that, but if we do, this how we will do it if you come.

Representative Keiser said that this certainly is not an intention to cut off debate, but we usually have a motion before we have the debate. This has been good. This bill has to come out of the committee. We have two options. We can amend it, but I am not sure how much interest there is in amending it. If there is a strong interest, I will withdraw my motion gladly. I am going to move to Do Pass.

Chairman Porter asked for a second? There was a second from **Representative DeKrey**.

Chairman Porter asked for discussion.

Representative Meyer asked Representative Keiser, since she had not served on the interim, to clarify that the change in the procedure was basically it just comes to the Legislature for final approval? Is that the change in the process from what happens now?

Representative Keiser said that he was not on the interim committee. What I have been told is that without this bill, the current process they would probably follow is this one with the exception of bringing it back to the Legislature.

Representative Hanson said that he thought they should wait before they vote on this bill. Let's get the interim minutes and have intern run the copies off and put them on our desk and bring this thing back up next week. That way we get the whole ball of wax at one time. There has been two years of study on this thing and we are talking about it for a couple of hours.

Representative Charging indicated that she had those meeting minutes. For example, what wasn't brought forward was that the single tribe was the Turtle Mountain. They strictly dealt with the interim committee. They asked for a bill to be drafted on their behalf. It was moved by Senator O'Connell and seconded by Representative Klein and defeated on the roll call vote. So they tried. This is the final point....that the Legislative Council staff be requested to redraft the bill draft authorizing the Governor to negotiate reserved water rights of the United States and federally recognized Indian tribes to make it only applicable to the Turtle Mountain Band of Chippewa Indians. So that is where that came from. This is the final point. She read this for the record. The Winters and Reserved Water Rights Doctrine. "when the Federal Government withdraws its land from the public domain and reserved it for a federal purpose, the Government, by implication, reserved appurtenant water then unappropriated to the extend needed to accomplish the purpose of the reservation. The amount must satisfy both present and future needs of the reservation. This reserved water right vests on the date that Congress reserved the land and remains regardless of non-use. And that holds up to the Water Commissioners point having it first. And in that same doctrine it says the State Engineer has

the power to "monitor" water use under a court's reserved rights decree, but enforcement by that same official against either the tribes or the United States would require judicial action. And so Committee, there is more to this. Whether we are agreeing the assembly should be involved or not agreeing that the assembly should not be involved.

Representative Danschen said that he had been part of the interim committee and there were questions as to when the Governor tries to negotiate his outline in the constitution, there was some difference of opinion, but there was testimony that might be questioned for any portion of that authority in this bill. There is a new Senator, Senator Marcellais, who is probably working on something and whether this influences your vote or not there is probably something coming from the Senate.

Chairman Porter said that **Representative Solberg** and **Representative Danschen** were both on the interim committee and I guess I am just wondering in regards to **Representative Hanson's** comments regarding the interim notes, is there anything that we are missing that has not already been presented that we should wait for?

Representative Solberg said that he thought the committee should wait for those interim minutes.

Chairman Porter asked **Representative Danschen** if there was anything they were missing. He said that he could not always count on his memory, but he did feel like the committee had been through most of this a number of times. He certainly had been through it a number of times as he was on the committee, but there may be points that are more important to someone else that he was not recognizing.

Chairman Porter asked for questions on the Do pass for HB 1025.

The Clerk called the roll.

Let the record show that there were 3 yeas, and 11 nos.

The motion failed.

Representative DeKrey made a motion for a do not pass. There was a second by **Representative Nottestad**. **Chairman Porter** asked for discussion. Seeing none, the Clerk called the roll.

Let the record show that there were 11 yeas, and 3 nos.

The motion for Do Not Pass prevailed.

The bill will be carried by **Representative Solberg**.

Date: 1-11-07
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1025

House **Natural Resources** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass

Motion Made By Rep Keiser Seconded By Rep DeKrey

Representatives	Yes	No	Representatives	Yes	No
Chairman – Rep. Porter	✓		Rep. Hanson		✓
Vice-Chairman – Rep Damschen		✓	Rep. Hunskor		✓
Rep. Charging		✓	Rep. Kelsh		✓
Rep. Clark		✓	Rep. Meyer		✓
Rep. DeKrey	✓		Rep. Solberg		✓
Rep. Drovdal		✓			
Rep. Hofstad		✓			
Rep. Keiser	✓				
Rep. Nottestad		✓			

Total Yes 3 No 11

Absent 0

Floor Assignment –

If the vote is on an amendment, briefly indicate intent:

Motion fails

Date: 1-11-07
Roll Call Vote #: 2

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB1025

House **Natural Resources** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken motion for Do Not Pass

Motion Made By Rep. DeKrey Seconded By Rep. Nottestad

Representatives	Yes	No	Representatives	Yes	No
Chairman – Rep. Porter		✓	Rep. Hanson	✓	
Vice-Chairman – Rep Damschen	✓		Rep. Hunskor	✓	
Rep. Charging	✓		Rep. Kelsh	✓	
Rep. Clark	✓		Rep. Meyer	✓	
Rep. DeKrey		✓	Rep. Solberg	✓	
Rep. Drovdal	✓				
Rep. Hofstad	✓				
Rep. Keiser		✓			
Rep. Nottestad	✓				

Total Yes 11 No 3

Absent 0

Floor Assignment Rep. Solberg

If the vote is on an amendment, briefly indicate intent:

Do not pass prevailed.

REPORT OF STANDING COMMITTEE

HB 1025: Natural Resources Committee (Rep. Porter, Chairman) recommends **DO NOT PASS** (11 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). HB 1025 was placed on the Eleventh order on the calendar.

2007 TESTIMONY

HB 1025

60TH LEGISLATIVE ASSEMBLY
HOUSE NATURAL RESOURCES COMMITTEE
HONORABLE T. PORTER, CHAIRMAN AND COMMITTEE MEMBERS

TESTIMONY OF MARCUS D. WELLS, CHAIRMAN
MANDAN, HIDATSA, AND ARIKARA NATION
ON HOUSE BILL 1025

Chairman Porter and Committee Members, my name is Marcus Wells, Jr.; I am the Chairman of the Mandan, Hidatsa, and Arikara Nation. Thank you for hearing my testimony today.

House Bill 1025 authorizes the governor to negotiate reserved water rights of the United States and federally recognized tribes.

It is the position of our Tribe that negotiation implies a two-way process. In that our Tribe has neither participated in the preparation of the State's proposed administrative process nor have we had sufficient time to research its implications relative to our position in the negotiation process, it would not be prudent of us to give a favorable response to HB 1025 at this juncture.

We do believe that if the intent of this bill is to negotiate the water rights of a certain tribe, then we recommend that the bill be tribal-specific and that it clearly identify the reserved water rights being negotiated. For example, if the State wishes to negotiate with the Turtle Mountain Band of Chippewa, then we recommend that HB 1025 pertain only to said Tribe and to the negotiated element as being groundwater.

We further emphasize that the Mandan, Hidatsa, and Arikara Nation prefers that the process for negotiating the quantification of our reserved water rights be patterned after the State of Montana's water rights compact with the Fort Peck Tribe. Again, thank you for your time.

House Bill No. 1025

House Natural Resources Committee hearing

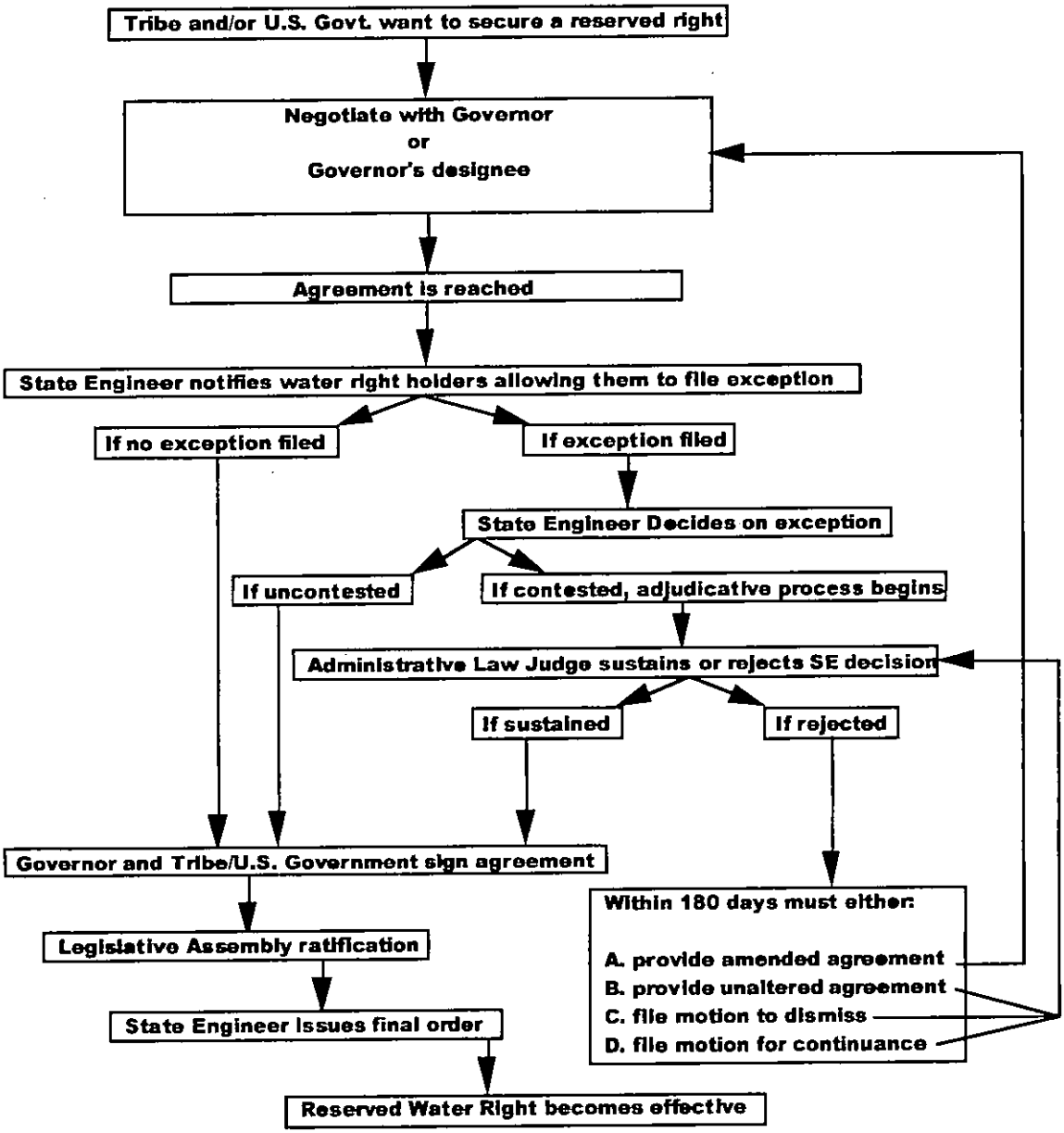
January 11, 2007

Comments by Robert Shaver, ND STATE WATER COMMISSION

Mr. Chairman, members of the Natural Resources Committee, my name is Robert Shaver, I am the Division Director of the Water Appropriation Division of the State Water Commission. On behalf of the State Engineer, I would like to make a few comments regarding House Bill No. 1025 which outlines a procedure for negotiating reserved water rights of the United States and federally recognized Indian tribes.

The process described in this bill appears workable. It is apparent that much of the process described is similar to existing statutory procedures that the State Engineer follows for appropriating water. That is, notifying the public and providing opportunity for comment by those potentially affected, and also a procedure for those who feel aggrieved by a decision to seek relief though an administrative process under the Administrative Agencies Practices Act. (NDCC 28-32). I have attached a flow chart which provides a more easily readable schematic diagram of the processes described in the bill draft.

HB No. 1025 (70063.0300)
Reserved Water Rights
Flowchart



House Natural Resources Committee hearing
January 11, 2007

RESOLUTION NO. 106-01

FORMALLY ESTABLISHES THE STANDING ROCK SIOUX TRIBE'S POLICY ON ITS ABORIGINAL TREATY AND WINTERS RIGHTS TO THE USE OF WATER IN THE MISSOURI RIVER TO MEET ALL PRESENT AND FUTURE USES; AMONG OTHER THINGS

WHEREAS, the Standing Rock Sioux Tribe is an unincorporated tribe of Indians, having accepted the Indian Reorganization Act of June 18, 1934, with the exception of Article 16, and the recognized governing body of the Tribe is known as the Standing Rock Sioux Tribal Council; and

WHEREAS, the Standing Rock Sioux Tribal Council, pursuant to the Constitution of the Standing Rock Sioux Tribe, Article IV, Section(s) 1(a,b,c,h and j), is authorized to negotiate with Federal, State and local governments and others on behalf of the tribe, is further authorized to promote and protect the health, education and general welfare of the members of the Tribe and to administer such services that may contribute to the social and economic advancement of the Tribe and its members; and is further empowered to authorize and direct subordinate boards, committees or Tribal Officials to administer the affairs of the Tribe and to carry out the directives of the Tribal Council; and is empowered to manage, protect, and preserve the property of the Tribe and natural resources of the Standing Rock Sioux Reservation; and

Master Manual EIS Specifically Excludes Consideration of Indian Water Rights

WHEREAS, the United States Army Corp of Engineers makes the following statement describing how the Corps fails to recognize or consider Indian water rights in its Master Water Control Manual for the future operation of the Missouri River, thereby committing Missouri River water to operational priorities and creating an insurmountable burden for the future exercise of the rights to the use of water by the Standing Rock Sioux Tribe as reserved from time immemorial;

> *The Missouri River basin Indian tribes are currently in various stages of qualifying their potential future uses of the Mainstem System water. It is recognized that these Indian tribes may be entitled to certain reserve or aboriginal Indian water rights in streams running through and along reservations. Currently, such reserved or aboriginal rights of tribal reservations have not been quantified in an appropriate legal forum or by compact with three exceptions....The study consideration only existing consumptive uses and depletions; therefore, no potential tribal water rights were considered. Future modifications to system operation, in accordance with pertinent legal requirements, will be considered as tribal water rights are quantified in accordance with applicable law and actually put to use. Thus, while existing depletions are being considered, the Study process does not prejudice any reserved or aboriginal Indian water rights of the Missouri River basin Tribes.* (PDEIS 3-64); and

WHEREAS, the failure of the United States, acting through the Corps, to recognize and properly consider the superior rights of the Standing Rock Sioux Tribe must be rejected by the Tribe for the reason that the Master Manual revision and update is making irretrievable commitments to (1) navigation in the lower basin, (2) maintenance of reservoir levels in the upper basin and (3) fish, wildlife and endangered species throughout the upper and lower basins. These commitments are violations of the constitutional, civil, human and property rights of the Tribe; and

Endangered Species Guidance Specifically Excludes Consideration of Indian Water Rights in Missouri River Basin

WHEREAS, the Working Group on the Endangered Species Act and Indian Water Rights, Department of Interior, published recommendations for consideration of Indian water rights in Section 7 Consultation, in national guidance for undertakings such as the Master Manual, as follows:

> *The environmental baseline used in ESA Section 7 consultations on agency actions affecting riparian ecosystems should include for those consultations the full quantum of: (a) adjudicated (decreed) Indian water rights; (b) Indian water rights settlement act; and (c) Indian water rights otherwise partially or fully quantified by an act of Congress... Biological opinions on proposed or existing water projects that may affect the future exercise of senior water rights, including unadjudicated Indian water rights, should include a statement that project proponents assume the risk that the future development of senior water rights may result in a physical or legal shortage of water. Such shortage may be due to the operation of the priority system or the ESA. This statement should also clarify that the FWS can request reinitiation of consultation on junior water projects when an agency requests consultation on federal actions that may affect senior Indian water rights.*

The Working Group recommendations further the failure to address unadjudicated Indian water rights. It is unthinkable that the United States would proceed with water resource activities, whether related to endangered species, water project implementation or Missouri River operation in the absence of properly considering Indian water rights that are not part of an existing decree – presuming, in effect, that the eventual quantification of Indian water rights will be so small as to have a minimal impact on the operation of facilities in a major river, such as the Missouri River, or so small as to be minimally impacted by assignment of significant flow to endangered species. The flows required to fulfill or satisfy Indian water rights are, in fact, not small nor minimal but are significant; and

Final Indian Water Right Agreements and Claims of the United States on Behalf of Tribes Are Denigrated by Master Manual and Other Regional Water Allocation Processes

WHEREAS, failures of federal policy to properly address Indian water rights in planning

documents such as the Master Manual is underscored by example. Tribes in Montana have water right compacts with the State that are complete and final but have not been incorporated into a decree. Incorporation is certain, however, and will be forthcoming. It is not a matter of "if", it is a matter of "when". The water rights agreed upon by compact are substantial, but neither the Corps of Engineers' Master Manual nor the Secretary of Interior's ESA guidance, as currently constituted, will consider these rights – they presume the rights do not exist -- until they become part of a decree. At such time as the decree in Montana is complete, the Master Manual conclusions will be obsolete and any assignment of Missouri River flows to upstream reservoirs, downstream navigation or endangered species, relied upon by the various special interest groups, will be in conflict with the decree; and

WHEREAS, in Arizona, as another example, these same flawed federal policies to ignore Indian water rights in the allocation of regional water supplies are manifest. The United States is in the process of reallocating part of approximately 1.4 million acre-feet of water diverted from the Colorado River and carried by aqueduct system in the Central Arizona Project for the Phoenix area. The reallocation is purportedly for the purpose, in part, of resolving Indian water right claims in Arizona, but careful review of the reallocation demonstrates that only two Indian tribes are involved. The Bureau of Reclamation, agent for the trustee in the reallocation process, has given short shrift to other Indian concerns that the EIS. should address the impacts of the reallocation on all affected tribes and on all non-Indian claimants that will be impacted by ongoing adjudication of Indian water rights. In response Reclamation describes claims filed by the Department of Justice on behalf of the tribes as *speculative*. Thus, Arizona tribes are in the same dilemma as Missouri River basin tribes, but the process to determine the magnitude of Indian claims in Arizona is much further advanced. The United States is, on the one hand, pursuing a claim for adjudication of Indian water rights; and the United States, on the other hand, is reallocating water necessary to supply non-Indian interests impacted by Indian water rights-- but is refusing to recognize any potential for Indian water rights success in ongoing adjudications. This denigrates the claims of the United States on behalf of the tribes and draws into question the intent and commitment of the Department of Justice in the proper advancement of Indian claims, claims which at least some tribes consider deficient and poorly prosecuted by the Department of Justice; and

WHEREAS, the Standing Rock Sioux Tribe cannot tolerate these policies: cannot permit reliance by wide and diverse interest groups in the Missouri River – states, environmental, federal agencies and economic sectors– on conclusions associated with the preferred alternative in the Master Manual when the conclusions are based on the presumption of no Indian water rights and insignificant future Indian water use throughout the Basin; cannot expect future courts to undo investments, undertakings, mortgages and economies that build on the basis of the Master Manual conclusions; cannot expect future Congresses to act more favorably than future courts; and

Importance of Master Manual Process is Underscored by Congressional and Other Activity

WHEREAS, the Master Manual of the Corps of Engineers is the name presently given to the operating procedures for the mainstream dams and reservoirs. The Corps of Engineers has responsibility for those operations as directed by the 1944 Flood Control Act, the controlling legislation for the Pick-Sloan Project. Since 1944, all dams (except Fort Peck Dam) were constructed and have been operated by the Corps of Engineers or the Bureau of Reclamation. The current Master Manual revision is the first public process update of Corps of Engineers operating procedures, and its importance to future exercise of the Tribe's water rights cannot be ignored by the Tribe; and

WHEREAS, the Master Manual is intended by the federal courts and Congress to resolve issues between the upper and lower basin states, irrespective of tribal issues. The federal courts have dismissed cases brought by the states over the last decade and a half, cases designed to settle issues of maintenance of water levels in the reservoirs in North and South Dakota and the conflicting release of water for downstream navigation; and

WHEREAS, most recently, the Energy and Water Resource Development appropriations for FY 2001 were vetoed by the President because upstream senators supported by the President opposed language by downstream senators in the appropriations bill, which contained controversial language as follows:

> *Sec. 103. None of the funds made available in this Act may be used to revise the Missouri River Master Water Control Manual when it is made known to the Federal entity or official to which the funds are made available that such revision provides for an increase in the springtime water release program during the spring heavy rainfall and snow melt period in States that have rivers draining into the Missouri River below the Gavins Point Dam.*

The provisions cited above require the Corps of Engineers or any other official to refrain from using any funds to revise the Master Manual if it is determined that the revision would cause any increase in water releases below Gavin's Point Dam in springtime. There is apparently concern by downstream members of Congress that the Master Manual will recommend an increase in releases to the detriment of downstream navigation, environmental values or flood control. Upstream members of Congress stopped the approval of appropriations over this controversy until the above-cited language was omitted from the bill; and

WHEREAS, given the importance of the Master Manual revision and update to the States, the Congress and Courts, the Standing Rock Sioux Tribe cannot tolerate the exclusion of proper consideration of their water rights, nor can the Tribe tolerate the inadequate representation of the Trustee on this matter; and

Brief Historical Review of Indian Water Rights

WHEREAS, the right of the Crown of Great Britain to the territory of North America was derived from the discovery of that continent by Sebastian Cabot, who in 1498 explored a greater part of the Atlantic Coast under a Commission from King Henry VII and took formal possession of the continent as he sailed along the coast. But those commissioned by the Crown to settle in North America were cognizant of the rights, titles and interests of the original possessors. In the proprietary of Maryland, granted to George Calvert, Lord Baltimore, in 1632, for example, it was recognized by English law evolving from invasions against the Celtic tribes and their successors by the Romans, Anglo-Saxons and Normans, among others, over a period of 1,500 years prior to the discovery of America that the rights of the ancient possessors were specific and could not be ignored by a just occupier. The following was the rationale:

> *The roving of the erratic tribes over wide extended deserts does not formed a possession which excludes the subsequent occupancy of immigrants from countries overstocked with inhabitants. The paucity of their numbers in their mode of life, render them unable to fulfill the great purposes of the grant [by the King to the Proprietary of Maryland]. Consistent, therefore, with the great Charter to mankind, they [Tribes] may be confined within certain limits. Their rights to the privileges of man nevertheless continue the same: and the Colonists who conciliated the affections of the aborigines, and gave a consideration for their territory, have acquired the praise due to humanity and justice. Nations, with respect to the several communities of the earth, possessing all the rights of man, since they are aggregates of man, are governed by similar rules of action. Upon those principles was founded the right of emigration of old: upon those principles the Phenicians and Greeks and Carthagenians settled Colonies in the wilds of the earth.... In a work treating expressly of original titles to land it has been thought not amiss to explain... the manner in which an individual obtaining from his Sovereign an exclusive licence, with his own means, to lead out and plant a Colony in a region of which that Sovereign had no possession, proceeded to avail himself of the privilege or grant, and to reconcile or subject to his views the people occupying and claiming by natural right that Country so bestowed... In particular, an history, already referred to, of the Americans settlements, written in 1671, after speaking of the acquisition of St. Mary's continues 'and it hath been the general practice of his Lordship and those who were employed by him in the planting of the said province, rather to purchase the natives' interest... than to take from them by force that which they seem to call their right and inheritance, to the end all disputes might be removed touching the forcible encroachment upon others, against the Law of nature or nations... When the earth was the general property of mankind, mere occupancy conferred on the possessor such an interest as it would have been unjust, because contrary to the Law of Nature, to take from him without his consent: and this state has been happily compared to a theatre, common to all; but the individual, having appropriated a place, acquires a privilege of which he cannot be dispossessed without injustice'. ... the Grant [to Lord Baltimore] comprehended 'all islands and islets within the limits aforesaid, and all islands and etc. within ten marine leagues of the Eastern Shore, with all Ports, Harbors, Bays, Rivers, and Straits, belonging to the region or islands aforesaid, and all the soil, plains, woods, mountains, marshes, Lakes, Rivers, Days, and Straits, with the fishing of every kind, within the said limits'; all mines of whatsoever kind, and patronage and advowson of all Churches. Lord Baltimore ... was invested with all the Rights, Jurisdictions, Privileges, Prerogatives, Royalties, Liberties, Immunities, and Royal Rights and Temporal Franchises whatsoever, as well by sea as by land, within the Region,*

Baltimore: G. Dobbin & Murphy, 1808. MSA SC 5165-1-1).; and

WHEREAS, 130 years later the Proclamation of 1763 by King George III recognized title to the land and resources reserved by the American Indians of no lesser character or extent than the Charter to Lord Baltimore:

> *And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds -- We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no... Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them. And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, ... all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid. And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained. And We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described. or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements. And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests. and to the great Dissatisfaction of the said Indians: In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement: but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie: and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose....*
>
> *Given at our Court at St. James's the 7th Day of October 1763, in the Third Year of our Reign.*
>
> *GOD SAVE THE KING;* and

WHEREAS, after the American Revolution and consistent with the foregoing, the United States Supreme Court by 1832 relied upon the ancient concepts of its predecessor Great Britain and recognized the property rights of Indians in the classical case of *Worcester v. the State of Georgia:*

> *America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.* (6 P 515, p. 543)
>
> *... This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discovers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man.....*
>
> *... This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The Crown could not be understood to grant what the Crown did not effect to claim; nor was it so understood.*
> (6 P 515, p. 544-545) (Emphasis supplied); and

WHEREAS, the principles in the case of *Worcester v. Georgia* are ancient as shown above and are the foundation of the principles announced by the U. S. Supreme Court three quarters of a century later relating to the Yakima Indian Nation in the case of *United States v. Winans (198 U.S.* 371). Title of the Indians in their property rights was fully acknowledged, and the Treaty was interpreted as a grant of property to the United States in the area not reserved by the Tribe to itself.

> *The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words the Treaty was not a grant of rights to the*

Indians, but a grant of rights from them - a reservation of those not granted. (Emphasis supplied); and

WHEREAS, the Supreme Court case of *Henry Winters v. United States* (207 US 564) found that reservation of water for the purposes of civilization was implied in the establishment of the Reservations:

> *The Reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be adequate with a change of conditions. The lands were arid and, without irrigation, were practically valueless.*
>
> *... That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, [at Fort Belknap] and it would be extreme to believe that within a year later [when the state of Montana was created] Congress destroyed the Reservation and took from the Indians the consideration of their grant, leaving them a barren waste - took from them the means of continuing their old habits, yet did not leave them the power to change to new ones."* (207 U S 574, p. 576 577); and

WHEREAS, the case of *United States v. Ahtanum Irrigation District* (236 Fed 2nd 321, 1956) applied the *Worcester-Winans-Winters* concepts on Ahtanum Creek, tributary to the Yakima River and northern boundary of the Yakima Indian Reservation:

> *The record here shows that an award of sufficient water to irrigate the lands served by the Ahtanum Indian irrigation project system as contemplated in the year 1915 would take substantially all of the waters of Ahtanum Creek. It does not appear that the waters decreed to the Indians in the Winters case operated to exhaust the entire flow of the Milk River, but, if so, that is merely the consequence of it being a larger stream. As the Winters case, both here and in the Supreme Court, shows, the Indians were awarded the paramount right regardless of the quantity remaining for the use of white settlers. Our Conrad Inv. Co. Case, supra, held that what the non-Indian appropriators may have is only the excess over and above the amounts reserved for the Indians. It is plain that if the amount awarded the United States for the benefit of the Indians in the Winters Case equaled the entire flow of the Milk River, the decree would have been no different.* (236 F. 2nd 321, p. 327) (Emphasis supplied); and

WHEREAS, these concepts were further advanced in *Arizona v California*, 373 U.S. 546, 596-601 (1963):

> *The Master found as a matter of fact and law that when the United States created these reservations or added to them, it reserved not only land but also the use of enough water from the Colorado [River] to irrigate the irrigable portions of the reserved lands. The aggregate quantity of water which the Master held was reserved for all the reservations is about 1,000,000 acre-feet to be used on around 135,000 irrigable acres*

of land....

> *It is impossible to believe that when Congress created the Great Colorado River Indian reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of desert kind -- hot scorching sands -- and the water from the River would be essential to the life of the Indian people and to the animals they hunted and crops they raised. We follow it [Winters] now and agree that the United States did reserve the water rights for the Indians effective as of the time Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the Act [Boulder Canyon Project Act] became effective on June 25, 1929, are present perfected rights and as such are entitled to priority under the Act. We also agree with the Master's conclusion as to the quantity intended to be reserved. He found that water was intended to satisfy the future as well as present needs of the Indian reservations.... We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. The various acreage of irrigable land which the Master found to be on the different reservations we find to be reasonable;* and

General Nature of Attacks on Winters Doctrine

WHEREAS, notwithstanding the injunctions of Lord Baltimore, King George III and favorable decisions of the United States Supreme Court, in practice, Congress, the executive branch and the judiciary have (1) limited Indian reserved water rights, (2) suppressed development of Indian reserved water rights, and (3) permitted reliance by state, federal, environmental and private interests on Indian water, contrary to trust obligations. The federal policy has clearly been .. *how best to transfer Indian lands and resources to non-Indians*... rather than to preserve, protect, develop and utilize those resources for the benefits of the Indians.

> *With an opportunity to study the history of the Winters rule as it has stood now for nearly 50 years, we can readily perceive that the Secretary of the Interior, in acting as he did, improvidently bargained away extremely valuable rights belonging to the Indians.... viewing this contract as an improvident disposal of three quarters of that which justly belonged to the Indians, it cannot be said to be out of character with the sort of thing which Congress and the Department of the Interior has been doing throughout the sad history of the Government's dealings with the Indians and Indian tribes. That history largely supports the statement: From the very beginnings of this nation, the chief issue around which federal Indian policy has revolved has been, not how to assimilate the Indian nations whose lands we usurped, but how best to transfer Indian lands and resources to non-Indians.* (*United States v Ahtanum Irrigation District*, 236 F. 2nd 321, 337); and

WHEREAS, the McCarran Amendment interpretation by the United States Supreme Court, if not in error, is a further example of the contemporary attack on Indian water rights. The discussion of the McCarran Amendment here is intended to show why tribes are (1) opposed to state court adjudications and (2) negotiated settlements

under the threat of state court adjudication. In 1952 the McCarran Amendment, 43 U.S.C. 666 (a), was enacted as follows:

> *Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a River system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner or in the process of acquiring water rights by appropriation under State law, by purchase, by exchange or otherwise, and the United States is a necessary party to such suit;* and

WHEREAS, the McCarran Amendment has been interpreted by the U.S. Supreme Court to require the adjudication of Indian water rights in state courts. *Arizona v San Carlos Apache Tribe*, 463 U.S. 545,564,573 (1981) held:

> *We are convinced that, whatever limitation the Enabling Acts or federal policy may have originally placed on State Court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment.*

In dissent, however, Justice Stevens stated:

> *To justify virtual abandonment of Indian water right claims to the State courts, the majority relies heavily on Colorado River Water Conservancy District, which in turn discovered an affirmative policy of federal judicial application in the McCarran Amendment. I continue to believe that Colorado River read more into that amendment that Congress intended... Today, however, on the tenuous foundation of a perceived Congressional intent that has never been articulated in statutory language or legislative history, the Court carves out a further exception to the virtually unflagging obligation of Federal courts to exercise their jurisdiction. The Court does not -- and cannot -- claim that it is faithfully following general principles of law... That Amendment is a waiver, not a command. It permits the United States to be joined as a defendant in state water rights adjudications; it does not purport to diminish the United States right to litigate in a federal forum and it is totally silent on the subject of Indian tribes rights to litigate anywhere. Yet today the majority somehow concludes that it commands the Federal Courts to defer to State Court water right proceedings, even when Indian water rights are involved;* and

WHEREAS, in Arizona, Montana and other states, general water right adjudications to quantify *Winters* Doctrine rights are ongoing. For example in the state of Montana:

(1) the state of Montana sued all tribes in a McCarran Amendment proceeding.

(2) the State of Montana established a Reserved Water Rights Compact Commission. The purpose of the Commission was to negotiate the *Winters* Doctrine rights of the Montana tribes.

(3) the Department of Interior has adopted a negotiation policy for the settlement of Indian water rights. The United States Department of Interior has

a negotiating team which works with the Montana Reserve Water Rights Compact Commission and Indian tribes, some forced by the adjudication in state court, to negotiate, while others are willing to negotiate.

(4) the Department of Interior makes all necessary funding available to any Tribe willing to undertake negotiations. A Tribe refusing to negotiate cannot obtain funding to protect and preserve its *Winters* Doctrine water rights.

(5) upon reaching agreement between the State of Montana and an Indian tribe, congressional staff are assigned to develop legislation in the form of an Indian water rights settlement that may or may not involve authorization of federal appropriations to develop parts of the amount of Indian water agreed upon between the Tribe and the State or for other purposes.

(6) in the absence of the desire of a Tribe to negotiate, the State of Montana will proceed to prosecute its McCarran Amendment case against the Tribe; and

WHEREAS, this process relies on ongoing litigation to accomplish negotiated settlements of *Winters* Doctrine Indian water rights. The process is held out to be a success by the state and federal governments. However, comparison with the taking of the Black Hills from the Great Sioux Nation, the taking of the Little Rocky Mountains from the Fort Belknap Indian Reservation and the taking of Glacier Park from the Blackfeet are valid comparisons. There are elements of force and extortion in the process; and

WHEREAS, in the Wind River adjudication, 753 P. 2nd 76, 94-100 (WY 1988), the State of Wyoming utilized the McCarran Amendment to drastically diminished the Arapaho and Shoshone *Winters* Doctrine water rights in the Big Horn River Basin. The Wyoming Supreme Court found as follows:

> *The quantity of water reserved is the amount of water sufficient to fulfill the purpose of the lands set aside for the Reservation.*
>
> ***
>
> *The Court, while recognizing that the tribes were the beneficial owners of the reservations timber and mineral resources... and that it was known to all before the treaty was signed that the Wind River Indian Reservation contained valuable minerals, nonetheless concluded that the purpose of the reservation was agricultural. The fact that the Indians fully intended to continue to hunt and fish does not alter that conclusion.... The evidence is not sufficient to imply a fishery flow right absent a treaty provision.... The fact that the tribes have since used water for mineral and industrial purposes does not establish that water was impliedly reserved in 1868 for such uses. The District Court did not err in denying a reserved water right for mineral and industrial uses... the District Court did not err in holding that the Tribes and the United States did*

not introduce sufficient evidence of a tradition of wildlife and aesthetic preservation that would justify finding this to be a purpose for which the Reservation was created or for which water was impliedly reserved... not a single case applying the reserved water right doctrine to groundwater is cited to us.... In Colville Confederated Tribes v. Walton, supra, 547 F 2d 42, there is slight mention of the groundwater aquifer and of pumping wells, Id at 52, but the opinion does not indicate that the wells are a source of reserved water or even discuss a reserve groundwater right.... The District Court did not err in deciding there was no reserved groundwater right; and

WHEREAS, the statement by the Wyoming Supreme Court that *Colville* does not discuss a reserved water right to groundwater is in error, for Colville did decree reserved groundwater rights; and

WHEREAS, the *Wind River* case must be carefully examined by all tribes, including those of the Missouri River Basin. The single purpose of the Wind River Indian Reservation recognized by the Wyoming Supreme Court was limited to agriculture: severely limited relative to the... *Rights, Jurisdictions, Privileges, Prerogatives, Royalties, Liberties, Immunities, and Royal Rights and Temporal Franchises whatsoever, ... within the Region, ..*comprehending... *'all the soil, plains, woods, mountains, marshes, Lakes, Rivers, Days, and Straits, with the fishing of every kind, within the said limits'; all mines of whatsoever kind:..*received by from the King by Lord Baltimore in the Proprietary of Maryland, which were, nevertheless, subject to purchase from the Native possessors. The Arapaho and Shoshone must have believed that the purpose of the reservation was to provide a permanent home and abiding place for their present and future generations to engage and pursue a viable economy and society. Despite existing oil and gas resources, they were denied reserved water for mineral purposes. Despite the need for industry in a viable economy, they were denied reserved water for industry. Despite a tradition of hunting and fishing, they were denied reserved water for wildlife and aesthetic preservation. Despite the existence of valuable forests, they were denied reserved water for this purpose. Despite the existence of valuable fisheries, established from time immemorial, they were denied a reserved water right to sustain their fisheries; and

WHEREAS, the United States Supreme Court reviewed the *Wind River* decision on the following question:

In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in presence of substantial state water rights long in use on the reservation, may reserved water rights be implied for all practicably irrigable lands within reservation set aside for specific Tribe? 57 LW 3267 (Oct. 11, 1988); and

WHEREAS, acting without a written opinion and deciding by tie vote, the United States Supreme Court affirmed the decision of the Supreme Court of the State of Wyoming and rejected the thought process presented in the question above that the Tribes needed no additional water than the amount they were using and that state created

water rights with long use should not be subjected to future Indian water rights. But a change in vote by a single justice would have reversed the decision and severely constricted the benefits of the *Winters* Doctrine to the Indian people, a subject to be discussed further. The decision is limited to the State of Wyoming on critical issues, namely that Indian reserved rights do not apply to groundwater; the absence of a reserved water right for forest and mineral purposes; the absence of a reserved water right for fish, wildlife and aesthetic preservation; and a reduction of the Tribes claims to irrigation from 490,000 to less than 50,000 acres; and

WHEREAS, the acreage for irrigation finally awarded to the Wind River Tribes for future purposes was 48,097 acres involving approximately 188,000 acre-feet of water annually:

> *In determining the Tribes claims to practicably irrigable acreage, the United States [trustee for the tribes] began with an arable land-base of approximately 490,000 and relied on its experts to arrive at over 88,000 practicably irrigable acres. The claim was further "trimmed" by the United States to 76,027 acres for final projects. The acreage was further reduced during trial to 53,760 acres by Federal experts with a total annual diversion requirement of about 210,000 acre-feet.* (Teno Roncalio, Special Master. In Re: The General Adjudication of All Rights to the Use of Water in the Big Horn River System and All Other Sources, State of Wyoming, Concerning Reserved Water Right Claims by and on Behalf of the Tribes of the Wind River Indian Reservation, Wyoming, Dec. 15, 1982, pp. 154 and 157); and

WHEREAS, the *purposes* of reservation issue addressed by the Wyoming courts evolved from the 1978 United States Supreme Court case, *United States v. New Mexico* (438 U.S. 696), involving the water rights of the Gila National Forest:

> *The Court has previously concluded that Congress, in giving the President the power to reserve portions of the federal domain for specific federal purposes, impliedly authorized him to reserve "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."... The Court has repeatedly emphasized that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more."... Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.... The legislative debates surrounding the Organic Administration Act of 1897 and its predecessor bills demonstrate that Congress intended national forests to be reserved for only two purposes -- "to conserve the water flows, and to furnish a continuous supply of timber for the people."... Not only is the Government's claim that Congress intended to reserve water for recreation and wildlife preservation inconsistent with Congress's failure to recognize these goals as purposes of the national forest, it would defeat the very purpose for which Congress did intend the national forest system.... While Congress intended the national forest to be put to a variety of uses, including stockwatering, not inconsistent with the two principal purposes of the forest, stock watering was not, itself, a direct purpose of reserving the land;* and

WHEREAS, there may be debate with respect to the purposes for which a national forest was created and for which purposes water was reserved, but it is a "slender reed" upon which to found a debate that when Indian reservations were established by the Indians or Great Britian or the United States, the purpose of establishment might vary among the Indian reservations; and, depending upon that purpose, the Indians would be limited in the beneficial uses to which water could be applied. Indian neighbors could apply water to any beneficial purpose generally accepted throughout the Western United States, but Indians could not. It is inconceivable that an Indian Reservation was established for any other "purpose" than an "Indian" reservation or that each Reservation was established for some arcane reason other than the pursuits of industry, self-government and all other activities associated with a modern, contemporary and ever-changing society embracing all of the ... *Rights, Jurisdictions, Privileges, Prerogatives,... and Temporal Franchises whatsoever, ... within the Region,* ..comprehending... *'all the soil, plains, woods, mountains, marshes, Lakes, Rivers, Days, and Straits, with the fishing of every kind, within the said limits'; all mines of whatsoever kind*, and

WHEREAS, nevertheless, the Wyoming courts relied upon the "purposes" argument to exclude water reserved for the pursuit of many of the arts of civilization.... Industry, mineral development, fish, wildlife, aesthetics... on the basis that the purpose of the Wind River Indian Reservation was limited to an agricultural purpose absent specific Treaty language to the contrary. As crude as this conclusion may be, however, Tribes of the Missouri River basin and throughout the Western United States are faced with the "purposes" limitation originally applied in 1978 to national forests; and

WHEREAS, if there may be a question that the issue ended in Wyoming, it is only necessary to examine the state court general adjudication process in Arizona. A June 2000 pretrial order by the Special Master in the *General Adjudication of All Rights to Use Water in the Gila River System and Source* summarizes the issues as follows:

> *... Does the "primary-secondary" purposes distinction, as announced by the U.S. Supreme Court in United States v. New Mexico, 438 U.S. 696 (1978), apply to the water rights claimed for the Gila River Indian Reservation?...*
>
> *.... The State Litigants takes the position that the distinction does apply.*
>
> *... If the "primary-secondary" purposes distinction does apply to the Gila River Indian Reservation, what were the primary and secondary purposes for each withdrawal or designation of land for the Gila River Indian Reservation? May the Reservation have more than one "primary" purpose?....*
>
> *.... The State Litigants takes a position that the federal government withdrew or designated land to protect existing agriculture, create a buffer between the community and non-Indians who were settling in the area, provide substitute agricultural lands*

when non-Indians encroached on existing Indian agricultural lands, and provide for other specific economic activities such as grazing; and

WHEREAS, the restriction or limitation of Indian water rights in the Missouri River basin is not confined to a federal denial of them in federal actions, such as the Master Manual and endangered species consultation. The limitations are expected to grow and expand from these federal actions. Indian water right opponents will concentrate on the language of *United States v. New Mexico* that *"...only that amount of water necessary to fulfill the purpose of the reservation, no more...* has been reserved by the Tribes or the United States on behalf of the tribes. The effort will be to first limit the purposes for which an Indian reservation was established and second limit the amount of water necessary to fulfill that purpose. If, for example, opponents could successfully argue that the purpose of an Indian reservation in the Missouri River Basin was primarily a "permanent homeland" and that agriculture was secondary, they would further argue that the amount of water reserved was limited to domestic uses, and no water was reserved for irrigation; and

WHEREAS, *Cappaert v. United States* (426 U.S. 128, 1976) was the basis, in part, for the decision in *United States v. New Mexico* discussed above. Here again the purposes of a "federal" reservation (as distinguished from a reservation by Indians or a reservation by the United States on behalf of Indians) and the use of water for that purpose is the subject. But the Cappaert decision is helpful in showing the extreme interpretations to which is the State Court in Wyoming went in its *Wind River* decision:

> *....The District Court then held that, in establishing Devil's Hole as a national monument, the President reserved appurtenant, unappropriated waters necessary to the purpose of the reservation; the purpose included preservation of the pool and pupfish in it.... The Court of Appeals for the Ninth Circuit affirmed... holding that the "implied reservation of water" doctrine applied to groundwater as well as surface water...*and

WHEREAS, the purpose of establishing the national monument was clearly limited -- to preserve the Devil's Hole pupfish, which rely on a pool of water that is a remnant of the prehistoric Death Valley Lake System an object of historic and scientific interest. This is not an Indian reservation which embraces all of the purposes related to civilization, society and economy. Yet, Wyoming seized on the concept of an Indian reservation with purpose limited in the same manner as a national forest or a national monument. Note, however, that the Wyoming case (1988) grasps at the purposes argument to diminish the Indian water right but ignores the damaging aspect of *Cappaert* (1976) that reserved water concepts apply to groundwater as well as surface water. Not only did Wyoming ignore *Colville Confederated Tribes*, it ignored *Cappaert*. Recently, the Arizona Supreme Court, after considering the Wyoming decision, could not countenance a similar decision in Arizona, specifically rejected the Wyoming decision and found as follows:

> *...the trial court correctly determined that the federal reserved water rights doctrine applies not only to surface water but to groundwater...*and*...holders of federal reserved rights enjoy greater protection from groundwater pumping than do holders of state law rights...*; and

WHEREAS, similarly, Wyoming ignored *Cappaert*, a U.S. Supreme Court decision about federally reserved water rights in a National Monument in Nevada, where *Cappaert* specifically rejected the concept of "sensitivity" or balancing of equities when water is needed for the purpose of a federal or Indian Reservation. In *Cappaert* the Court cited the *Winters* decision as a basis for rejecting the notion of Nevada that competing interests must be balanced between federal (or Indian) reserved water rights and competing non-federal (or non-Indian) water rights. Wyoming returned to the U.S. Supreme Court seeking a more favorable decision respecting "sensitivity" than provided by *Cappaert*:

> *Nevada argues that the cases establishing the doctrine of federally reserved water rights articulate an equitable doctrine calling for a balancing of competing interests. However, an examination of those cases shows they do not analyze the doctrine in terms of a balancing test. For example, in Winters v. United States, supra, the Court did not mention the use made of the water by the upstream landowners in sustaining an injunction barring their diversions of the water. The "Statement of the Case" in Winters notes that the upstream users were homesteaders who had invested heavily in dams to divert the water to irrigate their land, not an unimportant interest. The Court held that, when the Federal Government reserves land, by implication, it reserves water rights sufficient to accomplish the purposes of the reservation;* and

WHEREAS, the United States Supreme Court reviewed the decision of the Wyoming Supreme Court and upheld the decision by a tie vote as discussed above. However, the majority of the court had apparently been swayed by the Wyoming argument:... *In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in presence of substantial state water rights long in use on the reservation, may reserved water rights be implied for all practicably irrigable lands within reservation set aside for specific Tribe?...* and had prepared a draft opinion referred to by the Arizona Supreme Court as the "ghost" opinion. The draft opinion was apparently not issued because Justice Sandra Day O'Connor, author of the "ghost" opinion on behalf of the majority, disqualified herself because she learned that her ranch had been named as a defendant in the Gila River adjudication in Arizona. Despite more than 350 years of understanding of justice and law relating to Indian property, the O'Connor opinion would have destroyed the basic tenets of the *Winters* Doctrine:

> *...The PIA standard is not without defects. It is necessarily tied to the character of land, and not to the current needs of Indians living on reservations....And because it looks to the future, the PIA standard, as it has been applied here, can provide the Tribes with*

more water than they need at the time of the quantification, to the detriment of non-Indian appropriators asserting water rights under state law....this Court, however, has never determined the specific attributes of reserve water rights – whether such rights are subject to forfeiture for nonuse or whether they may be sold or leased for use on or off the Reservation....Despite these flaws and uncertainties, we decline Wyoming's invitation to discard the PIA standard... The PIA standard provides some measure of predictability and, as explained hereafter, is based on objective factors which are familiar to courts. Moreover no other standard that has been suggested would prove as workable as the PIA standard for determining reserve water rights for agricultural reservations....we think Master Roncolio and the Wyoming Supreme Court properly identified three factors that must be considered in determining whether lands which have never been irrigated should be included as PIA; the arability of the lands, the engineering feasibility (based on current technology) of necessary future irrigation projects, and the economic feasibility of such projects (based on the profits from cultivation of future lands and the costs of the project... Master Roncolio found...that economic feasibility will turn on whether the land can be irrigated with a benefit-cost ratio of one or better....Wyoming argues that our post-Arizona I cases, specifically Cappaert and New Mexico, indicate that quantification of Indian reserved water rights must entail sensitivity to the impact on state and private appropriators of scarce water under state law.... Sensitivity to the impact on prior appropriators necessarily means that "there has to be some degree of pragmatism" in determining PIA....we think this pragmatism involves a "practical" assessment – a determination apart from the theoretical economic and engineering feasibility – of the reasonable likelihood that future irrigation projects, necessary to enable lands which have never been irrigated to obtain water, will actually be built....no court has held that the Government is under a general legal or fiduciary obligation to build or fund irrigation projects on Indian reservations so that irrigable acreage can be effectively used..... massive capital outlays are required to fund irrigation projects...and in today's era of budget deficits and excess agricultural production, government officials have to choose carefully what projects to fund in the West. ... Thus, the trier of fact must examine the evidence, if any, that additional cultivated acreage is needed to supply food or fiber to resident tribal members, or to meet the realistic needs of tribal members to expand their existing farming operations. The trier must also determine whether there will be a sufficient market for, or economically productive use of, any crops that would be grown on the additional acreage....we therefore vacate the judgment insofar as it relates to the award of reserved water rights for future lands and remand the case to the Wyoming Supreme Court for proceedings not inconsistent with this opinion; and

WHEREAS, the United States Supreme Court has virtually unlimited power to arrive at unjust decisions as evidenced by the *Dred Scott* decision, and the opinion of the minority would have had no force and effect in *Wyoming* as given by Justice Brennan:

...in the Court might well have taken as its motto for this case in the words of Matthew 25:29: "but from him that has not shall be taken away even that which he has." When the Indian tribes of this country were placed on reservations, there was, we have held, sufficient water reserved for them to fulfill the purposes of the reservations. In most cases this has meant water to irrigate their arable lands.... The Court now proposes, in effect, to penalize them for the lack of Government investment on their reservations by taking from them those water rights that have remained theirs, until now, on paper. The requirement that the tribes demonstrate a "reasonable likelihood" that irrigation

projects already determined to be economically feasible will actually be built – gratuitously superimposed, in the name out "sensitivity" to the interests of those who compete with the Indians for water, upon a workable method for calculating practicably irrigable acreage that parallels government methods for determining the feasibility of water projects for the benefit of non-Indians – has no basis in law or justice; and

WHEREAS, whether inspired by the "ghost" opinion of Justice O'Connor or not, the Arizona Supreme Court held arguments in February 2001 on the issue of: "what is the appropriate standard to be applied in determining the amount are water reserved for federal lands?", particularly Indian lands, which were not reserved by the United States for the Standing Rock Sioux Tribe but were, rather, reserved by the Tribe by its ancient ancestors from time immemorial. The outcome by the Arizona Supreme Court is immaterial but provides the question for review by the United States Supreme Court with full knowledge from the "ghost" opinion of the probable outcome. The Salt River Project and Arizona, principal losers in *Arizona v California I,* make the following arguments in *Gila* River against Indian reserved rights to the use of water:

...Under the United States Supreme Court's decision in United States v New Mexico..., all federal land with a dedicated federal purpose "has reserved to it that minimum amount of water which is necessary to effectuate the primary purpose of the land set aside." Judge Goodfarb also found, however, that this "purposes" test does not apply to Indian reservations. Instead, he held that, for Indian reservations, "the courts have drawn a clear and distinct line"....that mandates that reserved rights for all Indian reservations must be quantified based on the amount of "water necessary to irrigate all of the practicably irrigable acreage (PIA) on that Reservation" without considering the specific purposes for which the Reservation was created....this interlocutory proceeding with respect to Issue 3 arose because Judge Goodfarb incorrectly ruled (as a matter of law and without the benefit of any factual record, briefing, or argument) that PIA applies to all Indian reservations...

....as shown below, the Supreme Court in that case (Arizona I) and the courts in all reported decisions since that time, have applied the following analysis: first, review the historical evidence relating to the establishment of the Reservation and, from that evidence, determine the purposes for which the specific land in question was reserved (a question of fact). Second, determine, based upon the evidence, the minimum quantity of water necessary to carry out those purposes (a mixed question of law and fact). ...and in Colville Confederated Tribes V. Walton, for instance, the ninth circuit stated:. "to identify the purposes for which the Colville Reservation was created, we consider the document and circumstances surrounding its creation, and the history of the Indians for whom it was created. We also consider their need to maintain themselves under changed circumstances."
...the Zuni Reservation in northeastern Arizona, for example, was established by Congress expressly "for religious purposes."...the original 1859 creation of the Gila Reservation and each of the seven subsequent additions had different

rationales and were intended to address different purposes or combinations of purposes (e.g. protecting existing farmlands, adding lands for grazing, including lands irrigated by Indians outside the Reservation as part of the Reservation...

....in addition to varying in size, Indian reservations also vary in location and terrain. Reservations in Arizona, for instance, run the gamut from desert low lands to the high mountains and everything in between. Certain reservations along the Colorado River include fertile but arid river bottom land and were created for the purpose of converting diverse groups of "nomadic" Indians to a "civilized" and agrarian way of life...other reservations, such as the Navajo Reservation in extreme northeastern Arizona, consist largely of "very high plateaus, flat-top mesas, inaccessible buttes and deep canyons. "....there can be little doubt that the PIA standard works to the advantage of tribes inhabiting alluvium plains or other relatively flat lands adjacent to stream courses. In contrast, tribes inhabiting mountainous or other agriculturally marginal terrains are at a severe disadvantage when it comes to demonstrating that their lands are practicably irrigable....

...the special master [Arizona I] conducted a trial, accepted and reviewed substantial evidence regarding the purposes of the five Indian reservations at issue in that case, made factual findings as to purposes, and only then found that the minimum amount of water necessary to carry out those purposes was best determined by the amount of water necessary to irrigate all "practicably irrigable" acres on those reservations. ....the special master stated: "moreover the 'practicably irrigable' standard is not necessarily a standard to be used in all cases and when it is used it may not have the exact meaning it holds in this case. The amount reserved in each case is the amount required to make each Reservation livable."

...although the United States Supreme Court affirmed the Wyoming court's decision in that case without opinion, events surrounding that review shed considerable light on the Supreme Court's concerns about the continued viability of PIA as a standard, at least in the form it was applied in Arizona I. ....several Justices challenged the United States's defense of PIA.... "at this point, Chief Justice Rehnquist challenged the precedential validity of Arizona I by noting that the opinion 'contains virtually no reasoning' and the Court merely had accepted the special master's conclusion as to the PIA standard...arguing that Congress must of contemplated the size of the tribe that would live on the Wind River Reservation, ...the Chief Justice stated that he found it difficult to believe that 'in 1868 Congress...should be deemed have said we're giving up water to irrigate every – every inch of arable land. No matter how large the tribe they thought they were settling. Did they expect to make some tribes very rich so that they can have an enormous export business... in agricultural products?" (State Litigant's Opening Brief on Interlocutory Issue 3, Gila River Adjudication); and

Historical Analysis of Thought Processes Embraced by Master Manual

WHEREAS, the means employed by the Corps of Engineers to deny consideration of Indian water rights in the preparation of the Master Manual and those same means employed by the Department of Interior to deny consideration of Indian water rights in baseline environmental studies of endangered species have been presented. Also, presented was the favorable body of law supporting the proper consideration of Indian water rights followed by the denigration of that law in state court adjudications, namely in Wyoming and, more recently, in Arizona. Briefly examined here are historical examples of the diminishment of property rights by a superior force and the strikingly similar arguments in support of that diminishment, and

WHEREAS, the concepts and techniques for diminishing the water rights of the Standing Rock Sioux Tribe in the Missouri River, its tributaries and aquifers are not novel. The colonization of Ireland by the English (*circa* 1650), for example, was justified in a manner that provides insight in the federal treatment of Indian water rights in the Missouri River Basin. Sir Thomas Macaulay, a prominent English politician in the first half of the 19th-century and one of the greatest writers of his or any other era, rationalized the taking of land from the native Irish and the overthrow of King James II in 1692, which overthrow was due, in part, to the King's efforts to restore land titles to the native Irish: (Sir Thomas Macaulay, 1848, *The History of England,* Penguin Classics, pp 149-151)

> *To allay national animosity such as that which the two races [Irish and English] inhabiting Ireland felt for each other could not be the work of a few years. Yet it was a work to which a wise and good Prince might have contributed much; and King James II would have undertaken that work with advantages such as none of his predecessors or successors possessed. At once an Englishman and a Roman Catholic, he belonged half to the ruling and half to the subject cast, and was therefore peculiarly qualified to be a mediator between them. Nor is it difficult to trace the course which he ought to have pursued. He ought to have determined that the existing settlement of landed property should be inviolable; and he ought to have announced that determination in such a manner as effectually to quiet the anxiety of the new proprietors, and to extinguish any wild homes which the old proprietors might entertain. Whether, in the great transfer of estates, injustice had or had not been committed, was immaterial. The transfer, just or unjust, had taken place so long ago, that to reverse it would be to unfix the foundations of society. There must be a time limitation to all rights. After thirty-five years of actual possession, after twenty-five years of possession solemnly guaranteed by statute, after innumerable leases and releases, mortgages and devises, it was too late to search for flaws in titles. Nevertheless something might have been done to heal the lacerated feelings and to raise the fallen fortunes of the Irish gentry. The colonists were in a thriving condition. They had greatly improved their property by building, planting and fencing..... There was no doubt that the next Parliament which should meet at Dublin, though representing almost exclusively the English interest, would, in return for the King's promise to maintain that interest in all its legal rights, willingly grant to him a considerable sum for the purpose of indemnifying, at least in part, such native families as had been wrongfully despoiled.*
>
> *Having done this, he should have labored to reconcile the hostile races to each other*

by impartially protecting the rights and restraining the excesses of both. He should have punished with equal severity that native who indulges in the license of barbarism and the colonists who abused the strength of civilization..... no man who was qualified for office by integrity and ability should have been considered as disqualified by extraction or by creed for any public trust. It is probable that a Roman Catholic King, with an ample revenue absolutely at his disposal, would, without much difficulty, have secured the cooperation of the Roman Catholic prelates and priests in the great work of reconciliation. Much, however, might still have been left to the healing influence of time. The native race might still have had to learn from the colonists industry and forethought, arts of life, and the language of England. There could not be equality between men who lived in houses and men who lived in stles, between men who were fed on bread and men who were fed on potatoes, between men who spoke the noble tongue of great philosophers and poets and men who, with the perverted pride, boasted that they could not writhe their mouths into chattering such a largon as that in which the Advancement of Learning and the Paradise Lost were written. Yet it is not unreasonable to believe that if the gentle policy which has been described had been steadily followed by the government, all distinctions would gradually have been effaced, and that there would now have been no more trace of the hostility which has been the curse of Ireland ...and

WHEREAS, the Master Manual rationale... *Currently, such reserved or aboriginal rights of tribal reservations have not been quantified in an appropriate legal forum or by compact with three exceptions.... The Study considered only existing consumptive uses and depletions; therefore, no potential tribal water rights were considered....* or the ESA rationale.... *The environmental baseline used in ESA Section 7 consultations on agency actions affecting riparian ecosystems should include for those consultations the full quantum of: (a) adjudicated (decreed) Indian water rights; (b) Indian water rights settlement act; and (c) Indian water rights otherwise partially or fully quantified by an act of Congress... Biological opinions on proposed or existing water projects that may affect the future exercise of senior water rights, including unadjudicated Indian water rights, should include a statement that project proponents assume the risk that the future development of senior water rights may result in a physical or legal shortage of water....* does not represent a significant step forward from that advanced by Macaulay given the opportunity of 150 years for refinement in America. There cannot be significant differences between the statement of the Corps of Engineers and the Macaulay logic; and

WHEREAS, it is material, not immaterial, whether there has been injustice or a fitting of the law to the purpose in the transfer of Standing Rock waters of the Missouri River, its tributaries and its aquifers to non-Indians in the Master Manual update. It is rejected as correct ... that after the new proprietor's (downstream navigation, upstream recreation and endangered species) have enjoyed the Indian "estate" for a period of 25 to 35 years, the wild hopes of the Indian proprietors for participation must be extinguished. It is rejected as correct that the lacerated Indian feelings be healed, or for a considerable sum, despoiled Indian families can be made whole and the new possessors of Standing Rock Sioux water rights can be indemnified. It is rejected as proper that this be justified on the basis that the new possessor has greater industry, forethought, arts of life, language, diet, and housing. It is rejected as untrue that after numerous leases, releases, and mortgages by non-Indians relying upon unused Indian *Winters* doctrine water rights, it is too late to search for flaws in titles. It is accepted as true that the Master Manual promotes reliance by non-Indians

upon unused Indian *Winters* doctrine water rights; and

WHEREAS, the rationale of Supreme Court Justices, Master Manual and ESA is but a limited improvement from historical examples even earlier than Macaulay. Over 400 years ago, the sovereigns of England and Scotland, upon their union, sought possession of the borderlands between the two nations and to dispossess the native tribal inhabitants. The following provides the rationale of the Bishop of Glasgow against those ancient inhabitants as they sought (in vain) to stay in possession of their ancient lands:

> *I denounce, proclaim and declare all and sundry acts of the said murders, slaughters,... thefts and spoils openly upon daylight and under silence of night, all within temporal lands as Kirklands; together with their partakers, assistants, suppliers, known receivers and their persons, the goods reft and stolen by them, art or part thereof, and their counselors and defenders of their evil deeds generally CURSED, execrated, aggregate and re-aggregate with the GREAT CURSING.*
>
> *I curse their head and all their hairs on their head; I curse their face, their eye, their mouth, their nose, their tongue, their teeth, their crag, their shoulders, their breast, their heart, their stomach, their back, their wame (belly), their arms, their legs, their hands, their feet, and every part of their body, from the top of their head to the sole of their feet, before and behind, within and without.*
>
> *I curse them going and I curse them are riding; I curse them standing, and I curse them sitting; I curse them eating, I curse them drinking; I curse them walking, I curse them sleeping; I curse them arising, I curse them laying; I curse them at home, I curse them from home; I curse them within the house, I curse them without the house; I curse their wives, their barns, and their servants participating with them in their deeds. I wary their corn, their cattle, their wool, their sheep, their horses, their swine, their geese, their hens, and all their livestock. I wary their halls, their chambers, their kitchens, their storage bins, their barns, their cowsheds, their barnyards, their cabbage patches, their plows, their harrows, and the goods and houses that is necessary for their sustenance and welfare.*
>
> *The malediction of God that lighted upon Lucifer and all his fellows, that struck them from the high heaven to the deep hell, must light upon them. The fire in the sword that stopped Adam from the gates of Paradise, must stop them from the glory of heaven until they forbear and make amends;* and

WHEREAS, truly, the rationale of the Master Manual may be a slight improvement in the techniques that were used to justify dispossession 400 years ago and represents progress, Standing Rock and other tribes have repeatedly encountered equally effective, if less colorful, opposition to their efforts to preserve, protect, administer and utilize their water rights; and

WHEREAS, the distinguishing feature for the Standing Rock Sioux Tribe, however, is the fact that the water right "estate" in the Missouri River has not been taken from them, even though it is under attack in the Master Manual. It is proposed in the Master Manual to commit water away from the Indians, but the process is not

accomplished, and those who would rely on unused Indian water rights have not yet taken possession and executed mortgages, leases and releases on the basis of them. The Standing Rock Sioux Tribe remain in position to retain its "estate" in the Missouri River by rejecting the Master Manual and taking affirmative action to protect its ancient and intact possessions; and

WHEREAS, by taking steps to protect their ancient possessions the Standing Rock Sioux Tribe recognizes that it cannot expect support from the United States or its agencies acting as Trustee. Strong reaction can be expected from any current attempt to do so, including strong reaction by the Trustee. First, the Trustee has no funds for litigation of Indian water right issues. Second, the Trustee has considerable funds for settlement of Indian water right issues, but the Indian costs in lost property are great. Third, the Trustee has considerable technical criteria and requirements to impose on the Indian tribes as a basis for limiting the Indian water right "estate": irrigable land criteria, water requirement criteria, limitation on beneficial uses and, most limiting, economic feasibility criteria that few, if any, existing non-Indian water projects could survive.

NOW THEREFORE BE IT RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe rejects the Master Manual Review and Update by the U. S. Army Corps of Engineers for the express reason that it establishes a plan for future operation of the Missouri River addressing inferior downstream navigation, upstream recreation and endangered species water claims of the States and Federal interests and specifically denies proper consideration or any consideration of the superior, vested water rights of the Standing Rock Sioux Tribe while committing reservoir releases to purposes and interests in direct opposition to those of the Tribe.

BE IT FURTHER RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe, seeking to protect and preserve its valuable rights to the use of water in the Missouri River, its tributaries and aquifers upon which the Tribe relies and has relied since ancient times for its present and future generations, directs the Chairman to take all reasonable steps, through the appointment of himself, Tribal Council members and staff to working groups to petition members of Congress and officials at the highest levels in the Bush Administration, including the Department of Justice, among other proper steps, for the single purpose of ensuring a full rejection and re-constitution of the Master Manual as now proposed for action by the Corps to properly reflect the rights, titles and interests of the Standing Rock Sioux Tribe.

BE IT FURTHER RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe proclaims its continued dominion over all of the lands within the boundaries of the Standing Rock Sioux Indian Reservation as reserved from time immemorial including but not limited to rights, jurisdictions, privileges, prerogatives, liberties, immunities, and temporal franchises whatsoever to all the soil, plains, woods, wetlands, lakes, rivers, aquifers, with the fish and wildlife of every kind, and all mines of whatsoever

kind within the said limits; and the Tribal Council declares its water rights to irrigate not less than 303,650 arable acres with an annual diversion duty of 4 acre feet per acre, to supply municipalities, commercial and industrial purposes and rural homes with water for not less than 30,000 future persons having an annual water requirement of 10,000 acre feet annually, to supply 50,000 head of livestock of every kind on the ranges having an annual water requirement of 1,500 acre feet annually: such proclamation made on the basis of the status of knowledge at the start of the third millennia and subject to change to include water for other purposes, such as oil, gas, coal or other minerals, forests, recreation, and etc; and such proclamation for the purposes and amount of water required to be adjustable in the future to better reflect improved knowledge and changing conditions.

BE IT FURTHER RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe directs the Chairman to take all reasonable steps, through the appointment of himself, Tribal Council members and staff to working groups to petition members of Congress and officials at the highest levels in the Bush Administration to support and promote legislation that would, among other things, enable the Standing Rock Sioux Tribe to exercise its rights to the use of water in the Missouri River, in part, by purchasing the generators and transmission facilities of the United States at Oahe Dam at fair market value, subject to such offsets as may be agreed upon, with provisions to sell power generated at Oahe Dam at rates necessary to honor all existing contracts for the sale of pumping power and firm, wholesale power during their present term and sufficient to retire debts of the United States that may be agreed upon; provided, however, that the Tribe may increase power production at the dam by feasible upgrades and market the new power at market rates and after expiration of current contracts market power at rates reflective of the market; and provided further that legislation to purchase generators and transmission facilities will also include provisions to finance wind and/or natural gas power generation on the Standing Rock Indian Reservation to combine with hydropower production, thereby using Tribe's water and land resources effectively for the benefit of the Tribe without further erosion, diminishment and denigration of Tribe's water right claims.

BE IT FURTHER RESOLVED THAT, the Standing Rock Sioux Tribal Council rejects all reports and investigations of the Bureau of Reclamation on the Cannonball and Grand Rivers watersheds and any and all proposals by Bureau of Reclamation for an Indian Small Water Projects Act and that all ongoing efforts of the Bureau of Reclamation respecting these specific efforts will cease by this directive of the Tribal Council.

BE IT FURTHER RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe directs the Chairman to take all reasonable steps, through the appointment of himself, Tribal Council members and staff to working groups, to petition members of Congress, officials at the highest levels in the Bush Administration, including the Department of Justice, the Churches and others disposed toward true and genuine justice, and to take all other necessary steps to demonstrate the injustice of the

officials at the highest levels in the Bush Administration, including the Department of Justice, the Churches and others disposed toward true and genuine justice, and to take all other necessary steps to demonstrate the injustice of the United States Supreme Court, when engaged in a Whiggish course, to subject the least powerful to the will of the States in matters involving property rights as evidenced by the *Dred Scott*, the *O'Connor Ghost* and comparable decisions of expediency.

BE IT FURTHER RESOLVED THAT, the Chairman and Secretary of the Tribal Council are hereby authorized and instructed to sign this resolution for and on behalf of the Standing Rock Sioux Tribe.

CERTIFICATION

We, the undersigned, Chairman and Secretary of the Tribal Council of the Standing Rock Sioux Tribe, hereby certify that the Tribal Council is composed of (17) members, of whom 12 constituting a quorum, were present at a meeting thereof, duly and regularly, called, noticed, convened and held on the 5th day of April, 2001, and that the foregoing resolution was duly adopted by the affirmative vote of 11 members, with 0 opposing, and with 1 not voting. THE CHAIRMAN'S VOTE IS NOT REQUIRED, EXCEPT IN CASE OF A TIE.

DATED THIS 5th DAY OF APRIL, 2001.

Charles W. Murphy, Chairman
Standing Rock Sioux Tribe

ATTEST:

Elaine McLaughlin, Secretary
Standing Rock Sioux Tribe

(OFFICIAL TRIBAL SEAL)

In response to a question from Representative Nelson, committee counsel said the bill draft anticipates separate negotiations between the state and each Indian tribe or the federal government for non-Indian reserved water rights claimed by the federal government.

In response to a question from Representative Pollert, committee counsel said if the agreement is not approved by the Legislative Assembly, then there is no agreement.

Chairman Pollert recognized Mr. Jon Patch, Assistant Division Director, Water Appropriation Division, State Water Commission. A copy of Mr. Patch's comments concerning the bill draft is attached as Appendix L.

Chairman Pollert recognized Mr. Robert Shaver, Director, Water Appropriation Division, State Water Commission. A copy of Mr. Shaver's comments concerning the bill draft is attached as Appendix M.

Chairman Pollert recognized Mr. Duane Houdek, Counsel, Governor's office, who discussed the authority of the Governor to negotiate reserved water rights of the United States and federally recognized Indian tribes. A copy of Mr. Houdek's written comments is attached as Appendix N. He said the procedures and authority that are subjects of the bill draft are already in place and are working well.

In response to a question from Senator Bowman, Mr. Houdek said the Legislative Assembly does not have approval authority of agreements negotiated under current law. However, he said, the Legislative Assembly does play a part through the appropriation process as well as other oversight responsibilities.

Mr. Houdek said requiring legislative approval of reserved water rights agreements may cause a delay because the Legislative Assembly only meets once every two years. Also, he said, if the negotiators know that legislative approval is required, it may discourage serious negotiations.

Chairman Pollert recognized Mr. Charles Carvell, Assistant Attorney General, who discussed authority of the Governor to negotiate reserved water rights of the United States and federally recognized Indian tribes. A copy of his written comments is attached as Appendix O.

In response to a question from Representative Damschen, Mr. Carvell said if the Governor uses the authority under North Dakota Century Code Chapter 51-40.2 or Chapter 61-02 to negotiate reserved water rights agreements, then the Legislative Assembly could amend the statutes to require legislative approval. However, he said, if the Governor is relying on the authority contained in Article V, Section 7, of the Constitution of North Dakota that the Governor as Chief Executive Officer of the state has authority to transact and supervise all necessary business of the state with the United States, the other states, and the officers and officials of this state, then requiring legislative oversight may violate the separation of powers contained in the state constitution.

Chairman Pollert recognized Mr. Thomas D. Davis, Water Resource Director, Turtle Mountain Band of Chippewa Indians, Belcourt. A copy of Mr. Davis's written comments concerning the bill draft is attached as Appendix P. Mr. Davis said the Turtle Mountain Band of Chippewa Indians prefer the bill draft be revised to make the bill tribe-specific and the Governor may negotiate with the Turtle Mountain Band of Chippewa Indians to negotiate the tribe's reserved water rights.

In response to Mr. Davis's comments, Senator Bowman said the bill draft should not be limited to a single tribe but as drafted is discretionary and allows those tribes that wish to negotiate their reserved water rights an opportunity to do so but does not force any tribe to enter into negotiations with the state to quantify its water rights.

It was moved by Senator O'Connell, seconded by Representative Klein, and defeated on a roll call vote that the Legislative Council staff be requested to redraft the bill draft authorizing the Governor to negotiate reserved water rights of the United States and federally recognized Indian tribes to make it only applicable to the Turtle Mountain Band of Chippewa Indians. Representatives Bernstein, Nelson, Solberg, and Uglem and Senator O'Connell voted "aye." Representatives Pollert, Brandenburg, Damschen, Hanson, Headland, Kingsbury, and Klein and Senators Bowman and Urlacher voted "nay."

Chairman Pollert recognized Representative Nelson. Representative Nelson said if the committee does not recommend the bill draft to the Legislative Council for submission to the Legislative Assembly, then the committee is saying that the Legislative Assembly should not be involved in approving reserved water rights agreements. However, he said, if the committee forwards a bill draft to the Legislative Council, it is making a strong statement that it believes the Legislative Assembly should have final approval over any reserved water rights agreement negotiated between the state and a tribe.

Chairman Pollert recognized Senator Bowman. Senator Bowman said based upon testimony received by the committee, it is clear the Governor has authority to negotiate reserved water rights agreements under current law. However, he said, if the Legislative Assembly is to have a voice in the process by requiring that an agreement be submitted to the Legislative Assembly for approval, then the bill draft before the committee should be approved and recommended to the Legislative Council.

It was moved by Senator O'Connell, seconded by Representative Hanson, and carried on a roll call vote that the bill draft relating to authority of the Governor to negotiate reserved water rights of the United States and federally recognized Indian tribes be approved and recommended to the Legislative Council. Representatives Pollert, Hanson, Klein, Nelson, Solberg, and Uglem and Senators Bowman, O'Connell, and Urlacher voted

it is important for legislators to have an understanding of the *Winters* doctrine and the very complicated legal issues surrounding it.

Winters and the Reserved Water Rights Doctrine

The Western states all determine water rights using some form of the prior appropriation doctrine, which holds that rights to water belong to the party that first puts the water to "beneficial use."[4] As long as the party continues to put that water to beneficial use, its prior appropriation right remains senior to all other users.[5] Many commentators condense the entire doctrine, somewhat glibly, into six words: first in time, first in right.

In 1908, the Supreme Court added a complicated twist to this system when it promulgated what came to be known as the reserved rights doctrine in *Winters v. United States*.[6] There, the Court ruled that when Congress set aside land for the Fort Belknap Indian Reservation, Congress also impliedly reserved water to help transform the tribe into a "pastoral and civilized people."[7] It is important to stress here that the Court reached this conclusion not by looking to the Constitution or explicit statutory language, but rather by *implying* a certain Congressional intent. To this day, the *Winters* doctrine remains such an implication.

The Supreme Court has continued to imply the same Congressional intent with regard to all federal reservations - tribal or otherwise (e.g., national parks) - stating that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water, then unappropriated to the extent needed to accomplish the purpose of the reservation."[8] The amount must satisfy both present and future needs of the reservation.[9] This reserved water right vests on the date that Congress reserves the land[10] and remains regardless of non-use.[11] Therefore, because most Indian reservations were created in the 1800's or early 1900's, such reservations are generally both first in time and first in right under the Western prior appropriation system.[12]

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[4] David H. Getches, Water Law in a Nutshell 6 (3d ed. 1997).

[5] *Id.*

[6] 207 U.S. 564 (1908).

[7] 207 U.S. at 576.

[8] *Cappaert v. United States*, 426 U.S. 128, 138 (1976). The Colorado Supreme Court has held "appurtenant" water to be that water "on, under or touching the reserved lands." *United States v. City and County of Denver*, 656 P.2d 1, 35 (Colo. 1983).

[9] *Arizona v. California*, 373 U.S. 546, 600 (1963).

[10] *Id.* at 600 (1963).

[11] *Hackford v. Babbit*, 14 F.3d 1457, 1461 (10th Cir. 1994).

[12] The priority date can be even earlier if the water use fits under the category of aboriginal title. In *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983), the Ninth Circuit found

(continued...)

While the law is clear that the McCarran Amendment grants state courts the right to adjudicate Indian water rights, the question of who has the power to *administer* water rights determined in a McCarran Amendment adjudication is not so clear.[24] Some argue that the above-quoted language of the McCarran Amendment distinguishing between administration and adjudication of water rights is meant to limit a state's ability to administer such rights.[25] The Wyoming Supreme Court has held, though, that state courts have the power to administer as well as adjudicate Indian water rights.[26] Significantly, the court also ruled that an appointed State Engineer has the power to "monitor" water use under a court's reserved rights decree, but enforcement by that same official against either the tribes or the United States would require judicial action.[27]

The benefit of the McCarran Amendment is that it allows a state to take a more active role in the determination of a resource so precious to all of that state's citizens. As discussed above, however, the Supreme Court in *Winters* left many questions regarding reserved water rights to be determined by other courts. In the wake of the McCarran Amendment, most of the courts to take up these questions have been various state judicial bodies, with different states sometimes providing very different answers. This lack of uniformity breeds confusion, which is nowhere more evident than in the courts' handling of the quantification problem.

Litigation and Quantification

Using the *Winters* rationale to guide them in their search for a quantification standard, courts have generally focused first on each reservation's purpose, and then determined the amount of water necessary to fulfill that purpose. Until recently, virtually every court to consider the question of a reservation's purpose held that purpose to be agricultural, in that the federal government, in reserving the land, intended that the Indians who inhabited the reservation would cultivate the land in order to become self-sufficient.[28] Subsequent judicial attempts to establish a quantification standard in line with this agricultural purpose have resulted in some

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[23] (...continued)
A Federal Appeals Court has held that a failure to include groundwater in a state general stream adjudication does not invalidate the adjudication on "comprehensiveness" grounds. *United States v. Oregon*, 44 F.3d 758, 768-769 (9th Cir. 1994).

[24] What exactly the power to "administer water rights" entails is not immediately apparent. The most widely followed definition seems to be the one given by a Nevada Federal District Court over thirty years ago: "To administer a decree is to execute it, to ensure its provisions, to resolve conflicts as to its meaning, to construe and interpret its language." *United States v. Hennen*, 300 F.Supp. 256, 263 (D. Nev. 1968).

[25] *See* Conference of Western Attorneys General, American Indian Law Deskbook 220-221 (2d ed. 1998).

[26] *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 114-115 (Wyo. 1988).

[27] *Id.*

[28] Conference of Western Attorneys General, American Indian Law Deskbook 194 (2d ed. 1998).

courts move toward the Arizona Supreme Court's "permanent homeland" approach, water marketing might rest on a much stronger foundation.

Tribal Regulation of Water

The Supreme Court has held that Indian tribes, as limited sovereigns, have the right to regulate the conduct of their members,[71] a right which presumably extends to the regulation of members' use of tribal water. States must respect a tribe's right to order its own affairs,[72] and even those states that have assumed criminal and civil jurisdiction over Indian tribes pursuant to Public Law 280 are expressly prohibited from regulating Indian trust water rights.[73]

The real problem with tribal regulation of water arises when tribes attempt to extend their authority to nonmembers. Nonmember water rights arise in two ways: first as mentioned above, an allottee holds rights to a portion of reservation water; second, and even more complicated, homesteaders have rights to reservation water. In the late 1800's and early 1900's some reservations were opened up to the public, and homesteaders moved in to claim portions of reservation land.[74] These homesteaders hold state appropriative water rights,[75] which must be reconciled with the federal reserved water rights of the tribe.

In *Montana v. United States*, the Supreme Court held that a tribe may only regulate the on-reservation activities of *nonmembers* on non-Indian land within the reservation if (1) the nonmembers have entered into consensual relationships (e.g., contracts, leases, etc.) with the tribe; or (2) nonmember conduct on the reservation "threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe."[76] Citing their inherent sovereign powers over tribal land and resources, as well as the second *Montana* exception, tribes have enacted water codes purporting to regulate all who use reservation water, sometimes including nonmembers.

The law governing tribal authority to enact water codes regulating nonmembers is not very clear, engendering a great deal of confusion among tribes and private

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[71] *United States v. Wheeler*, 435 U.S. 313, 322 (1978). The Court went on to clarify that the power to punish tribal offenders is an exercise of retained tribal sovereignty. As such, the power "[E]xists only at the sufferance of Congress and is subject to complete defeasance. But, until Congress acts, the tribes retain their sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Id.* at 323.

[72] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

[73] 25 U.S.C § 1322.

[74] *See* Peter W. Sly, Reserved Water Rights Settlement Manual 138 (1988).

[75] *United States v. Anderson*, 736 F.2d 1358, 1363-1365 (9th Cir. 1984).

[76] *United States v. Montana*, 450 U.S. 544, 565 (1981).

Ongoing Adjudications. Presently, there are at least 19 ongoing adjudications involving at least 52 tribes laying claims to water rights on the Gila River, Virgin River, Walker River, Little Colorado River, Milk River, Missouri River, Big Horn River, Tongue River, Rosebud River, Flathead River, Blackfoot River, Bitterroot River, Marias River, Wind River, Klamath River, Snake River, and Yakima River. Initiated in 1977, the Big Horn adjudication, referred to numerous times in this memorandum, reached the Supreme Court once and is currently before the Wyoming Supreme Court for the fifth time.

Pending Settlements. To date, Congress has approved eighteen Indian water rights settlements.[89] Various tribes have negotiated settlement agreements still awaiting Congressional approval, including the Fort Peck Indian Reservation, the Fort Belknap Indian Reservation, and the Aamodt Pueblo Tribe. The Crow Indian Reservation is in the negotiation process and may have a settlement ready to present to Congress within the next few years.

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[89] The Gila River Indian Community Water Rights Settlement Act (Title II of P.L. 108-451); The Southern Arizona Water Rights Settlement (Tohono O'odham Nation) (Title III of P.L. 108-451); The Nez Perce/Snake River Water Rights Act (P.L. 108-447, Division J, Title X); The Zuni Indian Tribe Water Rights Settlement Act (P.L. 108-34); The Shivwits Band of the Paiute Tribe of Utah Water Rights Settlement Act (P.L. 106-263); The Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement Act (P.L. 106-163); The Yavapai-Prescott Indian Tribe Water Rights Settlement Act (Title I of P.L. 103-434); The San Carlos Apache Water Rights Settlement Act (Title XXXVII of P.L. 102-575); The Jicarilla Apache Tribe Indian Water Rights Settlement Act (P.L. 102-441); The Northern Cheyenne Indian Reserved Water Rights Settlement Act (P.L. 102-374); The Fort McDowell Indian Community Water Rights Settlement Act (P.L. 101-628); The Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act and the Pyramid Lake/Truckee-Carlson Water Rights Settlement Act (Titles I and II, respectively, of P.L. 101-618); The Colorado Ute Indian Water Rights Settlement Act (P.L. 100-585); The San Luis Rey Indian Water Rights Settlement Act (Title I of P.L. 100-675); The Salt River Pima-Maricopa Indian Community Water Rights Settlement Act (P.L. 100-512); The Ak-Chin Indian Water Rights Settlement Act (P.L. 98-530); The Southern Arizona Water Rights Settlement Act (P.L. 97-293).

HB 1025

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS

P.O. BOX 900
BELCOURT, NORTH DAKOTA 58316

(701) 477-0470
FAX: (701) 477-6836

STATEMENT
BY
THOMAS D. DAVIS, WATER RESOURCE DIRECTOR

THE TESTIMONY OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA
BEFORE
THE NATURAL RESOURCE COMMITTEE
NORTH DAKOTA STATE

January 11, 2007

Good morning Chairman Porter and Committee Members:

For the record my name is Thomas Davis, I am the Water Resource Director for the Turtle Mountain Band of Chippewa. On behalf of my Tribal membership and Tribal Council I wish to extend my appreciation to the Committee once again for the opportunity to provide continuing testimony on behalf of my Tribe and comment on the HB 1025, the bill before us. But prior to that, I am instructed to the following:

Over the past three years I have had the responsibility to come before various committees and members of North Dakota's legislative branch of government. In each of my appearances I have come with the good-willed intentions of my people and government.

In every way I have carried the message that our Tribe as a true partner wished litigation to be the last means of a solution to a reserved water right settlement. Today as before I carry the same message of a partnership rather than a jealous ownership. It has always been the understanding of the Turtle Mountain Band the issue of land and water in Rolette County ties us all together; and as such we are one of the same, socially, economically, culturally, and spiritually. It is our primary and most precious inheritance as a people. As a result, we must do all that we can to preserve, protect and manage as neighbors the water and its uses for those that are to follow. Let me address a few concerns.

1. That the Turtle Mountain Band of Chippewa is first and foremost is a senior water user in this state, not junior or secondary users or citizens. One must know in order to obtain that particular status, treaties were made with the Band by whom enormous sacrifice was made by now the most impoverished people within your state. Our people relinquished a 10 million acre tract of territory, fertile and beautiful beyond description, with river bottom richer than the banks of the Nile; by far the best part of North Dakota. From that sacrifice of my people, an era of brilliant promise and productivity was provided to the resident's of your state.
2. That from the unset Tribal direction was to develop with our State a settlement specifically for the Turtle Mountain Tribe, not the Three Affiliated Tribes, not Spirit Lake, not Standing Rock Sioux, nor the Federal Government. We have always been forthright and up-front in maintaining that position. Since our first testimonial it would appear that we who were the initiator of this process have been put in a position of the accommodator. We have observed other parties brought into the mix; we have seen our process stalled to accommodate other parties who appeared to have no set of circumstances or desire to negotiate a settlement to their reserved water rights; we involved ourselves out of cooperation as you brought a Special Assistant Attorney General from the State of Idaho to seek guidance; a state that is adversarial to native people in as much as they expended in excess of 100 million state dollars litigating issues the Federal Courts and Government resolved to benefit of the Nez Perce Tribe.
3. The Tribe has always been concerned at the reluctance of the State to acknowledge in their permit process that the Tribe holds senior reserved water rights and that all others are subordinate to treaty obligations, federal law, and western water policy established pursuant within the parameter's of the Winter's Doctrine. At this time it is once again necessary that explanation is provided to the Committee that the Turtle Mountain Tribe at the time they finalized their first permit, to the present, only allows for a permit process with the State as a cooperate measure, never should the State ever read this as relinquishment of their reserve water rights embodied within their Treaty, and Congressional Agreement protected under Federal Law, and Congressional intent.

Consistent with previous testimony I must reiterate, since our first contact with the first North Dakotans, there has been a relationship of commerce and economic dependence on one another. At times there have been disagreements and the attributes of competition on various issues, but cooperation and common sense has always prevailed to the extent progress was maintained to all Rolette County and Tribal residents.

Predominately the County of Rolette is and has been a group of Native Americans from the Great Chippewa Nation of which we are the Turtle Mountain Band. Our ownership and treaty cessions revert back to an era when there was an absence of statehood in all the territories we shall be concerned with as a Tribe. Presently 70 % of Rolette County is Native American with one of the State's fastest rising populations.

All of our actions are pursuant to the reserved water rights established by the Prairie DuChien Treaty of 1829, the 1863 Treaty between the Red Lake and Pembina Band's, Executive Orders of 1882 & 1884. The Congressional Agreement of 1892 better known as the Ten Cent Treaty or McCumber Agreement only confirmed and validated our existence to the continuation of a lengthy land exchange between the Tribe and the United States Government.

Accordingly, Congressional Acts, Federal Law, Presidential or Secretarial Orders hold that a reservation created by such circumstances maintains a reserved water right. Indian water rights, like other real property interests of Indians, may not be conveyed without Congressional consent. Simply put, the United States holds legal title to our Tribe's water rights as the trustee.

Henceforth, it has been the mission of the Water Right Division to quantify through negotiations a sufficient amount of water and funding to achieve the following for generations to come not only for the benefit of the Tribe, but all residents of Rolette County as well.

1. Natural resource protection.
2. Promotion of conservation measures.
3. Adoption of sound conservation practices.
4. Economic benefits from the development of natural resources.
5. Maintain cultural identity and traditional uses.
6. Protection of Tribal sovereignty and jurisdictional understanding.

In commenting on the present bill, I must respectfully request that the State of North Dakota tailor their Bill to be specific to each individual Tribe. Then and only can the State and Tribe's sit down to allow cooperation and common sense to prevail in true government – to – government development and relationship.

Regarding SECTION 1. sub-part 1., the Tribe finds no argument with the governor or his designee to negotiate with the Tribe, the only concern is the word ***any*** as it gives indication all Tribe's are considered to be one of the same. In the spirit of cooperation, I respectfully request that Turtle Mountain Band of Chippewa be inserted and that same courtesy be extended to each individual Tribe as they decide to come forward in the form of true government-to-government relationship and consultation.

The House Bill 1025 in its present form cannot be supported by the Tribe and I would respectfully request that it be quashed, redrafted, and constructed to give recognition to the special and unique attributes of the Turtle Mountain Band's reserved water rights.

With that said, I would welcome any question and sincerely do my best to give a satisfactory answer. Megwetch from my people.

70063.0100

Sixtieth
Legislative Assembly
Of North Dakota

Introduced by

Second Draft:
Prepared by the legislative Council staff for the
Agriculture and Natural Resources Committee
March 2006

A BILL for an Act to authorized the governor to appoint a commission to negotiate a reserved water right settlement with the Turtle Mountain Band of Chippewa Indians of North Dakota.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Negotiation for reserved water rights.

1. The governor shall appoint a Reserve Water Rights Compact Commission of four (4) members selected from the State of North Dakota and recognize one member selected by the Turtle Mountain Band of Chippewa to negotiate a federally recognized reserved water right in North Dakota. Such negotiations shall include only the State of North Dakota, the Turtle Mountain Band of Chippewa and representatives of the federal government as trustee for the Turtle Mountain Chippewa Tribe to define the scope and attributes of rights to water claimed by the Chippewa Tribe. The Governor's designated commission shall include one member of the Turtle Mountain Band of Chippewa Indians.
2. During negotiations conducted under subsection 1. the governor or governor's designees, in the manner the governor or governor's designees determines appropriate, shall provide notice of the negotiations and shall allow public input.

SECTION 2. Agreement.

1. When the governor or the governor's designee's and representative of Turtle Mountain Band of Chippewa who are claiming a federal reserved water right in North Dakota and the federal government as trustee for the federally recognized Indian tribe have completed an agreement, the agreement, upon approval of the legislative assembly must be signed by the governor on behalf of the State of North Dakota and by authorized representatives of the Turtle Mountain Tribe and the United States Department of the Interior.

SECTION 3. Notice to persons affected by agreement. After signing the agreement, the governor or the governor's designee's shall give written notice to the owners of water right permits, including the holders of conditional permits, who may be affected by the agreement, that the agreement has been signed, the time and manner for filing an exception to the agreement, and the

telephone number or address at which a copy of the agreement may be requested. The notice must be served in the manner allowed for service under the North Dakota Rules of Civil Procedure or by depositing the notice in the United States mail or with a third-party commercial carrier, postage or shipping prepaid, and directed to the owner's or holder's last reasonably ascertainable address.

SECTION 4. Effective date of agreement – Remand.

1. An agreement negotiated under section 1 of this Act is not effective until incorporated in a final order of the state engineer after the state engineer has provided an opportunity for the owners of water rights, including the holders of conditional permits that may be affected by the agreement, to file and exception to the agreement.
2. Once an exception is filed with the state engineer, the proceeding is deemed to be an adjudicative proceeding under chapter 28-32 and the provisions of chapter 28-32 apply to proceedings to sustain or reject exceptions. The state engineer shall appoint an administrative law judge or request the office of administrative hearings to designate an administrative law judge to preside over proceedings.
3. If the administrative law judge does not sustain an exception, the state engineer shall issue a final order incorporating the agreement as submitted without alteration.
4. If the administrative law judge sustains an exception to the agreement, the administrative law judge shall remand the agreement to the governor or the governor's designee for further negotiation according to sections 1 through 5 of this Act, if desired by the parties to the agreement.

SECTION 5. Procedures after remand of agreement.

1. An amended agreement complying with section 2 of this Act, which is subject to the procedures specified by sections 3 and 4 of this Act;
2. A motion to dismiss the proceedings without prejudice; or
3. A motion for a continuance.