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Panel Discussions from "Indian Nations on the Eve of the 21st Century"

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PANEL DISCUSSIONS FROM
“INDIAN NATIONS ON THE EVE OF
THE TWENTY-FIRST CENTURY”

On the afternoon of May 19, 1998, in the University of South Dakota
School of Law Courtroom, two panels assembled to discuss current
issues in Indian land and water rights. The panels were part of the
Fifth Biennial Indian Law Symposium entitled “Indian Nations on
The Eve of The Twenty-First Century: Sovereignty, Self-Government,
Water Rights, Land Rights.” Those panel discussions are reprinted
here, with minor stylistic edits. The first panel, dealing with water
rights, included Mark Van Norman, Susan Williams, Robert
Cournoyer, Tony Iron Shell, Professor John Davidson, and moderator
Robert Gough. The second panel, dealing with land rights, was com-
posed of Larry Long, former U.S. Senator James Abourezk, Profes-
sors John LaVelle and Frank Pommersheim, and was moderated by
Christopher Schneider.

I. CURRENT ISSUES IN INDIAN WATER RIGHTS PANEL

MR. ROBERT GOUGH: It’s my honor to host this coming panel on
water issues, but before we do, we've had a little change in the schedule,
due to climactic events, weather situations, and delayed air flights.

Mr. Mark Van Norman was able to arrive, and we are delighted to be
able to have some time to listen to his observations on some of the current
issues in Indian law. Mark is presently the deputy director of the Office of
Tribal Justice in the Department of Justice, United States Department of
Justice, in Washington, D.C. He’s an enrolled member with the Cheyenne
River Sioux Tribe and was formerly part of the attorney general’s office at
the Cheyenne River Sioux Tribe. So he’s been, I suppose, laterally trans-
ferred from one sovereign government to another, still working in those
areas of justice, particularly as they refer to tribal issues. So, Mark?

MR. MARK VAN NORMAN: Thanks, Bob, and I want to thank Profes-
sor Frank Pommersheim and the Native American Law Students Associa-
tion and the university for inviting me out here, and especially for
squeezing me into the agenda this way. Maybe some of you that fly have
had the experience of getting out on the runway and the pilot says, “We
have to change a few parts before we take off...” I had that experience
yesterday.

Anyway, I work as deputy director in the Office of Tribal Justice, and
we’re a policy-coordination office for the department on Indian issues.
And it’s really been an honor and a privilege to work for the department
under the leadership of Attorney General Janet Reno, because, consistent
with the department’s responsibilities, the attorney general supports, very
strongly, tribal self-government.

I should say my remarks today haven’t been cleared by the depart-
ment, so they don’t necessarily reflect the official views, but I did bring a copy, and there are copies at the front table, of recent testimony by our director, Tom LeClaire, on tribal sovereign immunity.

Well, from my experience in working for — I don’t know — ten or twelve years in Indian law, it’s really a fascinating area of the law, and it’s really an exciting area, and you can have very diverse issues. For example, if you were working on land claims in New York, you might have issues arising under the Treaty of Fort Stanwix of 1785, and then you might have issues arising under the Articles of Confederation, because that treaty was ratified before the Constitution. Or under you might have treaties arising under the supremacy clause, or you might be working in the area of religious freedom and run into the Smith\textsuperscript{1} case and find out that states can outlaw peyote as a sacrament under the First Amendment. And, of course, that was an Indian law case, in a sense, but it was also a First Amendment case. It had reverberations throughout the country, and Congress changed the law and put in place the Religious Freedom Restoration Act to sort of remedy the change in law that they perceived in Smith. There’s been some rollback of that with the recent decision as that applies to states, but it still applies within the federal government.

So these are very important issues, sort of in the whole states’ rights debate that’s going on now and that’s very much reflected in Supreme Court rulings. You can see the Seminole\textsuperscript{2} case under the Indian Gaming Regulatory Act, where they decided that Congress does not have the authority, under the Indian Commerce Clause or the Interstate Commerce Clause, to waive the sovereign immunity of the United States to allow those suits by tribes. That’s very much fitting into the broader framework of the law, while it’s a distinctly Indian law case.

It’s also a very important area of the law. Indian law is important because tribal societies are ancient societies that have rights that preexist the Constitution, and they’re dynamic societies, because those ancient rights that are still existing today are also working within the federal system in our country. The values here really go to the heart of democracy, because tribal self-government is democracy for Indian people. And, you know, when you think about the idea of the consent of the governed in the Declaration of Independence, and it’s also reflected in international law and in the U.N. Convention on Civil and Political Rights, those same ideas of democracy are reflected in the treaties that preserve tribal self-government.

We think it’s important to educate people about tribal governments. Without education, it’s easy for people to think that off-reservation treaty hunting and fishing rights, the rights to spear fish, those are some kind of a

\textsuperscript{1} Employment Div., Oregon Dept. of Human Res. v. Smith, 494 U.S. 872 (1990). All citations were added by the editors; any errors are not those of the speakers.

special break for Indians. Well, with a little education, people can come to understand that actually the Chippewa peoples reserved those rights while ceding a large area for settlement and use of non-Indian people. So that's part of the bargain that they made through those treaties; and the United States has the benefit of having those lands generally and should honor the rights that the tribes reserved.

We try and educate people somewhat, so sometimes in our testimony before Congress we try and reflect these principles. And in this testimony that I have out front, our office and the Department of Justice told the Senate Committee on Indian Affairs that Congress and the Executive Branch acknowledge the importance of working with Indian tribes within a framework of tribal self-government when tribal government, tribal land, or treaty rights are at issue. Within that framework, we're guided by principles that have been in place for over two hundred years. Since the formation of the Union, the United States has recognized tribes as domestic dependent nations that exercise governmental authority over their members and their territories. In numerous treaties and agreements, our nation has guaranteed the right of Indian tribes to self-government and pledged to protect Indian tribes. The administration and the attorney general honor the United States' commitments to Indian tribes.

Yet even as the administration works on this government-to-government relations policy and there are many people in Congress that stand ready to defend tribal rights, there are others who find serious fault with tribal governments and seek to waive tribal sovereign immunity. In this framework, I think the challenge, for tribal leaders, for tribal attorneys, for people that work in the field of Indian law, is to listen to the voices not only of our friends, but also of those who oppose us, and to evaluate the complaints and take the challenges that are being raised to tribal self-government and turn them into something positive so that we can move forward in a positive direction with tribal self-government.

For example, under the Indian Self-Determination and Education Assistance Act, a system is provided where tribes can get insurance, and then if there's a claim against the tribe, the insurance company cannot raise sovereign immunity as a defense. Or in the performance of 638 self-governance contracts, the United States has also extended the protections of the Federal Court Claims Act to tribes for purposes of those — of implementing those contracts. And what that does is, it provides an avenue for claims without waiving tribal sovereign immunity. That might be looked on as a model for how to go forward in the area of tort claims.

In the area of tribal courts, recently many of us, many members of the federal Indian law bar, were disappointed by the outcome in Strate. And tribes are also challenged by election disputes or internal tribal governmental disputes. Recently, the Cherokee Nation's internal dispute has been on

the front page of the New York Times. And, you know, we have to think about concerns that are raised in those areas. But we also have to acknowledge the tremendous positive work that's been going on with tribal courts. Tribal courts are making important strides. They're working hard to ensure due process for all people. A number of tribes in South Dakota have worked on the concept of separation of powers, separating judicial decision-making from legislative functions, and they're employing qualified, sensitive Indian judges to serve their communities. The Department of Justice is working with the Department of the Interior to support tribal courts as institutions of justice so they can take their place with federal and state courts in the nationwide administration of justice.

We have a drug courts program that's intended to take people that have nonviolent drug offenses, bring them into the court, and guide them through treatment rather than locking them up. Tribal courts are taking part in that program, and they have already taken that program and put it in the context of tribal values. So the tribal courts don't call them drug courts programs. They call them wellness court programs.

We've also been trying to work with the federal and state courts on cooperation, and the Eighth Circuit recently formed a task force to promote cooperation, and Judge Piersol from this district is very instrumental in that. In North Dakota, Chief Justice Vande Walle is on the Conference of the Chief Justices of the State Supreme Courts, and he's the chair of their subcommittee on state tribal court cooperation. Those areas offer a lot of promise.

We're also seeking to get more resources out to tribal courts. Next year, the Department of Justice is seeking ten million dollars for tribal courts, and we're going to try and target that in ways that can really help tribal courts institutionally. We're also seeking to boost funding for law enforcement, and we have fifty-two million that's going to be sought for detention, fifty-four million for increased law enforcement personnel, twenty million for children at risk, and ten million for drug testing and intervention. These are important initiatives. With the increasing population in Indian Country, they're very much needed initiatives, and we're working actively with the Interior to support those.

So while we face a lot of challenges, there are also a lot of opportunities, and I think we really have to look at these challenges and see how we can turn them to our benefit. As Black Elk said, "Everything in nature moves in a circle. The sun rises and sets and rises again. The seasons form a circle in their changing and coming back to the beginning." Well, we should all work together on these issues of federal tribal relations as they move forward in their cycles, to ensure that the principle of tribal self-governments is always respected and renewed.

And thank you for giving me this time to speak here today.

MR. ROBERT GOUGH: Thank you, Mark.
As Susan Williams comes down to join us, I would like to introduce the panel and make a few comments as we get into the discussion today on current issues in Indian water rights.

Welcome, Susan.

The panel will start with a discussion on some of these current issues from Susan Williams, who we heard from last night as part of the presentation that examined where tribes have been, looking through the lenses of certain Supreme Court decisions, looking at them in the sense of where the majority stood, where the majority opinions were developing, and where, today, the same language, the language that we saw in those dissents and in the minority opinions, rise today to become the majority opinion of the full court, and not in a way which is very favorable to tribes.

And one of the things that we pointed out is, the last three decisions that have come down against tribes were nine-zero, which leaves us with no dissents to look to to see where any future movement may be coming from on the Court. Not an encouraging prospect in some respects, but in others, perhaps, this is a crystallization of some long-term trends; and perhaps we are already — when things finally get together, something new may be breaking loose somewhere that we just don’t quite see yet. And with this discussion, we’d like to at least look at some of the possibilities into the future.

The topic or the title for this symposium is “Indian Nations on the Eve of the Twenty-First Century.” We’ve seen that the nineteenth century brought us Manifest Destiny with, as far as Indian Country is concerned, the movement and settlement of foreign peoples onto the land to use the resources. The twentieth century has seen industrialization, development by those foreign peoples to become acclimated, to become participants in this natural environment that Indians had previously occupied solely. And as we move into the 21st century, both Indian and non-Indian are faced with the fact that the practices that we’ve come to depend on have been doing a great deal of harm to the natural environment. And scientists around this country have been meeting, looking at the problems with CO2 levels and the ozone, looking at global warming, climate variability, and how our activities have contributed to shifts in weather patterns and shifts in climate that are going to affect us through the next century.

This gives us an opportunity to maybe pause and look at what tribes have contributed and where contributions may still come. As we look into the tribal contribution to federal law, to federal policy, we look at reserved rights. The federal government exercises reserved rights in many spheres. The origins, at least through the court cases, have come with the federal government having to stand up for tribes’ reserved rights in the area of water, the Winters Doctrine water rights. Tribes will be looking and this discussion will focus on how tribes may be able to deal with our water resources in the future.
The possibility for looking beyond the boundaries of our current reservations, working within them with the resources we have, working within them not only as tribes, but with the powers of states under federal law, and working beyond them: we see this in the various regions of the country. We see that in the Great Lakes, the Chippewa tribes have secured federal recognition of their off-reservation treaty rights to hunt, and particularly to fish in lakes off the reservation and have a role in the development and co-management of that habitat. We look to the Northwest. We see that tribal concerns and tribal interests extend beyond the boundaries of reservations. They extend to habitat for the fish, for the salmon, and for the treaty rights that may bring some new questions to what were presumed to be old answers. The idea that we simply build a dam and get electric power and we’re no longer concerned with the environmental consequences. That may have been the protocol for the thirties and the forties and the fifties and the sixties, but today, no new large dams will be built in the United States, and there is serious consideration of decommissioning many dams in order to improve the habitat for fish in response to tribal and international treaty rights.

We are looking in this area here, in the Great Plains particularly, and we have Robert Cournoyer, who is going to speak with regard to the activities of the MniSose Intertribal Water Rights Coalition. He will be examining some of the issues that tribes in the entire basin, working as a coalition, have organized on behalf of their own interests for the water in Missouri River. We will also again focus on the homelands, the tribal reservation bases where the tribal cultures are still the strongest.

Mr. Tony Iron Shell, who is here from the Rosebud Sioux Reservation, he’s involved with the MniWiconi Water Project, bringing drinking water to the Rosebud Reservation, but he was also involved in organizing, helping to establish the MniSose Intertribal Water Rights Coalition and begin that organization of the bands of the reservations within the Missouri River Basin.

And we will also hear from Professor John Davidson, from the faculty here at the University of South Dakota, who has been involved with issues of water rights, both in the academic sense, in promoting natural-resource curriculum here, having responsibility for the Great Plains Natural Resource Journal, and looking after our nation’s interests or the national interest in this region by serving on the Western Water Policy Review Commission, which is a presidential appointment. It’s charged by Congress to review all aspects of federal water-right policy. So he is part of the water resources that we have here in South Dakota in terms of our voice into the national policy arena.

So with those initial remarks, I will ask Susan if she would make her comments for this panel.

MS. SUSAN WILLIAMS: Good afternoon. I’ll speak for about ten
minutes and try to cover — at least skim the mountain tops of the Indian-
reserved doctrine, because it is a very complicated area of federal Indian
law as much as it is a complicated area of law because it concerns water law
and water rights. And in this country, the manner in which states have
regulated the right to use water is in a very fast-changing environment.
New ideas and new concepts for better managing water and water use in
this country are sort of on the cutting edge today. The law in the area is,
unfortunately, much further behind than the sort of current thinking of re-
source managers. So it’s a very complicated area of the law in general.

But Indian tribes, of course, have both federal water rights and many
tribes also have state water rights. Just a little bit of background, I suppose,
on water is important. There’s basically two systems for using water in this
country. One is the riparian system, which is the system of water regula-
tion used sort of east of the Mississippi, just to have a rough dividing line.
And under that law, the right to use water is based on land ownership. If
you have water that touches or is adjacent to your land, then you have the
right to take whatever amount of water you wish. The only limit is some
sort of reasonableness limit based on the concept that you can’t harm your
neighbor. You all have to share in it, but you can take whatever you’re
able to use.

Now, interestingly, California, of all the western states, has a riparian
and prior-appropriation system, which greatly complicates the quantifica-
tion of the Indian reserved rights in California. It’s a sort of unique area of
the law. I won’t spend a whole lot of time on that, because it is extremely
complicated, but suffice it to say that in California, tribes there hold both
riparian rights and federal reserved water rights, and it’s a very complicated
system that we’ve only begun to try to figure out very recently.

But tribes have, under federal law, at least since 1908, a right to use
water under the Western system of law, water law, and that is the prior-
appropriations system: basically, first in time, first in right. In times of
shortage, the oldest or first user of water has their right to use water until
completely satisfied before the next priority user or the later user is entitled
to use water. So the older your priority date for use of water, the more
valuable your water right is; and of course, since many Indian tribes have
been using water since time immemorial, or at least since the creation of
their reservations in the late 1800s, by and large the Indian water rights
have the oldest priority dates in the system. And particularly in the West,
where water is very scarce, Indian tribes’ water rights are, from the tribal
point of view, an extremely valuable resource and, from the non-Indian
point of view, a very threatening right that exists in the Indian tribes to
potentially disrupt Western economies.

Since 1908, the Supreme Court has said that when a reservation is cre-
at, even though the treaty doesn’t mention water, Indians have an im-
plied right to sufficient water to fulfill the purposes of their reservation,
with a priority date as of the creation of the reservation or earlier, if the
tribe can prove that they were using water in certain ways since time imme-
morial, in which case the priority date is a time-immemorial priority date, if
you can imagine that, sort of a back-to-the-beginning-of-time priority date.

But after 1908, the Court, which simply said Indians have this right but
didn't define how you quantify it or how this right could be used under
federal law — there were a series of efforts to, on a case-by-case basis,
quantify an Indian water right, but not a whole lot of case law happened
until 1963, in a case involving the states of Arizona and California, big,
general-stream adjudication. And in that case, there was also an issue of
what rights the Indian tribes along the Colorado River had to use water;
and a special master was convened for the purpose of holding trials on a
range of issues, including that issue of how you define the Indian water
right.

The special master in that case had a very difficult job, and his chal-
lenge was to figure out a water right for the Indian tribes for all time, pres-
ent and future needs, because in water cases, there is a doctrine of finality
that requires all of the claims that could be made or should be made for all
time to be made, or forever those claims are barred.

So the special master in Arizona v. California⁴ had to come up with a
method for quantifying the Indian reserved water right for both present
and future needs, and what he came up with was a right based on the essen-
tial purpose of the reservation. He said the purpose of these reservations
essentially was to encourage agriculture, and because agriculture was the
main purpose of those reservations, he would then define the Indian pres-
ent and future need for water based on the practicably irrigable acres of
that reservation. In other words, all land that had been used for farming or
could in the future be used for farming would generate a water right that
would then be found to have vested in the tribe, to use a legal term, vested
as a property right, since the creation of the reservation.

The special master's report went to the Supreme Court and was
blessed by the Supreme Court, and so the standard for quantifying Indian
reserved water rights, at least for those reservations whose main purpose is
agriculture, was established in that case as the Practically Irrigable Acre-
age standard or PIA standard. That standard held sway, since 1963, in a
number of cases that began to arise throughout the West. Everyone as-
sumed that that was the standard, at least for the agricultural reservations.

But it wasn't until 1978 that a number of cases went to the Supreme
Court over how and where Indian water claims could be brought. What is
the forum? What court has jurisdiction? And in a series of cases that went
to the Supreme Court, the Supreme Court made clear that a federal law
known as the McCarren Amendment, which is at 43 United States Code
Section 666(a) — that that federal law allowed or essentially waived the
United States' sovereign immunity from suit for the purposes of adjudicat-

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ing federal reserved-water-rights claims in state general-stream adjudications.

In the West, at least, the way in which water rights are determined, and who has what water and what priority, are typically determined in a very, very large and complex suit involving all the parties who have a claim to the use of water from a particular water source. They're very large cases and usually involve hundreds and hundreds of parties; but prior to these decisions in the Supreme Court, it was not clear at all whether the Indian reserved water right could be adjudicated in these cases. And since 1978, it was clear that not only was the U.S. immunity waived for purposes of hearing federal claims in these so-called general-stream adjudications in state court, but it also became clear, as a result of these cases in 1978 in the Supreme Court, that Indian reserved water rights also could be quantified or determined in these state general-stream adjudications.

Now, keep in mind the McCarren Amendment is only a waiver of U.S. sovereign immunity from suit. It does not waive the immunity of Indian tribes from suit, so tribes are not required to be brought into these McCarren Amendment general-stream adjudications. But what is also clear is that the United States, as trustee for the tribes, can be brought into these general-stream adjudications, and the tribe's right to a federal reserved water right can be determined with or without the tribe in these general-stream adjudications. So, typically, the question is whether a tribe will intervene in these general-stream adjudications to assert its own interests and its own claims on behalf of the tribe; and it's at least been my experience that it is very wise for Indian tribes to enter — if there is a general-stream adjudication ongoing in which that tribe's rights are being quantified, it is important for the tribe to intervene and assert its own claims, because the United States Justice Department has a view of its trust responsibility in these cases, and that view is not always held by the Indian tribe.

As one example, in the general-stream adjudication in Wyoming known popularly, or not so popularly, as the Big Horn case, the United States asserted a reserved water right on behalf of the tribe for all the tribal lands that were held in trust, but did not assert a water right for tribal or individual lands that were held in fee simple absolute on the reservation. The theory was there's no federal trust responsibility for those lands. So the tribe had to assert federal reserved-water-rights claims for these fee simple absolute lands, and, in fact, won, in that case, a very substantial water award based on the fee-land ownership. So that's an example of why tribes really need to get into these cases.

It wasn't until, again, 1978-79 that it was clear that the Indian reserved-water-rights claims could be brought in state court. Well, interestingly enough, there was a rash of general-stream adjudications after 1978 that were initiated throughout the West, all over the West, in many, many

states, and in these general-stream adjudications were asserted tribal claims and tribal rights to water. These cases kind of percolated on and on and on, very slowly, and the one case that actually sort of arose out of that period was the Shoshone and Arapahoe Tribes' case in Wyoming, the Wind River case known as Big Horn. That case went up to the Wyoming Supreme Court in 1985, on a very comprehensive claim on behalf of the Wind River Tribes to, essentially, much of the flow of the river through the Wind River Reservation. There were many issues involved in that case. A very long opinion was issued by the Wyoming Supreme Court. And in that case, the tribes won the right to use about half a million acre-feet of water per year on their reservation for a variety of purposes, but the right was essentially quantified on the basis of practicably irrigable acreage.

The tribe asserted many other claims: water for municipal purposes, industrial purposes, commercial purposes, in-stream flow purposes, domestic purposes. But the Wyoming Supreme Court awarded a water right only for practicably irrigable acreage and said the domestic right is subsumed in that right, said that there is no commercial right, no municipal right, but there is an industrial right. So they quantified some water based on the industrial purposes. The supreme court said there is no in-stream-flow right on behalf of the tribe because the tribe had failed to prove at trial that the tribe either had a treaty provision that reserved fish as part of the treaty, or the tribe couldn't show and did not show a very substantial dependence on fish for a livelihood. So the tribe was denied an in-stream-flow right.

That case was appealed by the state to the United States Supreme Court and was heard, and a decision issued in 1989.

What's interesting is that when we argued — or I argued — the Big Horn case in the Supreme Court, it was a sort of confusing argument. The state got up and basically turned history on its head and said, basically, the Indians were there second, the non-Indians were there first; and Justice O'Connor was very upset with this and, you know, really sort of tussled a bit with the state's oralist and said, "Now, wait a minute. The Indians were here first, and then the non-Indians came; isn't that right, Counsel?" and really was very much in the state's face on this. So we began to think that we were going to win that case. We thought that was great, because she was one of the swing votes we were really after.

But what was even more interesting was at the very end of my argument. I basically went on and on, had no questions, and then at the very end of the argument, Justice Rehnquist asked me a question, just as my yellow light went on. When you argue in the Supreme Court, you have this nice system of three big old cherry lights right in front of you. One's the green light, says, "Go ahead, keep talking." One's the yellow light, you know, just like a stop light, meaning, "Slow down. You're about ready to

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get cut off here." And then when the red light goes on, you’re supposed to just cut it completely, in deference to the Supreme Court.

So Justice Rehnquist asked me this question, the yellow light goes on, and the question was, “Won’t you acknowledge, Counsel, that the reserved-rights doctrine is, in fact, a judge-made law?” And I knew where he was going, because I had a feeling that the Supreme Court was very interested in altering the PIA standard. I didn’t ever believe that they were going to throw out the standard altogether, but I felt very strongly that the Court might modify how you calculate the practicably irrigable acreage. So when he asked that question, I thought what he’s wanting me to concede is that they have unrestricted ability in the Supreme Court to just change that law: one day it’s the reserved rights, the next day it’s not.

I made the argument that the Court needs to be very cautious, because what it’s interpreting is the Indians’ understanding of the treaty, of their right, and it’s not the Court’s prerogative to make that interpretation without understanding what the Indians understood and applying those understandings in their interpretation. But I kept talking, and the red light came on, and kept talking, and it was very interesting, because he let me talk on about that. It was almost as if he wanted me to air it, and then he was going to just dismiss it. And I thought that was very curious at the time.

And, in fact, even more interesting at the time was — When you make an argument in the Supreme Court, all the oralists are awarded a quill pin, a real quill pen. So after my argument was done and we were, of course, getting shuffled off and the next group of oralists coming up, I had in my hand my quill pen and all my papers from the argument, and as I was heading out the side, making my exit stage right, I ran into the big velvet curtains — I mean, it’s very crowded up there, you know, where all the oralists sit — and pierced my quill pen right into the big red curtain and noticed the end chipped off, and I thought, “Oh-oh. That’s not a good sign either.”

So, it turns out all of that was sort of a foretelling of a very interesting result. The tribes ended up winning that case by a tie vote in the Supreme Court, and the reason we had a tie vote is that Justice O’Connor recused herself at the last minute because she discovered — and I literally mean about the last minute. It was after the oral argument. It was after they’d had a conference, after the oral argument, that she discovered her husband owned some land in Arizona that was part of a general-stream adjudication involving Indian water rights, so she decided that she could not sit in judgment of that case. She recused herself, leaving a tie in the Supreme Court, which meant that the lower court decision was upheld; and that was a decision where the Wind River Tribes won most of the water that they were seeking.

Justice O’Connor had drafted an opinion and was ready to vote and make a majority opinion, and her opinion would have said it’s okay for Indians to have a water right, essentially, for lands that they have used or
activities that they have proven historically that they needed water for, actual activities; but as to the future, the so-called future water right... Remember, Practicably Irrigable Acreage is a method for computing water based on all of the arable lands of the reservation, some of which may not have been irrigated; and, in fact, in the case of the Wind River Tribes, approximately half the award was not used, historically, so you had a very large so-called future water right.

That was the cloud sort of hanging over all of the water uses in the basin, because the non-Indians basically were using the water subject to the tribe’s right to call it when they need it. And here’s this huge water right, 250,000 acre-feet per year of future water, that was always sort of hanging out there and could always be called by the tribe forever, and that’s a pretty scary water right, particularly where you have, throughout the West, a long history of the states permitting non-Indians to use water and, in fact, being encouraged by United States statutes, at the turn of the century, to use water under state law and put the land to use out there; and to find out many, many years later, some of these homesteaders, that the Indians have the prior right and call them out and pretty soon there’s no water for them. That’s a pretty scary thought.

Justice O’Connor, in her opinion, would have said, as to the future water right, she would remand the case and have the future water right calculated based on a showing by the tribes that they would actually use that water, whatever the means. So we were quite happy that she found a conflict and recused herself, because I think we would still be litigating, today, Big Horn I had she not. On the other hand, we’re now into Big Horn VII, so I don’t know where it stops.

Let me talk a little bit about some of these other cases, because they illustrate how long and hard these cases are to fight, and they also illustrate some of the unresolved issues in Indian water law. Again, what we do know is that Indians have an old priority date based on the creation of the reservations, or they have a time-immemorial priority date. That’s pretty much bedrock federal Indian water law. We know that the tribal water right is based on the Practicably Irrigable Acreage standard, at least for now.

What we don’t know is a number of issues, and that’s how we have found ourselves up to Big Horn VII. We’ve litigated some of these issues. Others are ahead of us. One is, what is the scope of use of the reserved water right? Once it’s quantified, based, for example, on practicably irrigable acreage or it’s water based on a commercial purpose or a domestic purpose, once that’s quantified for the tribe, how can the tribe make use of that water right? There’s not a lot of case law at all in this area.

And to make matters worse, Big Horn III complicated that question further in a divided Wyoming Supreme Court decision in which there was a

7. See In re Rights to Use Water in Big Horn River, 899 P.2d 848 (Wyo. 1995).
simple plurality for the result that the tribe could not take their future water right and dedicate it to in-stream flow. The Wind River Tribes had done an economic analysis of the highest and best use of their water and decided the best thing to do is, instead of making a new big agricultural project, they would put the water — dedicate it, by tribal law into in-stream flow — and recreate the fisheries of the reservation that they didn’t get a water right for because they couldn’t prove it. And the Wyoming Supreme Court said, “No, you can’t do that.” But it’s a decision in which you had five different views of why — three different views of why the tribe could do it and two very strong dissenters with two very different views about why the tribe shouldn’t be able to do it.

There really is not a whole lot of precedent. We do have a number of opinions, though; and in fact, the lower courts in Big Horn, which we thought was the law of the case, when we advised the tribe that they could use their future water for in-stream flow. What case law there is basically says that once the Indian water right is quantified, it can be dedicated to any use the tribes deem advisable. The only exception is a water right based on the fisheries or in-stream-flow needs of a tribe. Those water rights, at least in one decision in the Ninth Circuit, cannot be rededicated to another purpose once the in-stream flow is quantified. So scope of use.

Marketing of Indian water: can Indians lease their water to others for their use? Certainly on-reservation there’s some decent case law, but not an overwhelming number of cases. Off-reservation is complicated by the fact that a federal law known as the Nonintercourse Act prevents tribes from alienating any property interests without congressional approval; and there is no congressional statute authorizing tribes to lease their water off the reservations, and so that’s a big area in which we don’t know what the answer is going to be.

The rights of non-Indians who buy Indian land: do they get Indian reserved water rights, or do they have to go into the state and get a state water right? That’s a case we’re litigating in Wyoming, and right now, we’re hot in what we call the Walton trials. The Ninth Circuit has said that if a non-Indian buys a former allotment that was allotted and severed from tribal ownership under the General Allotment Act, the non-Indians get a special right that has a — looks like, sort of like, an Indian water right, but kind of like a state right, too, sort of this strange hybrid water right. It’s a water right with the old Indian priority; it’s used for agricultural purposes like the PIA right; and that water right is, however, subject to a requirement of “use or lose it.” One of the bedrock principles of Indian reserved rights is that tribes don’t have to use the water to retain the right, unlike state law. So the Waltons apparently are subject to that. We don’t know what that water right is. We’re litigating it, and we hope to reach a settle-

8. See Coville Confederated Tribes v. Walton, 752 F.2d 397 (9th Cir. 1985); Coville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981).
ment and not have to take that issue to the Supreme Court. It's a very confusing issue.

There are a number of cases going on under the McCarren Amendment. Just very quickly, the state courts are saying just about anything can be brought in under the McCarren Amendment. There were a lot of arguments tribes had for what was wrong with these state general-stream adjudications so that the tribal right didn't have to get quantified. That is no longer the case.

That's sort of, again, a "skim the mountain tops" look. There are a lot of activities going on in the Department of the Interior to increase the funds made available to tribes to develop these cases, because more and more, people are seeing the value of settling Indian water cases. Even though tribes fear the Supreme Court in a lot of respects on Indian sovereignty and other issues, given their most recent decisions, states also have a real interest in resolving these issues outside of court, because there are so many unresolved issues; and secondly, these general-stream adjudications are enormously expensive.

And I don't want to say this, but I'll leave you with this thought: once these general-stream adjudications are started, do any of them ever, ever end? I have a big question about that. Thank you.

MR. ROBERT GOUGH: Thank you, Susan. As long as the stream adjudication flows and the grass grows, may the rights be with the tribes. I'd like to turn this now over to Mr. Robert Cournoyer, who is the vice president of the Yankton Sioux Tribe and has agreed — Because Mr. Richard Bad Moccasin, who is listed in your program, was not able to make it, he did ask Mr. Cournoyer to come and speak in his stead.

MR. ROBERT COURNOYER: Good afternoon. I'd like to welcome you all to this afternoon's session. I hope I can do the subject some justice. I was asked to step in at the last minute. I felt like a student last night, reading over a bunch of material, as if I was preparing for a test or to speak. Sometimes, when you speak in front of a large crowd, you kind of get butterflies. And that's the way I felt last night, and I didn't sleep well. But hopefully I can do the subject some justice.

I'm representing the MniSose Water Rights Coalition. It consists of twenty-six tribes of the twenty-eight Indian nations located in the Upper Missouri River Basin, with a population of a hundred thousand tribal members. It's located between the headwaters of Montana to the mouth of the Missouri River and Kansas and Missouri.

The coalition has brought together the tribes and the people of these nations so we can protect our water rights. We feel we have water rights which take us back to the time of the beginning of our nations. As you know, there were no boundaries. Our people picked and chose to come and go as they pleased in their homelands, and, with the advent of Indian reservations, they backed us up onto small plots of land, compared to our
original land holdings; and a lot of times it backed us up to the rivers, on lands which were virtually worthless or worthless or not as good as some of the lands which could be put under the plow.

But once they pushed us on those homelands, we stayed there. We've had to make a living, and it has been very tough for a lot of the tribes, being pushed on these reservations and forced to live there. I don't think that there have been too many people that have faced what the indigenous people of this country have faced. We've been backed into a corner, and we're trying to protect what little we have left through the court systems and the current battles that we face in front of the Supreme Court and the halls of Congress. They're after what little we have left, and we can only fight back.

I was reading some of the old treaties and stuff last night, because there was a series of treaties with Indian nations; and one of the things that were granted to — the good word was spoken that — as long as the grass grows and the water flows, that these treaties would be intact. And they have been abrogated many, many times over, and the grass is still getting green, which we're coming on to spring, and the water is still flowing down that Missouri River. They have been broken many times, and what recourse do we have? One time we used to be able to battle back as warriors, but today times are different. There are many different battles that we must face for the survival of our Indian Nations, and that's becoming tougher, because Congress and the Supreme Court are taking what little we have left.

We've got to try to prepare a homeland or prepare a place for our young people, if they want to come back and choose to live on the reservations, and it makes it very tough when everything we try to do seems like it is eroding. We're losing; it's a losing battle every time.

One of the things that is coming up now in Congress, that is probably one of the toughest things that I can see, is sovereign immunity. That was granted to us on a nation-to-nation basis with the United States government, and it's a given to states to have their sovereign immunity, but now there's even an intrusion on that special status that we, as Indian nations, have; our sovereign immunity. And if we lose that, that doesn't leave us anywhere. It pretty much strips us of our authority to carry on as Indian nations. There's going to be some special hearings coming up on that, and one of them is going to be held in Hinckley, Minnesota, on April 9, and I've been reading through the laws, and last year it barely passed Congress, and this year it's back again.

But that isn't the only thing that's coming back. I don't know if anybody knows about the Istook Amendment, which is by Representative Istock of Oklahoma, and which is on the fringe of taxing — It's a bill they're trying to pass into law which would allow the taxation of Indian lands. We
enjoy a special status of having our lands put in trust by the federal government for our protection, and even that isn’t safe anymore.

So I feel that we’re backed into a corner. We’re going to have to battle for what little we have left; and we might even lose that. But we, as Indians, still believe we are strong, we have culture, we have tradition, we are Indian nations. We were granted that special status. And even President Clinton said that when he was running for his candidacy in his last term here. He addressed us as Indian nations, and we still want to hold on to that status.

I lived on a reservation all my life. I could have left, but I chose to stay because I felt I could help my people in some way; and I sat on the school board, and I’m on the council now. But sitting on the council is a lot different than sitting on a school board, because there are many great issues out there that face Indian nations, and the only way we’re going to overcome those is through education. I’m glad that we have a lot of young Indian people and some that have went out and got their education and are battling, but we still need more young people to go out and get their education so we can battle and, hopefully, save what we have left.

For the dominant society, you don’t know what it’s like for us Indian people to battle for everything we’ve ever had. Everybody thinks that we get everything for nothing. That’s not true. We gave up a lot. We gave up millions and millions of acres, and we were backed into a corner. And sometimes the government people say that, “You Indians, you get everything for free.” You know, we gave up a lot. The Yankton Sioux Tribe, at one time we had land holdings that were over fourteen million acres, which encompassed the whole of eastern South Dakota, going up into Minnesota, western Iowa, on down into Nebraska, western Iowa, which ran all the way down to Council Bluffs. We ceded lands in countless treaties. Every time we gave up something, our people didn’t want to go to war anymore, they didn’t want to fight anymore. But the war of words... At times when we promised things. They never happened. And even today we are still promised things, and we don’t see those.

The MniSose is created to champion the water-rights cause for the Upper Missouri Basin tribes, and hopefully they’ll continue to educate and create a dialogue so that we can save what little we have. When they built, with the Pick-Sloan Act, a series of six large earthen dams on the Missouri River — and predominantly those dams were built on Indian reservations — Indian reservations gave up 350,000 acres of prime land from eight tribes; river bottomlands where there were wooded areas and there was homes and there were communities, everything. We gave them up because this federal law, the Pick-Sloan Act, was enacted to save towns and whatnot from flooding, you know, downstream. And it affected us. The people of the downstream states, they reap the benefits through barge traffic and other areas and through recreation and many, many, many resources. But
those were all taken away from us, and we weren't given much in return for
those thousands of acres that were destroyed.

So those are the kinds of things MniSose is pushing for, equal treat-
ment or fair treatment. All we wanted to do, all we ever want to do, is be
treated fairly, and this country has continually taken and taken from us.
We don't have much to take anymore, but we're going to battle till there's
only one of us left, because I feel that we have something that is sacred,
and we still have our cultures, we have our traditions.

There's just so many things out there, and this is a huge, huge subject.
We can go on and on about Indian water rights, and this is only one battle
that we're fighting, for the protection of our water rights. I was reading this
article in Indian Country Today, and it really hits you: the government
trying to make things right by returning or giving moneys. From the taking
of these lands, they destroyed whole river bottoms. There were communi-
ties. All those were given up when they had to move up on the hills along
the rivers from the dams being flooded. Nothing was put forth there. Very
little money was given to rebuild them, and then they're trying to do that
now, trying to make it right twenty, thirty, forty years later, and people
have suffered

So that's what MniSose's all about. WAPA, which is the Western Area
Power Association, reaps benefits of six hundred and some million dollars
worth of sales of electricity off those dams that are located on Indian reser-
vations, and nothing is given in return. But I think that there was a Joint
Travel Advisory Commission which did a study on Indian reservations up
and down and in North Dakota and South Dakota, and there was a set-
aside — they were trying to determine the amount of damage that was
done to these tribes, and you can't really put it in terms of dollars, because
much more was destroyed. There was hunting areas and there were places
where they went and harvested their medicines and whatnot. Now they are
completely under water.

So we can never tell the untold damage that was done, but the govern-
ment is trying to repay us in some way, by setting aside infrastructure dol-
lars. There's an Infrastructure Act and there's the Joint Tribal Advisory
Commission, JTAC, they call it, and JTAC dollars that go to Fort Yates or
Standing Rock, and other tribes get that, and down the line, these tribes
have settled. And the Yankton Sioux Tribe, we're in the process of settling
too, but it's been a long haul. These dams, some of them were built in the
fifties and the late forties, and that's a long time to wait to settle something
on behalf of the Indian people. All we want is to be treated fairly.

I've only barely touched on a lot of the issues that are associated with
water, but it's a huge issue, and like anything in this country. People don't
realize that in the Southwest water is a precious commodity, and those
tribes in the Southwest have fought for their water rights, and it's almost
become like a liquid gold. And up here in our country now we're having to
battle for our water rights too. People never knew at one time how pre-
cious water could be.

We’re going to have to protect our water and keep our water clean, because a lot of us drink out of that river water. That’s where our main sources of water come from because some of the groundwaters and the major aquifers have become contaminated, so they can only look to the rivers for a main source of water. They pump their water hundreds of miles so they can have a fresh, clean source of water. But we’re going to have to watch so that we don’t pollute the rivers, too. There are a lot of polluted rivers in this country, and we can safely say that, hopefully, the Missouri River will stay pure and clean.

I just want to thank you for having the opportunity to speak in front of you today. It was kind of a last-minute deal, but hopefully I came prepared and shed a little light on the subject, because as I said, it is a big subject, and there’s a lot of things happening out there, and we have to protect what we have.

Thank you.

MR. ROBERT GOUGH: Thank you, Robert. I’d like to ask now Mr. Tony Iron Shell of the Rosebud Sioux Tribe MniWiconi Project.

MR. TONY IRON SHELL: Mitakeyapi, chunke washte aunpechisela.

Good afternoon, relatives and friends. To learn the basic understand-
ing of the Lakota perspective in relation to water, land, and associated nat-
ural resources, I’ll do a brief overview of the Lakota spirituality and creation legend. The Creator, we call Iyan, and his spirit is called Nagitunkan. The Creator, in creating our universe, our earth, did it in two parts. The first part, he created Maka, Mother Earth. That happened in the dark. That was the dark creation. And according to our stories, we were growing inside Mother Earth as another type of being before we be-
came man. And the Creator turned himself into four elements. The Maka, which was Mother Earth and all the elements in Mother Earth, that was first creation, first part of creation.

And then, in order for there to be real life and communication, he had to give his powers, which resided in his blood, in his center. So as he started giving his blood to Mother Earth, which to us is the Black Hills, is the heart of the earth — as the blood started going into the Black Hills, some of the powers came out of the blood and made what we call takusk-
kanskan, which is everything that moves, the planets, the sun, the stars. According to our creation, when he breathed, he made the Milky Way, which the Lakota call Wanagitacanku, the Spirit Road. And each star rep-
resents a soul. So the nagi, the spirit of the Creator, became all these stars and the sun. So at that second part of creation, when he made the stars and sun, he made light, and with his breath he made air. So those are two spirits from above. And the spirit of Maka and the water — as the powers
came out of the blood, the blood turned blue and became MniWiconi, the Water of Life.

As man started coming to be inside the Mother Earth, there were three stages that I know of. We were called the Pte Oyate in that first creation; and then we became Wicasa Luta, the red man; and then we became Ikce Wicasa as we got the spirit from above, the two spirits from above. And at that point, when we got those spirits, we also got the five senses. Seven things came: the five senses, and then we became conscious, and we also have a conscience, to know right from wrong. At that level of creation, we call it “mitakuye oyasin.” People interpret that broadly as “we’re all related.” That’s not just talking about people who are related. It’s all of creation that is related, because it comes from the Creator. He turned himself into those things.

And so that’s natural law. Lakota see that as natural law. How you interacted with everything in creation was governed by that natural law; and the Lakota values associated with these resources, the virtue system came with the Lakota’s traditional law. The canunpa, when we received the sacred pipe, the traditional law came to be, and what I’m going to do is focus on the water part of that creation.

When the powers came out of the blood and turned — the blood turned blue and became MniWiconi, it went into the ground, so we have association with the groundwater. The caretaker, the guardians of the groundwater, we call Wiwila Wicasa; our relationship to the water, when you talk about the microorganisms inside the water, we call those MniWatu. We had a balance with those things, and we had a sacred relationship of respect with those things. That’s the natural law. We knew that if we didn’t take care of those things, the things inside the water can make us sick. So we have to pray, and every morning, before you’d take a first drink of water, you gave Mother Earth a drink; and, you know, those are the kind of things that you have to look at when you’re looking at the Lakotas’ perspective of this precious resource.

Water was one of our primary cultural resources, along with the land and the air and the energy, the light, the sun. In 1851, we entered into our first major treaty with the United States, and that set aside a huge territory for the Lakota Nation within our original territories. It’s smaller than the territory that we had ranged, but outside of that ‘51 territory, we enjoyed joint use and joint regulation of other lands, into Colorado and up into Canada, with other tribes. And in 1868, my great-great-grandfather, Chief Iron Shell, was the principle negotiator of the ‘68 treaty from the hostile position. We call that wolakota. It means “peace,” the treaty of peace. That was the primary purpose of that treaty.

But more important to us are the secondary agreements: to change from (I don’t want to call this a change from a buffalo economy to the arts of civilization or agriculture, because I don’t agree with the Winters Doc-
trine, which came out later to explain the reserved water right) our uncivilized and nomadic ways to civilized and pastoral ways and become farmers. Our oral history says that before we became nomadic horsemen, we were all mnikowajo, farmers by the water, so we experienced that life-style or way of life before we became nomadic and following the buffalo culture. The 1868 boundaries where we agreed to change were a smaller reservation within the ‘51 territorial boundaries.

One of the reasons why we can’t agree that we were uncivilized is because we have a complex star knowledge from our history, from creation, from the Big Bang to now, and these constellations, as they formed. We have stories with each of those. As the constellations — those are oyate, communities — matched up with communities of plants within our land, and these plants are medicine plants that we used for healing our people from different illnesses; and this is where we contributed to medicine as practiced today. They still use our medicines, and we’re not given any credit for that. We need to rewrite this history and give proper credit to the Lakota and their contribution to white America.

The Lakota ceded vast territories to the United States in exchange for establishing homeland economies and the provision of health, education, and welfare. My grandfather talked about how this transition was to take seven generations and secure things for us for that interim period of seven generations.

The Lakota on Rosebud were successfully making the change between the 1868 treaty and the 1889 Severalty Act. We were successful in making this change by communal land tenure, but these advances that we were making were ignored, and the communal land tenure was called savage land tenure. In order to civilize us, they said that they would allot individual pieces of land to individual families and heads of household, so they could become individual competitive farmers. Along with this act, the best lands within our new boundaries were deemed surplus before they were allotted, and they were given to non-Indians before all Indians had received their allotments. So right from the beginning they were designing the whole system so that we would fail, and instead of establishing a standard of living that was acceptable for all the Lakota, we ended up in abject poverty. Today we have high unemployment, poor health status, and social dysfunction, and that’s all related to the process of assimilation and the acculturation that took place, breaking down the Lakota society.

In 1944, when they flooded 350,000 acres of valuable Lakota land, part of the Flood Control Act, Senate Document 191, said they would establish projects on the reservation so that we could irrigate lands. On Rosebud we were supposed to have two dams on the Big White and irrigate 442,000 acres of land. And on Pine Ridge, off the same river, they were going to establish some dams so they could irrigate almost 600,000 acres, off the Big White. Before these projects could happen, the Bureau of Reclamation went upstream from us into Whitney, Nebraska, and dammed up the Big
White there and established a non-Indian community on the backs of the Indians again, and here they established stock ponds for their cattle and irrigation projects. These were the things that the tribes were going to do. We wanted to set up these multipurpose dams for generating hydroelectricity and to set up recreation and irrigation, and those things didn’t happen for us. Instead, we ended up in deeper poverty.

The acculturation process also removed the tribes from any concepts of our responsibilities as caretakers. The Lakota purpose from our creation is that we are to be caretakers of Mother Earth and the environment for future generations. But through the acculturation process and the new education, they removed the tribes from any concept of a caretaker responsibility. They weren’t taught the valuation and the different beneficial uses of tribal resources, and what we’re told instead today is that the waters that were reserved for us by our grandfathers are being put to beneficial use by the United States, and their contribution from us for those uses is $1.3 billion annually. We don’t receive any of that money back in any form.

Instead, the non-Indian projects are happening, these irrigation projects, where non-Indians, farmers, are setting aside land and not using it. They get a federal subsidy to just let that land lay; and when they get those subsidies, they raise the electric rates on the Indian reservation. And we pay for those subsidies. So by design, we’re kept in poverty. We pay the highest electric rates, on Rosebud Reservation, in the United States, and we have the fifth poorest county in the United States. We’re unable to pay those rates where we are.

To try to regain some sense of a standard of living that’s going to be acceptable, we’re doing other things. Today we have the MniWiconi Project on the Rosebud Reservation, which is providing free and safe drinking water to people, not just the Lakota, but the non-Indians within our boundaries; and we are all involved in a Little White River Basin water-management study to look at alternative scenarios of land management and water management in an effort to secure a quality of life that’s acceptable. We are also trying to teach our real history and to restore tribal identity and a sense of purpose to our people.

You’ve heard Susan and several other attorneys talk about water rights, but you need to understand how we feel about these rights, what it means to us, not just socially or religiously or spiritually. We also need the economics associated with those waters and the uses of those waters. We have, within our reservations, because of allotment, checkerboard areas, and we have questions of jurisdiction. It’s a real hard time for us as tribal people. I come to these things to try to get people to have a better understanding of our situation and maybe support the tribes in securing our rights, because it would be beneficial to the states around — that are on — these reservations. It’s not going to just benefit the tribal people. It’s going to have regional and national impact that’s going to be positive if, instead
of a fight, it's cooperative agreement or land tenure with our non-Indian neighbors.

Thank you.

MR. ROBERT GOUGH: Thank you, Tony. I'd like to ask, now, John Davidson to take the unenviable position of batting last, wrapping this up, and presenting us with a perspective from his position, looking at the wider area of Western water rights on behalf of the President's Council.

PROFESSOR JOHN DAVIDSON: No. Speaking on behalf of John Davidson, not on behalf of the Western Water Policy Review Commission. I'm in the familiar position, familiar to those of you who are my students, of holding the class over.

I'm going to offer a quick revisionist approach to the way we think about the Missouri River, and so I'm talking about the Missouri, where I think there is an opportunity for great recourse, a great opportunity for tribes, states, and other users to make some advancement. The Missouri is a very unique river in this context, because it presents us with what what Dan Tarlock calls the paradox of conflict without scarcity. That is, there's a paradox of a conflict over absolute abundance rather than scarcity. Much of the legal precedent relating to Indian water rights in the West is only moderately relevant to the Missouri. Not that I would ever yield the great advances in law made by those at the table and others. Rather, the Missouri requires, I think, in my opinion, that we develop new and original approaches.

With the Missouri, what we call the law of the river just doesn't work. It has been tried, and it not only doesn't work, we have learned that it does not apply. Now, what do I mean when I use this phrase "the law of the river"? To those at this table and others familiar with Western water conflicts, the phrase is familiar shorthand for the package of legal principles developed during the process of allocating interstate rivers in the arid western United States. What we call the law of the river emerged from this century-long conflict over allocation of the Colorado River. Through interstate compacts, congressional legislation, and litigation before the Supreme Court, the Colorado River has been carved up among basins, tribes, states, and the major user constituencies, including such things as hydropower, water supply, and, to a very minor extent, the environment. These legal principles which emerged from the struggle over the Colorado River provide the model for the allocation of all western rivers. But this law of the river assumes scarcity and assumes also that a majority of the desired water uses are consumptive uses, requiring some sort of diversion or removal of the water from the watercourse.

The State of South Dakota, in the seventies and the early eighties, attempted to force the law of the river onto the Missouri. Some of you may recall that long string of failed efforts. The state spent scandalous sums of money in this attempt. Some of you will recall the proposed ETSI water
pipeline, the so-called rippling-water general adjudication, the radical revision of state water statutes, and the repeated attempts to initiate litigation before the Supreme Court of the United States. Every stage in that effort led to failure. Every stage in that effort was an attempt to force the “law of the river” principles on to the Missouri. The failure was costly not only in terms of dollars — dollars wasted — but also in terms of the ill will created, particularly in regard to the tribes in the Sioux Nation along the Missouri.

The “law of the river,” the so-called allocation model, is simply an inappropriate model, in my opinion, for the Missouri River. So what model would be appropriate? In general, I think we can say that states and tribes cooperate to share waters when the financial stakes are high and the costs of noncooperation are equally high, or when the financial stakes are low but the political benefits of cooperation are high. The Colorado River, and to some extent the Wind River, provide examples of the first principle. The 1985 Great Lakes Charter, which requires the prior consent of all Great Lakes governors before a trans-basin diversion can be approved, I think provides an illustration of the second principle; but neither one of those principles applies to the Missouri, because the lower basin states perceive that there are no costs for noncooperation. So for the Missouri, I think we have to develop a new model.

I submit that the model that will work for the Missouri must be based upon a recognition that the primary use of the river will always be nonconsumptive and that what must be shared is a managed-flow resource, that what we share is not the quantities of the water, but the flow. This requires, in my opinion, that we develop a new vision for the Missouri. The “law of the river” model, the allocation model, assumes that the river is simply a commodity to be used to the maximum extent possible. It remains the dominant vision for rivers, westwide and worldwide. The defects of the model resonate from the very words “allocation” and “quantification.”

A new vision for the river requires that we adopt a new premise. That premise is that we integrate human use of the river system with the maintenance of its natural environmental sustainability on a landscape scale. This newer vision seeks to identify a river’s natural flow pattern and the natural function sustained by that flow over time. These functions include both the maintenance of natural systems, such as wetlands, and human economies.

Can we adopt such a new vision for the Missouri? Yes, I think so. And, in fact, the critical time is right now. As many of you know, the Corps of Engineers, which manages the great dams and reservoirs on the Missouri, is in the process of reevaluating its rules of flow management. The so-called master manual dictates how flows will be managed. The corps has already indicated its preference alternative, and supplemental revisions in that analysis will be announced later this spring.

Now, while there are some laudable features in the corps’s revisions, there is much to regret, because it does too little in the way of reestablish-
The natural hydrograph is capable of supporting both natural systems and our human economies, including all those desired by the Sioux Nation and other tribes in Montana and the Dakotas.

Where is the problem? In fact, there's plenty of water to support all proposed uses if minor changes are made in the corps's management system. The corps is reluctant to make those changes. Consider: the river provides significant economic benefits for water supply, hydropower, flood control, wildlife, recreation. Only one river benefit is trivial. Commercial shipping provides less than one percent of the economic benefits produced by the river. Yet the primary impetus for which the river is managed is what? Commercial shipping. Commercial shipping is only in the lower river, and in the lower river, channelization has destroyed nearly all placid and beautiful places. Despite that, even in the lower river, the economic benefits from recreation exceed those from commercial shipping.

The point is that every year, the vast part of reservoir releases are not to control floods, are not to generate hydropower, are not to provide for human uses and cultural uses. They're not to protect habitat, nor are they to respond to uses desired by tribes and states. Instead, it is to float a minuscule number of small boats below Sioux City. For example, some of you will remember the enormous drawdown of the Oahe Reservoir during the early nineties. The corps says it was due to drought, but that was a man-made drought. There was plenty of water to survive that dry period, but the waters were released downstream in enormous quantities to float a few small boats. So the water-flow regime that is desired by all the parties along the river can be restored, except for that one obstacle, commercial shipping.

The corps channelized the river because of its prediction that shipping would reach twelve to twenty million tons. Instead, shipping peaked at a little more than three million tons in 1977 and has declined steadily for twenty years to a recent average of 1.5 million tons. Through most of its history, the Missouri has carried more rock to maintain the channel than it has carried cargo.

Okay. The result that would make all other uses on the river possible is to eliminate Missouri River shipping. That would free up the Missouri River flows for all other water uses, including all of those desired by the tribes and states in the basin. It is a once-in-a-lifetime opportunity, and it's now.

Where is Mark Van Norman?

Much given to the question of the trust responsibility of the United States, a key issue is how to redefine the trust responsibility of the United States at this moment of critical decision-making about the future of the Missouri. We talk about the trust responsibility in the context of the law of the river, of litigation leading to quantification of specific water rights, but
what is the nature of that trust responsibility? What is the duty of Mark Van Norman’s office when the corps is about to make a decision which will have profound and enduring consequences for everyone in the upper basin? We have not heard — those of us who have been involved in this issue have certainly not heard from them.

And there are many other issues unresolved regarding this decision, because we are dealing with an entirely new model. Lawyers love to use existing models, but the existing model doesn’t apply to this fact situation, and we need to revise our thinking. There is a loose group, organization, that is the Missouri River Coalition that has formed around revision of the river’s flow regime, made up of user groups, conservation, wildlife, environmental groups, many tribes, representing the full length of the river. I am convinced that control of flows will be the model for the Missouri, and the tribes and states need to capture the moment, to capture and control the flows in the river just as they fought to capture, control, and allocation of the Colorado, the Wind River, Pyramid Lake, and others.

Thank you.

MR. ROBERT GOUGH: Perhaps we have a time for just a couple questions, or we can get back to approaching what was our schedule. Are there any questions?

Yes, sir?

MR. CALVIN IRON SHELL: I have a comment. My name is Iron Shell, the name of that man on the end over there, Sicangu Lakota. A comment on spirituality and practicality: I wanted to commend Susan Williams on everything that she had shared with us here today, and my thoughts have to do with the old people, which is where all of our knowledge came from originally.

Our value system comes from these people. One of the things that I was reminded of when I came back into this method of believing was by a mentor, an old man that had a special relationship with water. He would tell you all of the time that water was alive, that it was a spirit on itself, exists in that way, and is alive. When you are sharing a meal near the water, you want to always feed the water. One of my daughters, it was her job always to feed the water with prayer and food before we ate.

This, again, had to do with the knowledge that the water was alive, and also to keep the water from becoming angry and feeding itself. We use the example of the floods in Rapid City as the water being angry. At one time at home we lost seven children in one drowning at a time when we felt, again, the water was angry. There is that type of mentality that we need to apply to water, accepting the fact that it is alive, that in the Lakota way, we deal with water in that respect. At the same time, there is a practicality that we have to apply ourselves to. The old people that I referred to would at this time be in council, determining what it is that is a threat to our society in a given way.
A threat to our ways of use of the water is one of the largest threats that we have in existence. They would have a warrior society of consequence out in front to deal with this situation. This red road that we talk about walking, it’s not one safe little road that you walk on and nothing happens. There’s a lot of conflict on that road. We walk it, and sometimes we stumble, and we pick ourselves up and go on. This warrior society that needs to be in this conflict is not people who have weapons. We’re still in a fight, but the old people would tell you to use your intelligence in reference to this and to get these people that have knowledge and the education in these areas to be our warriors, to fight our fight for us, and for us to join them in this fight.

I liked listening to these people, my nephew and Susan Williams and the rest of these people here, when they talk about these things, because they project the fact that we are still in existence in this fight, that we are here, and that we need to continue to think that we are always going to be here. But we always have to deal with these other powers. We talk about the politicians. We talk about the court system. They’re all one. We talk about the religious people. They all at one time formed to seek our eradication, and that’s not too far in the past and probably not that far gone.

So some of the approaches that they have to many areas now are being threatened, then, because once in a while it looks like we might prosper. Somebody makes a couple dollars off a casino, and those people in Washington are crazy, wanting the money. So we need to conceal a lot of the successes that we might have in these areas until we have enough to fight off anything that comes our way.

But the water always must be something that we have the greatest reverence and respect for, and the knowledge that other people would want this water for reasons other than that, and that we’ll do almost anything, legally or illegally, to gain the right to these waters that we have. We have privileges attached to this that we need to look at and protect, and gain more knowledge of. I spend the better part of my time in education as an administrator, working in athletics and all of these things, and I’m very happy to see a lot of young people in here to gain this type of knowledge, and hope they can use it and go back to these people that have this knowledge and to insist that they share it.

This man here, I’ve known for a period of time from home [indicating Professor Pommersheim]. He hasn’t looked at me yet, but he’s there, and he knows that I’ll speak a piece every now and again. But this is a practical thing that I’m talking about, again, when I talk about spirituality and practicality. And both exist in this discussion we’re having about this most sacred event, our water; and we need to keep that in mind when we discuss these things, and to keep our minds and our spirits there. And it’s an easy thing if we continue to learn and if we continue to live these ways, and it seems as if enough of you are interested just to sit here and listen.
I want to thank the panel for being here, my nephew — he’s really my son now, and Susan Williams. Again, I’m impressed with what she said. I spent some time with the Arapahoe and Cheyenne and all those people at a time when I was still boxing and moving around and that type of thing, so I know what they were experiencing; and now I again experience it. And we all need to share this. This is a good thing, to come to here. I’m obviously not from Vermillion, but when you hear about these things, we need to gather at a given time and share our thoughts. And I thank you for allowing me to share mine at this time.

MR. ROBERT GOUGH: Thank you, Mr. Iron Shell.

Yes?

AUDIENCE MEMBER: Professor Davidson, can you name some of the tribes who were involved with the Missouri Coalition? Or if you can’t, where can we find this out?

PROFESSOR JOHN DAVIDSON: I think mainly the MniSose Tribal Council lawyer represents — has been intimately involved with — these tribes.

AUDIENCE MEMBER: Okay. Thanks.

MR. ROBERT COURNOYER: Does that answer your question?

AUDIENCE MEMBER: No.

MR. ROBERT COURNOYER: Well, that would be the Crows, all the tribes in the Upper Missouri River Basin that live up above the river. And if you had a map of all the tribes that were up against the river, then you would know. But all the tribes in South Dakota: the Oglala, the Rosebud, the Cheyenne River, Standing Rock, Yankton, Crow Creek, Lower Brule.

AUDIENCE MEMBER: What is the character of the involvement? The reason I ask is because tribal council members on two different tribes were trying to find out about this — whether they should get involved or not. So maybe they are already involved and they don’t know, and that says something about the process.

PROFESSOR JOHN DAVIDSON: Yeah. The question is a very good one. It’s, “What’s the nature of the process right now?” And several years ago, the corps undertook this review of the master manual, an enormous undertaking. A year and a half, two years ago, it released a draft proposal, accompanied by a draft environmental impact statement. Since that time, there have been comments provided to the corps, that is, the environmental impact statement has been widely publicized and has been available to everyone to comment upon. Those comments have been received by the corps; at least, the mail was delivered.

And this spring, in the next month or two, there will be released a revised draft environmental impact statement, and then, somewhere down the line, a final proposal. They have already stated their preferred alternative. Clearly, the revised environmental impact statement that will come
out in a few months will not vary that preferred alternative. We've been working closely with the people who drafted it, and they're not going to change it. And so if it's going to be changed, if the corps is going to change its preferred alternative, it will be because of citizen involvement and insistence that that change occur. The corps is not going to do it. No reason why they should. It ought to come from the people, from the states, from you all. And so now is the time for involvement.

MR. ROBERT GOUGH: Thank you. We'll take a five-minute break and be back for the next session. Thank you very much.

II. CURRENT ISSUES IN INDIAN LAND RIGHTS

MR. CHRISTOPHER SCHNEIDER: Ladies and gentlemen, this is the panel on Indian Land Rights. I'm Christopher Schneider, and I have the great honor and privilege to be the moderator on this distinguished panel.

The late Justice Hugo Black once said, "Great nations, like great men, should keep their words." This truism has never been fully realized in federal Indian law, and perhaps it's most conspicuously clear in the area of Indian land rights. From the moment of the first contact between European Americans and Native Americans, land has been the center of controversy. This is still the case, but Indian land has always meant something more. Indian land envelopes Indian sovereignty, Indian sacred sites, and ultimately, Indian cultural identity. Today's distinguished panel seeks to address some of the current issues concerning Indian land rights.

On my right, at the end, is Mr. Larry Long. In 1969, Mr. Long graduated from South Dakota State University, where he majored in political science. In 1972, Mr. Long received his juris doctorate from the University of South Dakota. From 1972 until 1990, he was in private practice in Martin, South Dakota. During that period of time, he was elected Bennett County State's Attorney. He served on the board of directors of Dakota Plains Legal Services for 16 years. He represented the Rosebud Sioux Tribe election board and credit committee for several years. Mr. Long practiced in the courts of the Rosebud, Oglala, Cheyenne River, and Sisseton-Wahpeton Sioux Tribes. Since January 1st, 1991, Mr. Long has been the chief deputy attorney general for the State of South Dakota. In this position, he has been involved in litigation involving Indian law, school funding, video lottery, and high-profile criminal cases.

On my left is Senator James Abourezk. Senator Abourezk was born on the Rosebud Sioux Reservation, youngest son of Lebanese immigrant parents. Following his graduation from high school, Senator Abourezk joined the Navy. He later earned his bachelor of science degree in civil engineering at South Dakota School of Mines and Technology. After working for the state of South Dakota — or state of California and Kiewit & Sons Construction Company, he entered law school at the University of
South Dakota. Abourezk began practicing law in Rapid City, South Dakota. In 1970, he ran for South Dakota’s second congressional seat and won. After serving one term, he won a seat in the United States Senate.

While in the United States House of Representatives, Abourezk was a member of the Interior and Judiciary Committees. In the Senate, he served on the Energy Committee, the Budget Committee, the Space and Aeronautics Committees, and the Judiciary Committee. He created and chaired the American Indian Policy Review Commission, which was a two-year study on American Indian policy which resulted in recommendations for changes in those policies. The creation of a full Senate Indian Affairs Committee was one of the results of the commission, a committee which Abourezk chaired until he left the Senate. He authored many important bills while in office, among them the Indian Child Welfare Act, the Indian Religious Freedom Act, and the Indian Self-Determination Act. He was an adjunct professor of international politics at American University in Washington, D.C., and lectures at universities and other public organizations, primarily on Congress, the Middle East, and on American Indian policy. Abourezk is currently practicing law in Sioux Falls, South Dakota, under the firm name Abourezk Law Office.

To my right is Professor John LaVelle. He’s a member of the Santee Sioux Tribe of Nebraska. He was born and raised in Sioux City, Iowa. He’s an assistant professor of law at the University of South Dakota School of Law. He teaches torts, administrative law, Indian jurisdiction. He’s a member of the South Dakota bar. He received his bachelor of arts degree from Harvard University, received his juris doctor degree from Boalt School of Law at the University of California at Berkeley, and will be speaking on the issues related to his research in federal Indian law and the Eleventh Amendment of the United States Constitution.

Mr. Long has got to leave fairly quickly, so he’s going to be making his presentation first, and then we’ll open it for questions briefly.

Mr. Long.

MR. LARRY LONG: I was interested in the moderator’s opening comments about great nations keeping their word. His obvious reference is to American Indian land claims. Let me see if I can give you a few minutes on what I perceive to be a legitimate other side of the story. As most of you know, there has been a history of federal Indian policy in this nation, and I will briefly go through it.

When there were only thirteen states in this country, Indian Country, as you know, was everything west of the thirteen original states, and from 1790, when the federal government was given the plenary power over Indian affairs, basic federal Indian policy was to simply move the Indians west, out of civilization; and so the United States was the United States, and Indian Country was simply “west of there.”

That policy was pursued for nearly a hundred years, until 1887, when,
frankly, "west of there" didn't exist anymore, and the entire country was populated, and simply moving them west didn't work. And then, of course, the assimilation policy, the focus of which was the Dawes Act or the Allotment Act, came into vogue in about 1887, and reservations were, to a great extent, allotted, except in the southwestern part of the country. American Indians, particularly in South Dakota were a classic example of how assimilation policy worked: American Indians on reservations in South Dakota received allotments. The surplus lands were purchased by the government, and those non-Indian lands were opened for homesteading. My grandmother came out from White Lake, South Dakota, and my grandfather came from Leon, Iowa, in 1912, and homesteaded on surplus land in Bennett County, South Dakota, which was, prior to that time, part of the Pine Ridge Indian Reservation, and that's the country that I grew up in. And so my grandparents were beneficiaries, if you will, of the homesteading policy that was in existence at the time.

Now, of course, in 1934 the federal government took a different view and again changed the overall federal policy towards American Indians, with the adoption of the Indian Reorganization Act. Then, in the early fifties, there was the termination policy, and finally, we are in the realm of what I think everybody would basically call self-determination.

Now, I submit to you that great nations ought to keep their word, and had they done so, or at least, had they picked a horse and ridden it — in other words, stayed with one policy — we might, perhaps, be sitting here today, but I suspect that the topics of discussion would be substantially different than they are. And I will submit, for the purposes of this discussion, that promises have been made by the federal government to the American Indians about land for many years, and most of those promises are embodied in treaties.

However, I think there's another group of Americans that promises were made to about these areas, and those are the homesteaders, the non-Indian homesteaders who were invited into the surplus-land areas, which are now in the counties of Bennett and Todd and Millette and Gregory and Tripp, and in the northeast in Roberts, and the counties up there, Grant and Deuel. Promises were made to my grandmother and my grandfather that this land that they were moving into was not going to be Indian Country and was going to be part of the state of South Dakota.

I submit that the federal government ought to keep their word to the American Indians, but they ought to keep their word to the homesteaders, as well, and their descendants. To the extent that they have misrepresented and not kept their word to the American Indians, they have also misrepresented and not kept their word to the American homesteaders. This, of course, creates much of the litigation that we have today, because, to a great extent, the problem that is created is that the tribes see themselves as sovereign, they see themselves as having an historic right to that property, which is understandable, but the non-Indians who live there also see the
promises that were made to them. They believe that they owe their allegiance to the state of South Dakota and that they ought not be governed by entities like the tribe, which is a government within which they cannot participate.

This conflict goes to the very heart of the way we govern ourselves, and it goes to the very heart of why these conflicts exist. You can look at all the litigation that goes on between the state and the tribes in not only South Dakota, but in most states where there is allotment policy which has been implemented, and the irreconcilable problem is how to deal with that reality.

Now, having said that, the Yankton Sioux Tribe case, in which my office was on one side and Senator Abourezk was on the other, is a good example of how those two conflicts meet in the courtroom. And, of course, the case itself revolves around the definition of Indian Country, which is contained in 18 United States Code section 1151, which is the federal-government definition of Indian Country and originally was enacted for criminal jurisdiction purposes, but the Supreme Court has adopted that definition, to a great extent, for civil and regulatory jurisdiction purposes, particularly tax.

Now, the narrow issue that was before the Court was whether or not the boundaries of the Yankton Sioux Reservation of 1858 had been extinguished. Our position was they had been disestablished or wiped out. The Supreme Court ultimately said they'd been diminished to a point which I submit is unknown, and I suspect Senator Abourezk will have a different view of that. But the question was: when the substantial amount of surplus land was purchased by the federal government from the tribe and opened for non-Indian homesteading, did that act of purchase have the effect of rearranging, disestablishing, or diminishing the boundaries of the reservation? That becomes a crucially important issue, because one of the definitions of Indian Country in 18 U.S.C. 1151 is that Indian Country consists of all land within the boundaries of a reservation, without regard to its ownership status. And this was the basis of the tribe's claim that they had a regulatory right, because this was not a criminal case. This was a civil case. The claim was that the tribe had a regulatory right relative to a solid-waste landfill that was being built by a local group within the ceded area, within the old reservation boundaries, but on a land which had been purchased by the federal government, returned to the public domain, and opened for homestead.

The Supreme Court indicated, in a unanimous decision, that the boundaries had been diminished, rather than the position that the state argued, which was that the boundaries had been disestablished. The distinction, usually, in boundary cases, is that there is a remaining identifiable tract or portion of the reservation which has been reserved or, obviously,

not open. That was not the case here in the treaty. Professor Pommer- 
sheim and I were visiting about this before the meeting commenced. The 
state argued that the boundaries were disestablished, and I don't know that 
the tribe took a particularly different position than that, other than to say 
that they had not been.

The Supreme Court went off in a third direction, which was that the 
boundaries had been diminished. Consequently, where that leaves us, I 
think, is an interesting and unanswered question. And with that, I will turn 
it over to the Senator.

MR. JAMES ABOUREZK: Thank you. I have permission to relate 
one anecdote, one story about when I used to be a hostage negotiator. I 
was involved, when I was in the U.S. Senate, in a number of different hos-
tage negotiations. All of them were failures, including the one I'm going to 
tell you about, and this happened in 1973. I had just been elected to the 
U.S. Senate, had been sworn in, and I had just been appointed as chairman 
of the Indian Affairs Subcommittee of the Interior Committee in the Sen-
ate, and it was February 28.

One of my staff members told me that Wounded Knee had just been 
taken over by the American Indian Movement, so I got a Pine Ridge 
phone book and the first number I found in Wounded Knee was a house, 
and I rang the number, and Russ Means answered the phone. It happened 
to be the house that they took over as their headquarters, fortuitously. 
And I said, "Tell me what's going on over there, Russ."

And he said, "Well, we've taken over this village, and we've got nine 
hostages, and we're not going to release them unless you, Senator Ken-
dey, Senator Fulbright, and Henry Kissinger come out and negotiate for 
their release."

I said, "Well, I guess you know I'll be out there, because it's my state 
and I'm chairman of the Indian Committee and so on, so let me see what 
the other fellows have to say."

I called Kennedy. He had no interest in going. He said, "I'll send a 
staff guy." And I called Fulbright, and he said he would send a staff guy. I 
didn't call Kissinger, because if you recall, two months before, he and 
Nixon had ordered the carpet bombing of Hanoi, to try to bring them to 
the negotiating table, in his words, and I didn't want to take any chances 
with the Pine Ridge Reservation.

So I called Russ back and I said, "Well, here's the situation." I told 
him who was coming and who wasn't, and he said, "What about John Ehr-
lichman, then, if Kissinger won't come?" I said, "You know, I've never 
done anything to you that you would have to treat me that way," I said, "I 
don't want to ride in an airplane with John Ehrlichman for three hours 
coming out there." So I talked George McGovern into going with me. I 
said, "George, you've got to run for reelection. You've just lost the presi-
dency, and you probably better to come out and get reacquainted with South Dakota." So he agreed to come.

So we flew out in an Air Force jet, a small one, and the deal was that the minute we landed at Pine Ridge, Russ said he would release the hostages. We flew to Ellsworth Air Force Base. They took us in a helicopter down to the Pine Ridge airport. We were met there by the FBI agent in charge, Joe Trembach, and I said, "Well, here's what they promised to do."

And he said, "Well, let me go see if I can find out if they'll release these hostages."

So McGovern and I went into town, and the two staff guys, Tom Sussman and Carl Marcy, we went into Pine Ridge and hung out at the Crazy Horse Cafe for four hours, and finally the FBI guy came in, and he said, "They won't talk to me. I can't raise anybody." By then, you know, everybody had guns, and they had set up checkpoints and roadblocks, and guns were aimed at each other. He couldn't get any further than his own checkpoint at the top of the hill going north into Wounded Knee.

I said, "Well, listen, George McGovern, let's you and I go down there. I think we can probably talk to somebody." So we got into a car driven by John Terronez, who was the CRS representative for the Justice Department, the guy sort of mediating between two sides, or trying to. And we got a big tree branch and tied a white towel on the end of it and stuck it out the window, and we were driving down past — we went past the FBI and U.S. Marshal checkpoint, and then we got to the first AIM checkpoint, and then we were in no-man's land. Or maybe I've got that wrong in order. But in any event, there were Indian guys with guns aimed right at our heads. We were driving very slowly, and they followed us just like this, and you could virtually see the hole in the gun, the barrel, the end of the barrel, and we were both very scared.

We got down into Wounded Knee, and Russ Means met us there, he and Dennis Banks. And I said, "Well, Russ, here we are. Are you going to release these hostages?"

He said, "Sure. They're right over here."

So I walked over to a group of people standing there, and I said, "We're here to rescue you. You're saved now. You're rescued. You're free to go."

They said, "What do you mean? We live here. We don't want to go anywhere."

So that was my history as a hostage negotiator. I guess the lesson is that if you get taken hostage, you know, call Ollie North.

Well, American Indian history didn't begin last year, nor did it begin twenty years ago, but for the purposes of this symposium, I think it's best to avoid going back too far in order to make a point. Let me begin with the days in the late sixties and the early seventies when the American Indian Movement was kicking up its heels around the country. AIM was its name,
and confrontation was its game. The AIM leadership settled on a strategy of political confrontation as a means of calling attention to the not-so-benign neglect of American Indians by the U.S. government. Conditions were both sad and sorry for Indian people on the reservations and in the cities where Indians were migrating. No one in the government was listening or even worried about it, so AIM began a series of actions, many of them centered in South Dakota, as well as in Washington, D.C.

America was caught between anger at the uppity Indians and guilt at the exposition of the condition of Indians around the country. The principal call from whites back then was that Indians should obey the law and go into the courts to redress their grievances, and forget about all this political confrontation and the sort of specialized terrorism that they were involved in. Do anything, they said, but don’t embarrass the white establishment.

Of course, the leadership of AIM had, for the most part, been imprisoned, so the Indians had little choice but to go to court. They were imprisoned following Wounded Knee.

When the Native American Rights Fund won the Maine land case in which the Penobscot Tribe was awarded the riches of a great deal of land in Maine, as well as money, those who had been advocating going to court began to chew the insides of their cheeks. They never expected the Indians would win in court and that they would keep winning, using, as a basis, the 1794 Nonintercourse Act. Those were the days when, the old Supreme Court hands have told me, if an Indian case came to the Supreme Court, the Indians would win, and Justice Thurgood Marshall would write the opinion.

Tragically, those days are gone, and no one knows when they might return, if ever. Justice Marshall is gone, Justice Blackmun is gone, Justice Powell is gone, and in their places are Justices Scalia, O’Connor, Clarence Thomas, and others on the Court who wish that the Indians would just go away. And, of course, their decisions in the past several years are reflecting that attitude.

Now, the tribe I represent, the Yankton Sioux Tribe, just about two months ago narrowly escaped a brush with jurisdictional death at the hands of the Court. Although, based on the Court’s precedents and the standards by which the Court presumably measures surplus-land cases, the Yankton Tribe should have come away with the entire reservation that was laid out for it in the 1858 treaty and the way the Eighth Circuit laid it out for them — but the Court worked its way to granting thirty-seven percent of the reservation’s jurisdiction to the state of South Dakota.

And considering how this Court has been deciding Indian cases, I consider us extremely lucky to have come away with the sixty-three percent of the jurisdiction that we did get in this opinion. The Court decided the Venetie¹ case a little later than it did ours, and it stripped away all of

Venetie’s jurisdiction. There will be, I predict, no immediate end to the anti-Indian nature of this Supreme Court unless and until some justices are appointed who do not consider Indians either invisible or expendable.

I might just add that my son Charlie is now writing an article saying that there ought to be a litmus test for Supreme Court appointees, just as there is on abortion. They should now be asked, “How do you stand on Indian sovereignty and Indian jurisdiction?” Because that’s been lost in the shuffle.

I suspect that Indian tribes are going to have to become a lot more active politically if they’re to hold on to anything in this day and age. Where they used to have to depend on the courts, they will now have to plead openly with senators and representatives to protect their land rights. It’s nothing that is either new or impossible, but it will take a lot more effort than the tribes have given to politics up till now. It will require learning the rules of the white man’s politics; and from what I’ve seen of Indian politics, they should be very good at it. In fact, I remember when an old-time director of the Indian Health Service told me, back in the sixties that Indian politics is good training ground for running for president of the United States.

But what is left for the tribes? That’s it. That is what’s left. No matter how considerate the district and appellate courts are in the federal system, the final arbiter is the U.S. Supreme Court, and they will get no sympathetic hearing from that Court. So if Indians are to protect their rights, it will have to be done in the Congress, and that will require doing a great many things differently from what they’re doing now.

Now, if I could just respond very briefly to what my colleague Larry Long has said, he tried to say that the homesteaders were promised they would have lands, that there would no longer be a reservation. That may be true in some cases. It was not true in the Yankton case, simply because we had a specific agreement that was drafted in 1892 that was passed by Congress, ratified by Congress in 1894, and in that agreement, there was an article that the Yankton Sioux negotiators at the time insisted on putting into the agreement. I can’t quote it verbatim, but it says, essentially, that, “Nothing in this agreement shall abrogate the Treaty of 1858.” And the 1858 treaty is the one that set out the boundaries of the Yankton Sioux Reservation.

Then that same article said it one more time, and then they added at the end, “And the Yankton Sioux Tribe shall receive their annuities.” Of course, we had Professor Hoover testify at the trial that the reason for that added “annuity” language was that the tribe was concerned that the government actually was threatening to cut off their annuities, and they wanted to make sure that those were not lost. So the question that would be posed is, why would the U.S. government and the Yankton Tribe agree,
in two different places in that agreement, that nothing would change the original 1858 treaty, no matter what was in this 1892 agreement?

Well, the U.S. Supreme Court then said, pertaining to that, "Well, we just see it as an annuity thing. We disagree with what the tribe says." Now, I don't know how it could be much more clear, much more clearly stated than it was, that this really was something that held the boundaries together, held them as to where they were; but the Court, in my view, had a results-oriented opinion. They knew what result they wanted, and they came out with the opinion and tried to reason it, which was, I think, very poor reasoning as to why they overturned that particular article. It was an article — and we researched this for the trial court — that was unique in all of the surplus-land agreements that were taking place around the turn of the century. There was nothing, no surplus-land agreement that had a savings clause as strongly as that one.

So, in other words, the Court trashed it. (I just want to say this, that I'm just trying to analyze the opinion.) We did have some support on the Court. I don't know how many votes we had, but we had three or four that I know of, from the way they were asking the questions; and I think, because it was a nine to zero decision, it turned out to be a compromise, and it seemed clear to me that the Court wanted to make sure that the Indian tribe did not have jurisdiction over the landfill that started this whole thing out.

The way to do that was to see where the landfill sat. There were two areas: the ceded area, the thirty-seven percent that the tribe sold to the government in 1892; and then the sixty-three percent that was allotted lands. And so, in their decision, they said, "All right. All the ceded lands will go to the state," and they said, "We decline to rule on whether the entire reservation is disestablished."

Because they didn't rule, the Eighth Circuit opinion, which said the entire reservation is under tribal and federal jurisdiction, to me, that means that part stayed under, even though a lot of the lands had been sold to whites following the allotment. So what really happened was that I think they came to this compromise and said, "All right. We're not going to give the Indians this landfill to regulate. Let the state regulate it."

I would have to say, also, that I've seen what the Department of Environment and Natural Resources has done. They don't do a very good job of regulating. I think it was a big mistake, because I think the tribe, which has an environmental department, would have been much more stringent and much more strict on this landfill than the state will ever be. Because I've had the experience.

Well, Larry says that the whites in that area, in the ceded area, cannot participate in tribal government, and so I guess the best thing to say there is that when you move to Mexico and live, you don't participate in Mexican government either. But the point is, people knew they were moving onto a
reservation, and the point is that even if the tribe retained jurisdiction, the only impact on the whites in that area would have been regulation of the landfill. There would be no other impact whatsoever, because, simply, the tribe wanted to regulate its own members in that entire reservation area. That’s all they were asking to do.

And what happened? There would be no taxation of the whites, there would be no arrests, no jurisdiction over the whites whatever. So basically, we’ve got a Supreme Court that really believes that Indians are invisible, and they just don’t want to have anything more to do with them, so all the decisions that have been coming out lately point toward that. I think it’s a frightening aspect.

Thank you.

MR. CHRISTOPHER SCHNEIDER: Mr. Long, would you like to respond to the senator before we open it to questions?

MR. LARRY LONG: Tell you what, why don’t we open up for questions.

MR. CHRISTOPHER SCHNEIDER: I’d like to invite anybody that’s got any questions, especially of Mr. Long, to approach the microphone.

AUDIENCE MEMBER: Mr. Long, in some of the discussions before the Supreme Court, there was concern over various municipalities located in the reservation, and it was sort of like really three problems in the room to try. Now, under the constraints which the Supreme Court is mandated to follow, when they’re looking at the intent of Congress of 1894, how can the Court justify looking at present-day positions, demographics, and a concern over what would happen to the towns on the reservation when they should have been looking for something?

MR. LARRY LONG: Thank you. In the decision, the explanation that the Court gave in response to your question was that the overriding concern that they would have is, first of all, congressional intent at the time that the 1894 act was passed. However, farther down in the opinion, they talk about the subsequent nature of the area, and I suspect that that’s what they were referring to and concerned about when they were asking the questions. And what they say, in the opinion, is that the subsequent demographics of the area, that is to say, the amount of non-Indian participation, the amount of transition to non-Indian land, the subsequent establishment of municipalities under state law, is an indication of what the common understanding was back in 1894 as to what likely was going to happen when the property was opened up for non-Indian homestead.

They then acknowledge that that type of evidence ought to carry very little weight in their determination, and that the overriding feature ought to be the intent of Congress; and they found intent of Congress in the first two articles of the treaty, which were the “cession and sum certain” language. And they went on to discuss all those other aspects. But my sense of the
opinion is that they ultimately determined the case based upon the "cession and sum certain" language in Articles I and II and that they did not give much deference, one way or the other, to the point that you made.

MR. JAMES ABOUREZK: I agree with that answer, because when they left the allotted areas — when they left the allotted areas to the tribe, most of those small villages remained in what we call the red area, which — there's a colored map showing red for the allotments and white for the ceded areas. So most of those villages, except for a part of Wagner, remain under tribal jurisdiction, so they didn't really follow up on their concern.

But I would want to say one thing about the "cession and sum certain" language. That was something that was set down in the Sisseton\textsuperscript{11} case, the DeCoteau\textsuperscript{12} case, that the Court decided, "Well, we'll use these magic words to determine that Congress really wanted to take the tribe's governmental functions out of this area." It's something the Court has seized upon that really doesn't mean a lot of anything, because we showed — the tribe showed — during the briefing and everything on this case here, that the "sum certain" price that was set for this was really a matter of a compromise.

In fact, the tribe and the government initially agreed on sale and appraisement. In other words, you appraise each piece of property and then sell it according to what the appraisal was. So the government's commissioner said, at the time, "Well, if we do that, we're not going to sell some of this land alongside the river breaks that you can't do anything, you can't grow crops on it, so we're going to have to come back and form another commission. So let's just take the whole thing, then." As the Eighth Circuit said in its opinion, the "sum certain" language is put in there for reasons other than jurisdiction. It had nothing to do with jurisdiction, just the convenience of the government. Didn't matter to the Court.

MR. JAMES ABOUREZK: Larry, do you want to wrap up here?

MR. LARRY LONG: By way of comment, I would like to thank the law school and the organizers of this presentation for the invitation to the Attorney General's Office to comment and participate. I consider myself fortunate to have been able to come and participate, and if you invite us again next year, we'll come back. Thank you.

MR. JAMES ABOUREZK: I promise I won't say anything bad about you.

PROFESSOR JOHN LAVELLE: Well, it's late in the day, and I guess I have the mike. My brain is like oatmeal after these two days, but it's been quite an energizing two days with all of the speakers addressing these important issues, all of us trying to come to some understanding of what's happening to the rights of Indian tribes.

\textsuperscript{12} DeCoteau v. District County Court for the Tenth Judicial Circuit, 420 U.S. 425 (1975).
It’s really a disaster what the Supreme Court is doing to tribes these
days. Federal Indian law is ceasing to make sense for people who have
been in this field for a long time. All of the fundamental core principles
of the federal Indian law are being turned on their head.

A brief comment about the Yankton Sioux Tribe case. I think Profes-
sor Pommersheim’s comments this morning are well taken, that what’s hap-
pening here is the courts are really simply forcing the fiction that Congress
had an intent to diminish or disestablish reservations in all of these cases.
There’s absolutely no way to ascertain an intent of Congress, because at
that time, Congress simply assumed that reservations would eventually
would just . . . Indian tribes would eventually just dissolve. That’s what the
Court says again and again, and so the Court has to make up indicators of
congressional intent.

So there certainly is intent involved in these cases. It’s not the intent
of Congress at the turn of the century. It’s the intent of the Rehnquist
Court in the 1990s that these reservations be disestablished and diminished.
That’s the intent that’s being imposed, all in the name of a forced fiction of
congressional intent at the turn of the century. That’s clear from all of
these cases.

And it’s ironic or perhaps insulting that the Court often interjects, as it
did in the Yankton case. O’Connor says at the end that, “It’s really regret-
table that we have to hold ourselves to the intent of Congress at the turn of
the century, because that’s a bygone Congress. That was the general-allot-
ment era. That’s not our modern era of Indian self-determination, but woe
to us, we must bend and bow to the intent of Congress, which, by the way,
we just made up and have imposed upon Indian people our own will."

These disestablishment cases are an example of what many people,
including Professor Pommersheim and others, have referred to as an exer-
cise of judicial plenary power: a brand-new thing, an invention of the
Rehnquist Court. You know, we had to suffer, as tribes — as Indian peo-
ple, we had to suffer through Congress’s intent to terminate our tribes that
happened in the 1950s; its intent to eliminate Indian people altogether
through physical genocide in the late nineteenth century through actions of
the executive branch; and now the ball has been thrown over to the
Supreme Court, and it is now exercising its plenary power. It’s making it
up as it goes along, but it is simply engaged in this process of imposing its
own will that Indian people be eliminated, that tribalism be eliminated, and
all of its various aspects be completely wiped out. That’s what we’re faced
with.

We can no longer talk about the Court, as we did in, say, the 1970s,
when Brennan, Blackmun, and Marshall were really powerful forces on the
Court, as the defender of Indian rights. The leading case book, the
Getches-Wilkinson-Williams case book, has a chapter or segment on the
Supreme Court as defender of Indian rights. We now must talk about this
Court as the destroyer of Indian rights. We are not in an era of Indian self-determination anymore. We’re in an era of the subversion of Indian self-determination by judicial activism. That’s what we’re in. It’s an illegitimate era, by the way. It’s one that the Court will not admit that it is imposing upon Indian people, but that’s the era that we’re in.

That’s why we’re all floundering. We all like to think, well, everything is really fine because this is the era of Indian self-determination. It’s not. As a de facto matter, you might say, it’s an era of a termination of tribes by judicial activism. That’s what’s going on in those cases.

Disestablishment and diminishment theory are not the only tools in the judicial-plenary-power toolbox. There are many other tools that the Rehnquist Court has created, most notably the so-called implicit divestiture theory, where the Court will simply say, “We believe that the inherent sovereignty of an Indian tribe has been implicitly divested. We can’t really locate any particular statement of Congress divesting tribes of their power, but we believe that the exercise of certain kinds of tribal power is inconsistent with their dependent status as tribes.” That’s basically saying: “the exercise of tribal power is inconsistent with our prejudices about tribes being inferior, and therefore we must see the tribal sovereignty to have been divested.”

That’s not the Court looking to Congress’s intent. It’s not at all. It’s the Court imposing its own will. It’s the Court projecting its own prejudices on a bygone era and on cases before the Court. It’s going to, on its own initiative, as the supra-legislature over Indian affairs, as a policy matter, simply shrink inherent tribal sovereignty.

There are all kinds of tools in that toolbox, and I will talk a little bit about another one. There is another problem here that is even more insidious, perhaps. It’s a problem that is very difficult to talk about because of how abstract and how convoluted this particular area of law is, but I’m going to try to make some sense of it. I want to talk about how the Eleventh Amendment of the U.S. Constitution has been used in a way that shows it’s a judicial plenary power. It’s an exercise of judicial plenary power when the Court uses Eleventh Amendment theory to say that tribes may not even sue states in federal court.

As we know from the whole history of Indian affairs, all of the great struggles and controversies of Indian affairs have been between the states and the tribes. Now, if the Supreme Court today begins to throw a blanket of immunity of the states in a way that was never before done, well, then, of course, the deck is being stacked in favor of states; and that’s what’s happening in case after case in these Eleventh Amendment cases. So I’m going to talk about a particular case. It was decided June 23, 1997. I didn’t even know that this case was out there. It just simply popped up, and the Supreme Court decided it. I hadn’t been following this particular case. But it shocked me, when I read the case, to see how far the Court has gone.
now, to say that when tribes have a legitimate claim against states for violating tribes' federally protected rights, the tribes may not even go into the federal courthouse. The federal courthouse doors are slammed shut, because this Court now is saying that they will be shut. It's another imposition of the judicial plenary power.

This case, *Coeur d'Alene Tribe*,\(^{13}\) involved the Coeur d'Alene Tribe of Idaho, which had a gripe against the state of Idaho for regulating the tribes' waters, submerged lands, for regulating the watercourses on the reservation itself. The tribe claimed that these rights to all of the lands within the boundaries of their 1873 reservation were reserved for the tribe itself, and that the state could not regulate any of that. That was all tribal land, including the waters and lakes. So the tribe did what you would expect the tribe to do, acting in a responsible manner, and that is to litigate this in federal court, to sue the state in federal court.

The tribe entered a lawsuit against both the state and state's officers, as well as state agencies. The way the Supreme Court ruled, and the way the lower courts ruled, as well, on the question of the tribe versus the state itself, was that the tribe may not sue the state itself, that the state is immune. The state has immunity under the Eleventh Amendment.

The Eleventh Amendment is a controversial amendment, but what the amendment actually accomplished was merely the withdrawal of certain types of jurisdiction which had been originally established under Article III of the Constitution. Article III sets up the power of federal courts, and there are several bases of jurisdiction whereby you can get into federal court under Article III. One of those is to assert what's called a federal question. If you allege that your federal rights are being violated, Article III says you can go into federal court and litigate. But there are other bases of jurisdiction in Article III that have nothing to do with the assertion of a federal question, but have to do with the diversity of parties.

To make a long story short, the Eleventh Amendment was intended to simply withdraw those particular certain bases of jurisdiction so that a state could not be sued by a citizen of another state or by an alien, by a foreign citizen. That was all the Eleventh Amendment was meant to foreclose, to prevent those particular types of parties from suing states on the basis of diversity. The amendment says nothing about federal-question jurisdiction. That kind of jurisdiction is supposed to remain open, by the text of the amendment and by all of the historical evidence on what the ratifiers of the amendment and the framers of the Constitution intended. There was no intent to close off a plaintiff's power to go into federal court and sue a state for the state's lawless conduct when the state is violating federal law. In other words, the Constitution is supposed to allow for federal rights to be supreme over conflicting state rights, and the courts are supposed to have power to adjudicate those kinds of disputes. And that's clearly the case,

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from all of the scholarly research on the meaning of the Eleventh Amendment.

But in 1890, the U.S. Supreme Court launched off in a very dangerous direction in a case called Hans vs. Louisiana. In that case, there was a guy named Hans who tried to sue the state of Louisiana, his own state. He was a citizen of Louisiana, suing Louisiana for violating his constitutional rights. Now, that was an example of federal-question jurisdiction. This guy is asserting a federal question, and the courts should have jurisdiction. But in that case, the Supreme Court said no, the federal courts do not have jurisdiction, because the Eleventh Amendment really means something that it doesn't say. The Eleventh Amendment means that there is a general sovereign immunity for the states, that the states are immune from suit, not just by those parties mentioned by the amendment, that is, citizens of another state, or aliens, or citizens of a foreign nation, but the state is immune generally from everyone. The amendment enacts a general sovereign immunity, and so Hans could not go into court to get his federal rights against his own state adjudicated.

The Court was talking there, too, about what was implicit in the Eleventh Amendment. The Court said, "We're not going to be confined to what the amendment says, the text. We're simply going to read into it what we would like to accomplish here," and that is a blanket immunity over the states to allow the states, in effect, to engage in lawless conduct and to violate people's federal rights. So that began the problem. Hans has never been repudiated. It remains valid law today; and, in fact, it has been expanded. It has been expanded beyond all proportion by the Rehnquist Court, because the Rehnquist Court is very fond of this particular doctrine.

We come now to the Rehnquist Court's decisions itself. The Rehnquist Court has begun to use tribe-versus-state disputes in a way to expand this wrongful reading of the Eleventh Amendment in a way that shrinks people's rights under federal law. In 1991, the Supreme Court held that Indian tribes may not sue states, generally may not sue states, because the Eleventh Amendment applies to prevent Indian tribes from suing states.

Indian tribes are not individuals. Indian tribes are not, quote, "citizens of another state or citizens of a foreign state." Indian tribes are sovereigns, and as to other domestic sovereigns, the Eleventh Amendment does not apply. The Supreme Court has held, for example, that one state may sue another and not be barred by the Eleventh Amendment. Also, the United States itself may sue a state and not be barred by the Eleventh Amendment, but now, in 1991, in a case called Blatchford vs. Native Village of Noatak, the Supreme Court said that an Indian tribe, however, is barred by the Eleventh Amendment and may not sue a state. That was the prob-

lem for the Coeur d'Alene tribe when this case first went into court. The tribe could not sue the state.

So how could the tribe get its federal rights adjudicated? After all, the state of Idaho had come in and, effectively, taken possession by regulating the submerged lands, all of the lakes and rivers on the reservation, the navigable waterways on the reservation. The tribe was barred by the Eleventh Amendment from suing the states because of this erroneous reading of the meaning of the Eleventh Amendment. What was left was to sue the state officers and to try to get what's called prospective relief, that is, forward-looking relief.

This is known as the Ex parte Young\textsuperscript{16} doctrine. It has been in existence ever since Hans. Ex parte Young itself was decided not too long after Hans, and what the doctrine says is that when a party cannot sue the state because the state has its immunity, the party can still go after the state officers to stop them from violating federal law. Why? Because if the officers are engaged in illegal conduct, those officers are considered to be stripped of their immunity. They're not cloaked in the state sovereign immunity, and therefore they must stand accountable in federal court for their lawless conduct.

Ex parte Young has always been a necessary balance to the Court's erroneous reading of the Eleventh Amendment, and up until Coeur d'Alene Tribe, it was understood that this was a vital doctrine; it was clear how it worked. In Coeur d'Alene itself, the tribe could not sue the state, so the tribe was going after the state officers, saying that, "We want a federal court order saying that from now on, these officers must stop regulating this land. They must stop their continuing violations from this point onward in time." That's prospective relief that the tribe was looking for.

Ex parte Young should have allowed the tribe to get into court, because two conditions were met. Number one, the tribe was asserting violation of federal law. That's required for Ex parte Young. The plaintiff must assert a violation of federal law. And number two, the relief sought must be prospective. It can't be retrospective or backward-looking. It can't be reaching into the state's treasury to get money damages, but prospective relief is available. So the tribe should have prevailed.

However, the tribe did not prevail. The Supreme Court said that even here, even here, the tribe may not sue the state officers in federal court. They are barred altogether from going into federal court, and if they want to have their complaint resolved, they can go into the state court and have the state court adjudicate this federal question. The only way to get into the federal court would be if, ultimately, there's a grant of cert from the state supreme court. So the only federal court that's ever going to hear the Coeur d'Alene tribe's case is the U.S. Supreme Court on a grant of cert from the state court. Now, this was basically an invitation to the Coeur

\textsuperscript{16} Ex parte Young, 209 U.S. 123 (1908).
d’Alene tribe to go into state court and throw all of this money away on expensive litigation to get a ruling by the state court that this land belongs to the state and not to the tribe.

This is a shocking decision. What is so unique about this kind of case — which looks just like an *Ex parte Young* case — that the tribe should not be allowed into federal court? What the Court said was that in this situation, the state has a real interest in closing off the tribe’s request for prospective relief, just shutting the door on the tribe, because this case implicates special sovereignty interests in submerged lands. The Court said, “These submerged lands are so closely tied with the state’s sovereignty that we ought to just simply not allow this case to go into court, that we’re going to say it has to be adjudicated in the state’s.”

This was all taking place in the wake of the *Montana* case that we’ve all been talking about today. In *Montana*, the Supreme Court said that when it comes to submerged lands on an Indian reservation, there’s a strong presumption that those lands belong to the state. It’s a strong presumption.

Why is it a strong presumption? Because the Court misread precedent. That’s why it’s a strong presumption. The Court was looking at cases where there was really no Indian tribe existing on those lands in past cases; and in those cases, the Court said those lands are presumed to belong to the state, that they became state property when the state entered the Union. But when it comes to an Indian reservation where Indian people are still living there and this was their original homeland, that rule should not apply. Nevertheless, the Court said there’s a strong presumption that the rule still applies that the submerged lands belong to the state, unless the tribe can point to very clear, unambiguous language in a treaty that says that those submerged lands were conveyed to the tribe by the United States prior to statehood.

*Montana* was a terrible decision, and it has been widely criticized by everyone. And interestingly, even though *Montana* really is driving the Court’s decision in *Coeur d’Alene Tribe*, not anywhere in the principal opinion, the concurring opinion, or the dissenting opinion is *Montana* even once mentioned or cited. Nevertheless, it’s driving this whole thing. There’s a strong presumption that the state owns the submerged lands, whether they’re on an Indian reservation or not. But it is a rebuttable presumption, and some tribes, in lower courts, have rebutted just that presumption since *Montana* was decided.

What’s effectively happening is that the Court is making it irrebuttable by saying that tribes cannot even go into the state courthouse to get that kind of question resolved by a federal court. They have to simply go into the state courts and have it resolved.

That’s a shocking decision, I think, for anyone to realize that, because

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all throughout history, Indian affairs have been uniquely the province of federal law. So this ought to be a question that is resolvable by a federal court, and yet, because of this erroneous reading of the reach and meaning of the Eleventh Amendment, the Court is now just closing the federal courthouse doors and betraying Indian tribes.

In fact, Justice Souter, in dissent, refers to an early quote from Chief Justice Marshall about how this very type of scenario represents the Court’s sanctioning of a tyranny — sanctioning of a tyranny — allowing the state to take lands and not be accountable for it in federal court. That’s the great tragedy that we’re now facing because of the *Coeur d’Alene Tribe* decision. The Court’s opinion is very full of language about how it’s important that this decision be decided this way in order to support the dignity and status of the state.

My response to that is that there is no dignity in tyranny. There is no dignity in tyranny. The Court is trying to force us to accept the proposition that the dignity of a state requires that the state not be held accountable for violating an Indian tribe’s federally created and federally protected rights, that somehow we’re supposed to listen to that and say that sounds like there’s dignity there. There’s no dignity in that. It’s the opposite of dignity, regardless of what the Court says about it.

So we have this terrible decision, and we now must live with it. I don’t have any really optimistic views on what’s going on. I’ve heard past speakers over the past couple days try to find some optimism here. I don’t find any optimism, and I kind of feel guilty about that. I have responsibility as an attorney, as a professor, to convey some kind of message of hope.

I take that back. I always go back to the real hope: that we have to stay, as Indian people, with our spiritual understanding, with the spiritual. Our spiritual ways have taken us through even darker moments of American history and I know that those ways will take us through these moments as well. And as an aside, what that requires is that we protect our own traditions from themselves being appropriated and exploited in just the way that our lands and our rivers and our lakes now are just open game for such exploitation, with the complete sanctioning of this kind of tyranny by the Supreme Court itself.

Now, I should add also: one — maybe — ray of hope is that *Coeur d’Alene* was five to four. This was not one of the nine to zero opinions that we have been talking about. It was not one of the ones we printed in the resource materials for the symposium. It was five to four. There are four justices who see this whole trend of expanding a state’s Eleventh Amendment immunity beyond anything ever intended by the framers, and in a way that would shock and appall the framers, to be a very, very major problem. The majority opinions, where they say that *Hans* was properly decided and that the Eleventh Amendment needs to have this meaning,
are all relatively short. There's not a whole lot of rationale and support that can be garnered for such tyrannical decisions.

There are lengthy dissenting opinions that have come out now which lay out the full history of how the Supreme Court has gotten it wrong from *Hans* onward. So maybe, with a five to four split, there's some ray of hope there that something may change; and perhaps Indian tribes could harness themselves to that division in the Court and bring to the attention of the Court Indian tribes' rights and the importance of the federal government having the responsibility of upholding the federal rights of Indian tribes. That is the most essential functioning of the federal power. I do not agree that the federal power is plenary, but that has long been established, at least with respect to Congress. But I would assert that at least Congress certainly has the power to uphold Indian peoples' rights. That's the very kind of power, now, that the Supreme Court is taking away from the federal government.

Indian tribes are being used as a kind of pawn in this battle of power between the federal government and the states, and this state's rights Court is effectively displacing the power of Congress to assist Indian tribes in maintaining their integrity and vitality. This Court is assisting the states in their long-standing campaign to exterminate Indian tribes, and that is happening as clearly today as it was in the late nineteenth century.

And I would put it to — Mr. Long is not here, but I would put it to those who believe that it's irreconcilable that there can be support for the existence of Indian reservations because of the expectations of non-Indians living on those reservations — I would put to them: is really what you're saying that Indian tribes must be eliminated in order to resolve this tension that you see in the expectations of non-Indians living on Indian land; that the way to resolve that is simply to eliminate the tribes? Is that what you're saying, that the elimination of Indian tribes is what's driving the state's thinking, what's driving the state's decisions to, for example, submit briefs in support of these anti-Indian parties in these cases?

Almost every single Supreme Court case, whether the state of South Dakota is a party or not, the state of South Dakota submits a brief supporting the state's interests or supporting the anti-Indian interests and against the tribes every single time. That's the taxpayer money of this state being thrown into this effort to effectively pursue this course of exterminating Indian tribes which was happening in the nineteenth century and is happening in the twentieth century; and I just hope that we can do something to turn this around in the twenty-first century.

I don't know what the answer is, except that I think that prayers are called for, and some consciousness-raising about exactly how brutal and tyrannical this particular trend in the Court is, how we should be outraged. We should express intolerance at all times. This is the imposition of the Court's political will, and it is not our will. I would hope. I'm not always
clear on that, either. I'm in the state of South Dakota, and it's all up to you, particularly you non-Indians, to decide in your heart of hearts whether you will silently support this effort or whether you can call upon your own conscience to see room in this state for the continuing existence of Indian tribes. I would hope that you would go for the latter. I pray that you would, in fact.

That's all the comments that I have.

MR. CHRISTOPHER SCHNEIDER: I disagree with your original assertion that your mind is turned to oatmeal, and I would thank you for your comments.

We're turning it over to Professor Pommersheim for some final comments.

Thank you.

PROFESSOR FRANK POMMERSHEIM: Well, I guess it's my duty to sum up, and I just want to do so very briefly. I think what people have heard in the last day and a half, particularly to students and tribal members, particularly to students, I think what they've heard is that there's an amazing kind of intellectual moral and ethical challenge for students to engage in learning about Indian law and helping to bring their ethical commitment and their intelligence to bear on these incredible issues that people have laid out for the last day and a half, and I hope students will take that challenge.

Secondly, in terms of the difficult things that the Supreme Court is doing, I think, as many people have laid out, the Court is almost impossible to deal with, but I think the one ray of hope is that one of the reasons that you have this kind of collision is that tribes are more active than they ever have been in exercising their sovereignty. That's what makes for the sparks. That's what makes for the collision. In my view, at least, tribes are doing more than they ever have in the last twenty-five or so years, and for the powers that be, I think that has created some fear in the state. That has created some fear in the Congress and some fear in the United States Supreme Court, too. So I think in some way the tribes can take pride in that, that in exercising their sovereignty, they've put everyone on notice that they're going to have to deal with it.

And I think, particularly for people who are lawyers or going to be lawyers, we're going to have to think ever more carefully about how the state is dealt with, how the federal courts are dealt with. As John LaVelle has indicated, it's very difficult to have a sense of optimism, but for those who were at Susan Williams' presentation last night, I think she used a phrase that continues and allows her to go forward in her work, and that is the notion of having optimism beyond reason, because if you just rely on reason, you might reach the conclusion that everything is beyond hope in the field of Indian law, and it's just what the other people want. It's just what the state wants. It's just what the feds want.
So I think people who are studying in this the area, people who live this out on the reservation, people who are practicing in the area, I think what Susan said last night, particularly at this time, is a necessary watchword, and that's the notion of having optimism beyond reason, and I would encourage all of us to try to have that as a watchword as we go forward in this era.

Again, I want to thank people for coming out, people who have traveled across the state from the reservations to be here, our students, students across campus, other members of the faculty across campus, and all our guests.

Thank you.