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The Navajo Indian Irrigation Project and Quantification of Navajo Winters Rights

ABSTRACT

It has been said that in accepting the Navajo Indian Irrigation Project (NIIP), the Navajo Tribe quantified its Winters rights for all time. Under the law governing the judicial interpretation of treaties, Congress has the power to abrogate a treaty right, such as Winters water rights, but it must manifest a clear and plain intent to do so. However, NIIP's record does not contain evidence of a clear and plain congressional intent to quantify all Navajo Winters rights for all time. Other issues similarly contradict the notion that quantification occurred. Thus it is not possible to conclude that NIIP constituted quantification of Navajo Winters rights.

INTRODUCTION

In 1962, the United States Congress authorized the Navajo Indian Irrigation Project (NIIP), a 110,630-acre, 508,000 acre-foot irrigation project located in the northeastern corner of the Navajo Reservation, just south of Farmington, New Mexico. In the course of negotiating NIIP with the federal government and the state of New Mexico, the Navajo Tribe made certain concessions regarding its legal claims to the waters of the San Juan River under the 1908 United States Supreme Court case, Winters v. United States. It has been claimed by some observers of NIIP that these concessions amount to quantification of Navajo Winters rights, or a limitation for

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2. 207 U.S. 564 (1908).
all time to a specified amount. The purpose of this article is to show that, based on the legislation and its history, it is not a simple matter to confirm that quantification took place. Indeed, ambiguities cloud most of the record on NIIP—ambiguities which the tradition of the trust responsibility and the canons of construction suggest ought to be resolved in favor of Navajo water rights.

The Winters decision established Indian rights to waters touching Indian reservations in any way, reasoning that when Congress created reservations, it implicitly created rights to sufficient water to satisfy the purpose of the reservation. These rights, also called federally reserved water rights, date from the year Congress created a reservation and exist whether or not Indians have put the water to beneficial use. A subsequent case, Arizona v. California, established the standard for quantifying Indian Winters claims. Under Arizona v. California, a tribe is entitled to enough water to irrigate all "practicably irrigable acreage on [its] reservation." Irrigation consumes many times more water than municipal or industrial (M&I) uses, and Indian reservations are often extensive, giving rise to

3. See, e.g., C. DuMars & H. Ingram, Congressional Quantification of Indian Reserved Water Rights: A Definitive Solution or Mirage? 20 Nat. Res. J. 17 (1980) The authors of this article maintain that "the Indian question was supposedly settled on the San Juan" with NIIP, but that considerable uncertainty remains, id. at 23–24. They present competing arguments on the issues. For the argument that the Navajo did not quantify their Winters rights with NIIP, see id. at 28–29; for the argument that they did, see id. at 35–39. See also M. Price & G. Weatherford, Indian Water Rights in Theory and Practice, 118 Law & Contemp. Probs. 97, 119–30 (1976). The authors write that with the passage of NIIP’s authorizing legislation, "[a]n unquantified Winters right with all its uncertainties, had been converted to the promise of water works that could be of use to the Navajo people. Something was surrendered...in exchange for a promise of substantial federal funds to develop a portion of the Navajo economy that was desperately in need of nourishment." Id. at 124. See also J. Thorson, Resolving Conflicts Through Intergovernmental Agreements: The Pros and Cons of Negotiated Settlements, in Indian Water 1985: Collected Essays 25, 32–33 (C. Miklas & S. Shupe eds., 1986) [hereinafter Negotiated Settlements]; D. Getches & C. Wilkinson, Federal Indian Law: Cases and Materials 702 (1986). None of these authors specifies the geographic extent of the alleged quantification. In the present article, mention of the potential quantification of Navajo Winters rights with NIIP always, unless specified otherwise, refers to Navajo claims to the San Juan in New Mexico only. For fuller understanding of this point, see infra note 130.

4. For descriptions of the trust responsibility and the canons of construction, see F. Cohen, Federal Indian Law 220–221 (1982). These concepts and other concepts of federal Indian law are discussed further in the present article in the section entitled The Law Relevant to Quantification.

5. Winters, 207 U.S. at 577.


7. Id. at 600. This case also applied the reasoning in Winters to federal reservations other than Indian reservations. Thus national forests, wilderness areas, parks, and the like have federally reserved water rights attached to them. Id. at 601.

8. The main uses of water are agricultural, municipal, and industrial. In the West as a whole, roughly 90 percent of all water is used for agricultural purposes. See W. Solley et al., Estimated Use of Water in the United States in 1985 at 62 (U.S. Geological Survey Circular 1004, 1988). In the Upper Colorado Basin, 95 percent of water is used for irrigation; in the Lower Colorado Basin, the figure is 84 percent; for the Rio Grande Basin, 89 percent; and for the Great Basin, 91 percent. Id.
potentially huge claims. These claims also conflict sharply with prior appropriation claims because they exist whether or not a tribe puts water to beneficial use.10

The settlement of Winters claims, whether through negotiation or litigation,11 is a double-edged sword: Indians settling Winters claims make specific the water rights to which they previously had only inchoate claims, but they also limit the size of their claims to the specified amount.12 Thus they lose or 'waive' any further Winters claims for all time, if the quantification is legally binding.

The simultaneous loss and gain involved in settling Winters claims for all time is illustrated by the quantities of water that appeared to be at stake when NIIP was under discussion.13 The Navajo Reservation touches the San Juan River from just downstream of Farmington, New Mexico, to the river’s confluence with the mainstream of the Colorado River, now Lake Powell. When NIIP was under serious discussion, in the 1950s and early 1960s, 45 years of annual flow records on the San Juan existed for two locations. At the site of Navajo Dam,14 the average annual flow as of 1960 was approximately 1 million acre-feet. At Bluff, Utah, 15

9. The original PIA award, given to the Indians of the Chemehuevi, Cocopah, Yuma, Colorado River, and Fort Mohave Reservations was approximately 1 million acre-feet per year, a significant portion of the entire Colorado River’s flow. See Arizona v. California, 363 U.S. at 595-96, 600. The PIA standard also produced an award of an estimated 500,717 acre-feet per year, in In Re The General Adjudication of All Rights to Use Water in The Big Horn River System, 753 P.2d 76, 100–11 (Wyo. 1988), aff’d Wyoming v. United States, 492 U.S. 406 (1989) [hereinafter The Wind River Adjudication]. This award of 500,717 acre-feet annually amounts to just under half of the flow of the river. While numerous acreage and water allotments are discussed in the Wind River Adjudication, no exact total is given. However, it is regularly reported in the Wyoming press that the award was 500,717 acre-feet per year, out of a total river flow of 1.2 to 1.5 million acre-feet. See, e.g., K. Collins, Tribes Ask Court to Order Regulation, Casper Star-Tribune, July 31, 1990, at A1, col. 5. It has been estimated that unadjudicated claims by Indians could exceed by many times the average annual flows of several of the West's major rivers, including the Klamath, Colorado, Flathead, Salmon, San Juan, and Yuba Rivers. See Western States Water Council, Indian Water Rights in the West 9 (1984) (study prepared for the Western Governors' Ass'n).


11. See, e.g., American Indian Lawyer Training Program, Inc., American Indian Resources Institute, Tribal Water Management Handbook 17 (1987); Cohen, supra note 4, at 599.

12. In this sense, the quantification of Winters rights is very much like an Indian agreement to relinquish rights to all the land and resources that they once used and to live on a small portion of that former claim—namely, a reservation. For this reason, quantification of Winters claims is parallel to treaties creating reservations. Further, both involve important Indian rights (without water, grants of land in the arid West are meaningless), a part of which Indians relinquish and a part of which they keep.

13. It is said that the quantities of water appeared to be at stake because the precise basis of Navajo claims was not fully known prior to the 1963 decision in Arizona v. California, supra note 6. Thus the figures are offered in this paragraph for illustrative purposes only.

14. Navajo Dam, authorized by the Colorado River Storage Project Act, 43 U.S.C. §§620, 620a-o (1956), stores water in Navajo Reservoir, some of which is diverted for use on the Navajo Irrigation Project. It was built between 1958 and 1962. For further information on Navajo Dam, see Bureau of Reclamation, Dep't of Interior, Navajo Dam and Reservoir: Technical Record of Design and Construction 1 (1966).
miles downstream, the figure was 2 million acre-feet. The Navajo could claim rights to all of this flow, and did so early in the NIIP negotiations. NIIP's authorizing legislation specifies a diversion for the completed project of 508,000 acre-feet per year. Testimony on the project discussed an annual consumptive use of approximately 250,000 acre-feet. Assuming a total potential claim of 2 million acre-feet, quantification of 250,000 acre-feet would entail the relinquishment of claims to 1.75 million acre-feet per year. Assuming a smaller potential claim of 1 million acre-feet and quantification at the larger diversion figure of 508,000 acre-feet, the lost or waived claims amount to approximately 500,000 acre-feet per year. These are substantial amounts of water, and therefore substantial potential losses in the arid West.

The political context of Indian water settlements gives rise to another feature of quantification. Often a de facto bargain appears to exist between Congress and a tribe: federal assistance for water works or economic development in general comes as compensation to a tribe for its

15. San Juan-Chama Reclamation Project and Navajo Indian Irrigation Project: Hearings on H.R. 2552, H.R. 6541, and S. 107 Before the Subcomm. on Irrigation and Reclamation of the House Committee on Interior and Insular Affairs, 87th Cong., 1st Sess. 196 (1961) [hereinafter House Hearing 1961]. The Animas River, a large, south-flowing tributary to the San Juan, contributes much of the difference between the 1.0 and 2.0 million acre feet. Its average annual flow as of 1960 was believed to be 617,000 acre-feet, id.

16. All the NIIP negotiations and consideration in Congress occurred prior to the practicably irrigable acreage standard for quantification established by the Supreme Court in Arizona v. California in 1963. Thus the negotiators did not have firm authority for the size of a Navajo claim. Only the Navajo made statements about having claims on the entire San Juan River. See Stenographic Transcript of Proceedings Before the U.S. Dep't of the Interior in the Matter of the San Juan-Chama Conference, March 27–28, 1951 (on file with the Office of the Secretary of the Interior in Box 3642 of the Central Classified Files, 1937–1953, Record Group 48, File Number 8-8) [hereinafter Stenographic Transcripts] After 1963, in addition to having priority, potential Navajo claims became enormous. The Navajo reservation is 15 million acres, and if only a small portion of it were deemed practicably irrigable, the claim on San Juan water easily reaches the entire flow. See, e.g., D. Getches & C. Meyers, The River of Controversy: Persistent Issues, in New Courses for the Colorado River: Major Issues for the Next Century 51 (G. Weatherford & F. Brown eds., 1986); W. Back & J. Taylor, Navajo Water Rights: Pulling the Plug on the Colorado River? 20 Nat. Res. J. 71 (1980).

17. NIIP Act, supra note 1, at §2.

18. The 1957 Supplement to the 1955 Feasibility Report prepared by the BIA on NIIP actually mentioned 281,800 acre-feet of consumptive use for a completed project. H.R. Doc. No. 424, 86th Cong., 2d Sess. 275 (1960). The Feasibility Report itself skirted the issue of total consumptive use for the project. See id. at 324–328. Early BIA testimony echoed the 281,000 acre-foot figure. Navajo Irrigation—San Juan-Chama Diversion: Hearings on S. 3648 Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs, 85th Cong., 2d Sess. 48 (1958) [hereinafter Senate Hearing 1958]. In later years, the figure became 252,300 acre-feet. See Navajo Irrigation—San Juan-Chama Division, New Mexico: Hearing on S. 72 before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs, 86th Cong., 1st Sess. 19 (1959) [hereinafter Senate Hearing 1959]; Navajo Indian Irrigation Project and San Juan-Chama Project: Hearing on S. 107 Before the Subcomm. on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 87th Cong., 1st Sess. 48 (1961) [hereinafter Senate Hearing 1961].
agreement to give up some portion of its *Winters* claim and limit itself to the quantified amount.\(^1\)

Indians also can compromise, waive, or otherwise relinquish the priority, as distinguished from the quantity, of their *Winters* claims. Under the doctrine of prior appropriation, when water is scarce, priority controls the size of the claim. Thus, if Indians consent to the validity of existing non-Indian claims on a stream, and if, with the Indian claims, the river is fully allocated, giving up the priority of a *Winters* claim amounts to the same thing as limiting the quantity. But if a stream is not fully allocated, or if the allocations violate valid Indian claims, a tribe could waive its *Winters* priority to a particular amount of water without limiting its total claim for all time to that amount.

Judicial quantifications of Indian *Winters* claims have occurred in only a few cases. *Arizona v. California* quantified the water rights of the Colorado River tribes at 1 million acre-feet per year.\(^2\) In 1989, the *Winters* claims of the Shoshone and Northern Arapaho tribes on the Wind River Reservation in Wyoming were quantified at approximately 500,000 acre-feet per year.\(^3\) Currently 50 cases are pending that would quantify Indian *Winters* claims.\(^4\) Litigation is so costly that significant pressure exists to negotiate settlements of Indian *Winters* rights. For instance, the Wyoming litigation has cost that state alone nearly $10 million.\(^5\) It is widely agreed that as of 1991 Indian claims have been legitimately quantified in five settlements. Each settlement has subsequently been ratified by or embodied in federal legislation. Those settlements involve the Ak-Chin Indians, some members of the Papago, and the Salt River Pima-Maricopa, all of Arizona, the Ute Mountain Ute and Southern Ute of Colorado, and several bands of Mission Indians in Southern California.\(^6\)

\(^1\) See, e.g., Cohen, *supra* note 4, at 598. See also Price & Weatherford, *supra* note 3, at 100, 124.

\(^2\) Arizona v. California, 373 U.S. at 596, 600.


Some commentators have included Navajo-New Mexico negotiations and the subsequent authorization of NIIP in the set of quantifications or have otherwise suggested that NIIP involved the quantification of Winters rights. The purpose of this article is to show how difficult it is to conclude decisively that quantification did occur. Ambiguities shroud the record, from the authorizing legislation through House and Senate Reports to hearing transcripts. This article will analyze that record, against the backdrop of federal Indian law relevant to quantification.

Whether Navajo claims to the San Juan River in New Mexico were quantified with the passage of NIIP's authorizing legislation is an important question. With 165,000 members and a reservation of 15 million acres, the Navajo Tribe has one of the largest potential Winters claims in the West. Also, the issue is not an academic one. Plans for building the Animas-La Plata Project in southwestern Colorado have been interrupted because the expected consumptive use of the Animas River involved in that project would reduce flows on the San Juan River below Navajo Dam and jeopardize the survival of two endangered fish species: the Colorado squawfish and razorback sucker. An interim plan for saving the fish involves releases from Navajo Dam of water that may belong to the Navajo Tribe—if they did not quantify their Winters rights for all time to the San Juan when they agreed to NIIP. Navajo water rights are also involved in a general stream adjudication on the San Juan filed by the New Mexico State Engineer in 1975. At issue in the case are the claims of the Navajo, the Jicarilla Apache, and Ute Mountain Ute. Also, at issue are water claims for other federal land. Finally, and most significantly, is the issue of whether the Navajo Tribe has given up water rights in exchange for federal projects—specifically, NIIP.

Understanding whether Navajo claims to the San Juan in New Mexico were quantified with NIIP requires a brief look at the history of the project.

25. See articles cited supra note 3. Significantly, in his 1990 review of Indian water rights settlements, John Echohawk, Executive Director of the Native American Rights Fund, does not include the Navajo or NIIP. See Echohawk, supra note 22.

26. For Navajo population and the Navajo Reservation's area, see Getches & Wilkinson, supra note 3 at 4, 6. For the size of Navajo Winters claims, see Back & Taylor, supra note 16, at 71.


HISTORY OF THE NAVAJO INDIAN IRRIGATION PROJECT

The 1962 legislation that authorized NIIP followed a decade and a half of negotiations among the Bureau of Reclamation, the Bureau of Indian Affairs, the state of New Mexico, and the Navajo Tribe to divide the waters of the San Juan River. The state of New Mexico is entitled to a portion of the San Juan under the set of interstate compacts that govern allocation of the river's water. During negotiations, the debate centered on the division of San Juan water among the two major river basins in New Mexico—the San Juan, the source of the water, and the Rio Grande, the state's most populous area.

Drought and erosion on the Navajo range in the 1930s spurred Navajo interest in a large irrigation project for the reservation. At the same time, the state of New Mexico had long been interested in diverting San Juan water to the more densely populated Rio Grande Valley, by way of the Rio Chama. By the end of World War II, both basins wanted to benefit from ambitious Bureau of Reclamation plans to develop the Colorado River Basin, including the San Juan.

The Winters decision gave the Navajo an important bargaining chip in the negotiations. The Navajo reservation was created by treaty in 1868, before nonIndian settlement in the basin. Thus Navajo Winters rights had senior priority over nonIndian prior appropriation claims in the basin. This priority provided the ground from which the Navajo bargained for an irrigation project for themselves and against a diversion to the Rio Grande. In 1957, the conflicting basins reached a compromise by agreeing to two projects—NIIP for the Navajo and, for the Rio Grande, a project called the San Juan-Chama Diversion. The Navajo Irrigation Project was, once completed, to divert 508,000 acre-feet of water annually to irrigate 110,630 acres of land. Water was to be stored behind Navajo Dam and would move through a total of 450 miles of canals, tunnels,

31. For a discussion of the “law of the Colorado River” see infra notes 59–61 and accompanying text.
siphons, and underground pipes in the course of irrigating project lands. NIIP was to be completed fourteen years after authorization.\textsuperscript{37} The Chama Project was to divert 110,000 acre-feet annually through three tunnels from the Rio Blanco, Little Navajo, and Navajo Rivers, tributaries of the San Juan, to Rio Chama, a tributary of the Rio Grande. To be completed in five years, the diversion’s waters were to be used for municipal and industrial purposes.\textsuperscript{38}

In the course of reaching agreement on the two projects, the Navajo Tribe compromised or waived certain Winters claims to San Juan waters. One can be certain about the waiver of some of the claims. First, the tribe agreed to allow 110,000 acre-feet of San Juan water to which they had Winters claims to be diverted to the Rio Grande Basin annually. In 1951, at the first negotiating session in which Navajo officials participated, Tribal Council Chair Sam Akheah insisted that the tribe had Winters claims to the entire river. “[T]he Navajos feel the San Juan is their river,” he said, pointing out that the Tribe had large enough needs and had been promised enough economic development by the federal government that they could easily use all the river’s water. Ahkeah concluded, “there are no tenable grounds for the proposed [Chama] diversion, and [we] urge you to support firmly what we regard as our moral and legal right to the fullest possible development of the San Juan.”\textsuperscript{39}

However, by 1957 the tribe had decided to relinquish its claims to the 110,000 acre-feet for the Diversion. The reasons for this choice are plain. In the 1957 resolution that urged Congress to pass a bill jointly authorizing NIIP and the San Juan-Chama Diversion, the Tribal Council acknowledged that it was supporting the Chama Diversion “[i]n return for the generous support of the State of New Mexico for the proposed Navajo Indian Irrigation Project.”\textsuperscript{40} Navajo accession to the Chama Diversion is a classic example of the political dynamic in which Indian water claims exist. In exchange for political support of NIIP, the tribe gave up 110,000 acre-feet of water a year.

The Navajo also waived their early priority to the water to be used in NIIP in the course of negotiating for the project. That is, instead of insisting on their right to receive all their NIIP water first in times of shortage, which they could do under Winters, they agreed to share any short supply ratably with other users.\textsuperscript{41} Section 11(a) of the 1962 authorizing

\textsuperscript{37} H. Doc. 424, supra note 18, at 274–78; B. Boman, Consumptive Use on the Navajo Indian Irrigation Project 3–4 (1983).
\textsuperscript{38} H. Doc. No. 424, supra note 18, at 343.
\textsuperscript{39} Stenographic Transcripts, supra note 16, at 57–62.
\textsuperscript{40} Navajo Tribal Council Resolution CD-86-57 (available in the Law Library of the Navajo Nation Department of Justice in Window Rock, Arizona.) [hereinafter Council Resolution CD-86-57].
\textsuperscript{41} See Navajo Tribal Council Minutes for Tribal Council decision to share shortages at 67–68 (Dec. 11, 1957) (on file with the Tribal Chairman’s Office at the Records and Communications Dep’t of the Navajo Nation, in Window Rock, Az.) [hereinafter Minutes of Dec. 11, 1957].
legislation requires all users of water under the legislation, including the Navajo Tribe, to have contracts with the Secretary of Interior which include a provision calling for ratable sharing of supplies in time of shortage. The contract signed by the Tribe in 1976 pursuant to the legislation contains such a provision. The Tribal Council clearly intended to share shortages: in discussion of the 1957 draft NIIP bill, attorney Larry Davis explained at length that a Navajo agreement to share shortages would mean the loss of the priority that Winters otherwise gave them. The Council voted to accept the provision anyway.

But does the agreement to share shortages quantify Navajo Winters rights? There are four areas which must be discussed before this question can be answered: existing Indian law relevant to quantification of Winters rights; provisions of NIIP’s authorizing legislation that may be read to affect Indian water claims (the shortage-sharing provision and section 12(a)); the law governing allocation of water within the Colorado River Basin; and the legislative record on NIIP. Each of these topics will be addressed in the following discussion.

THE LAW RELEVANT TO QUANTIFICATION

The law explicitly on quantification of Indian Winters rights is scanty. It is not possible to construct a line of case law from Winters to contemporary cases of Winters rights quantification. Thus one must turn for guidance to the larger body of Indian law. The portion of Indian law relevant to quantification of Winters rights—which are property rights created by judicial interpretation of treaties—is the law relating to the power

42. NIIP Act, supra note 1, §11(a). The shortage-sharing provision was part of the earliest draft bill agreed to by the Navajo Tribe and the state of New Mexico. See Council Resolution CD-86-57, supra note 40, at 3. The provision was also part of every NIIP-San Juan-Chama bill introduced. See Senate Hearing 1958, supra note 18, at 3–5; Senate Hearing 1959, supra note 18, at 3–6; San Juan-Chama Reclamation Project and Navajo Indian Irrigation Project: Hearing on H.R. 2352, H.R. 2494, and S. 72 before the Subcomm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs, 86th Cong., 2d Sess. 1–4 (1960) [hereinafter House Hearing 1960]; Senate Hearing 1961, supra note 18, at 1–5; House Hearing 1961, supra note 15, at 1–9 (1961).


44. Minutes of Dec. 11, 1957, supra note 41, at 67–68. Davis said, “If this section were not in there and the Bill were to become law, your Navajo Irrigation Project would have first priority to those waters. You would not have shortages. Everybody else would.” Id. The shortage-sharing provision is discussed further infra in the section entitled Sharing Shortages.

45. Writers concluding that NIIP quantified Navajo Winters claims do so on the basis of the shortage-sharing provision. See articles cited supra note 3.

46. There is no case law squarely on the question of how Indians can quantify their otherwise inchoate Winters rights to water. The only case that explicitly addresses Indian water rights other than Winters and Arizona v. California is Wyoming v. United States, supra note 9. That one-sentence, 4-4 opinion of the U.S. Supreme Court affirms The Wind River Adjudication, supra note 9, an award by the Supreme Court of Wyoming to the tribes of the Wind River Reservation based on PIA. See also Echohawk, supra note 22.
The power of the federal government over Indian affairs is usually described as 'plenary,' meaning full or complete. That power is so great that it even allows Congress to abrogate a treaty obligation against the will of the Indians involved. Thus Congress could, other things being equal, quantify a tribe's Winters rights without that tribe's consent. But the power of Congress over Indians, though full and complete, is not absolute. In *United States v. Dion*, the Supreme Court held that for Congress to abrogate a treaty provision, its intent to do so must be "clear and plain." The Court went on to specify that "what is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." In so holding, the Court did not require an "express declaration," or explicit statutory language, to find intent, instead allowing reliance on "clear and reliable evidence in the legislative history." That Congress must clearly and plainly intend to do something that compromises Indian property rights derives from what has been called "one of the primary cornerstones of Indian law," the trust responsibility. The roots of the trust responsibility lie in Chief Justice John Marshall's opinion in *Cherokee Nation v. Georgia*, in which Marshall called Indian tribes "domestic dependent nations... in a state of pupilage [to the United States]." He went on to say specifically that their "relation to the United States resembles that of a ward to his guardian." Thus the federal


48. See United States v. Kagama, 118 U.S. 375 (1885) (usually cited as the primary source of the plenary power doctrine). See also Cohen, *supra* note 4, at 207–12.

49. See Lone Wolf v. Hitchcock, 187 U.S. 553, 556 (1903) ("The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves that it should do so.")


51. Id. at 738.


54. See Cohen, *supra* note 4, at 221.

55. 30 U.S. (5 Pet.) 1 (1831).

56. Id. at 17.

57. Id. See also Wilkinson & Volkman, *supra* note 52, at 612–17.
government owes Indian tribes a duty to act as a fiduciary or trustee—in their best interests and in good faith.58

Since 1831, in the course of applying the principles of trust and fiduciary duty set out in Cherokee Nation v. Georgia, the Supreme Court has developed an important procedural limit on congressional power over Indian affairs. That limit is embodied in the "canons of construction," which derive from the principle that "federal action toward Indians as expressed in treaties, agreements, statutes, executive orders, and administrative regulations is construed in light of the trust responsibility."59 The specific canons include the following closely related ideas: language is construed liberally when the creation of Indian rights is at issue; language that might compromise Indian rights should be construed strictly; and where ambiguities exist, language will be construed to favor Indians and as the Indians involved would have understood it.60

It is possible to summarize the law pertaining to quantification of Indian Winters rights and apply it to the Navajo case regarding San Juan waters and the Navajo Irrigation Project in the following way: It is within the power of Congress to quantify Navajo Winters rights, even contrary to the wishes of the Navajo Tribe. For NIIP's authorization to have achieved this, however, the language of the statute or "clear and reliable evidence in the legislative history" must express the clear and plain intent of Congress to quantify Navajo Winters rights with NIIP for all time. Under the standard set by United States v. Dion, the record needs to show that Congress "actually considered the conflict" between allowing the Navajo the full scope of their Winters rights (treaty rights) and limiting those rights to the NIIP allocation. Under the canons of construction, language limiting Navajo water rights must be read strictly, while language creating or preserving Navajo water rights must be construed liberally. Ambiguities in the statute (or the record) must be read to favor Navajo interests (the preservation of Winters rights or compensation for lost rights) and as the Navajo would have understood the language at the time.

58. In Seminole Nation v. United States, 316 U.S. 286 (1942), the Supreme Court spoke of "the obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." Id. at 296. The Court wrote, "In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." Id. at 296-97.

59. Cohen, supra note 4, at 220–21. See also Wilkinson & Volkman, supra note 52, at 617–18.

60. See Cohen, supra note 4, at 221–22, 224–25. See also Getches & Wilkinson, supra note 3, at 217.
SECTION 12(A) AND "THE LAW OF THE RIVER"

The power to quantify Indian Winters rights lies with Congress.

The source of congressional action on the issue is legislative materials—NIIP's authorizing statute and, in the event of ambiguities, the legislative history. In the authorizing legislation itself, the only language that explicitly mentions Indian water rights is section 12(a). It provides:

None of the project works or structures authorized by this Act shall be so operated as to create, implement, or satisfy any preferential right in the United States or any Indian tribe to the waters impounded, diverted, or used by means of such project works or structures, other than contained in those rights to the uses of water granted to the States of New Mexico and Arizona pursuant to the provisions of the Upper Colorado River Basin compact. 61

This statement means that use of project canals and other conduits to satisfy a Winters right (a 'preferential right') can occur only if the amount delivered does not exceed the amount allocated to New Mexico and to Arizona under the 1948 Upper Colorado River Basin Compact. Understanding this statement fully requires a digression on what is traditionally called 'the law of the Colorado River.'

Two interstate compacts form the foundation of that law. The first is the Colorado River Compact of 1922; the second, the Upper Colorado River Basin Compact of 1948. 62 The 1922 Compact divides the basin into an upper and lower part (the point of division is Lee Ferry in northern Arizona) and allocates part of the river’s waters to each basin. The negotiators based the allocation on the belief that the average annual flow of the river at Lee Ferry was more than 16 million acre-feet and allocated something less than half that, 7.5 million acre-feet, to each basin. The apportionment took the form of a promise by the states above Lee Ferry (Wyoming, Colorado, Utah, and New Mexico) "not to deplete the Lee Ferry flow below an aggregate of 75 million acre-feet for any 10 consecutive years." 63 The upper basin was to get the balance. 64

61. NIIP Act, supra note 1, at §12(a).
64. See Colorado River Compact, supra note 62, at art. II (division at Lee Ferry into two basins); art. III(a) (allocation of 7.5 million acre-feet to each basin); art. III(d) (delivery by upper to lower basin, 10-year periods). In 1945, Congress ratified a treaty between the United States
In 1948 the upper basin states apportioned their share of the Colorado by percentages. Colorado was entitled to 51.75 percent of the upper basin's share of Colorado water in any given year, Utah, 23 percent, Wyoming, 14 percent, and New Mexico, 11.25 percent. In addition, Arizona, a small portion of which is located in the upper basin, received 50,000 acre-feet a year. As it happens, the estimate of average annual flow of the Colorado on which the 1922 Compact was based—over 16 million acre-feet—was high. In fact, analysis of several centuries of tree rings shows the long-term flow to be closer to 13.5 million acre-feet a year. Because the 1922 Compact promises 7.5 million acre-feet per year to the lower basin, with the upper basin taking the remainder, a lower annual flow means that upper basin supplies are considerably smaller than expected under the 1922 Compact.

All the states of the Colorado basin have traditionally felt that they need all of their compact allocation for state water rights, or prior appropriation rights. This is especially so of the upper basin in light of the lower than expected flow. Federally reserved water rights such as Indian claims are therefore an enormous threat to the states. Downstream states are especially fearful lest an upstream state exceed its compact entitlement in the course of serving an Indian claim with what is, in the view of the downstream state, downstream water. Colorado was in just such a position with regard to New Mexico's use of San Juan water for NIIP.

Section 12(a) of NIIP's authorizing legislation is Colorado's attempt to keep New Mexico's satisfaction of Winters claims within com-


67. For an example of the extent to which the lower flow at Lee Ferry, as estimated in 1922, diminishes upper basin state entitlements, consider the case of New Mexico. In 1958, New Mexico State Engineer Reynolds estimated that New Mexico's annual compact entitlement was 838,000 acre-feet. This figure is based on 11.25 percent (the 1948 Compact apportionment to New Mexico) applied to the net of 7.5 million acre-feet (the 1922 Compact allocation if the Colorado actually averaged something over 15 million acre-feet a year at Lee Ferry). Subtracted from this figure was 50,000 acre-feet (the 1948 Compact's allotment to Arizona). Senate Hearing 1958, supra note 18, at 86. This ignores treaty obligations to Mexico. By 1975, Reynolds had revised his estimate to 727,000 acre-feet, based on an average flow of 14 million acre-feet, though again ignoring treaty obligations to Mexico. San Juan-Chama Project: Hearings on the Existing San Juan-Chama Conversion Project in Colorado and the State of New Mexico, and the Effects of the Project on the Fish and Wildlife Inhabitants of the San Juan River Basin before the Subcomm. on Energy Research and Water Resources of the Senate Committee on Interior and Insular Affairs, 94th Cong., 1st Sess. 93 (1975). If the starting point of upper basin entitlement is 4.5 million acre-feet—based on an annual flow of 13.5 million acre-feet—then New Mexico's entitlement, taking treaty obligations to Mexico and Arizona's allotment into account, is just over 500,000 acre-feet, 60% of Reynolds's original claim.
pact entitlements. The provision that became section 12(a) first appeared in 1961.68 Felix Sparks, Director of the Colorado Water Conservation Board, first proposed the provision in 1960 in negotiations with New Mexico.69 The 1961 House Report on NIIP states straightforwardly, but succinctly, that the section was necessary to allay the concern of Colorado that under certain doctrines, particularly those pertaining to irrigation of Indian lands, the allocations of water to that state under interstate compacts may be jeopardized. It [section 12(a)] would preclude the United States from furnishing any water through the project works other than water allocated to the states of New Mexico or Arizona by the Upper Colorado River Basin compact.70

Colorado feared that 'various federal theories,' meaning the Winters doctrine, would allow New Mexico to draw more water from the San Juan River than the interstate compacts allow under the guise of meeting Indian water claims. If New Mexico were to exceed its compact allocation, Colorado feared that, under the 1922 Compact, it would be called on to release to the lower basin water that it wished to use for its reclamation project in the area, the Animas-La Plata Project.71

In House testimony in 1961, Felix Sparks said that as far as Colorado was concerned, all of the waters allocated to New Mexico or Arizona under the compacts could be used for Indians or other federal uses "but . . . that the Federal Government [could not] claim waters allocated to the State of Colorado for use in either New Mexico or Arizona."72

Thus section 12(a) protects Colorado's rights under the interstate compacts by placing a ceiling on Indian water claims in New Mexico. While it attempts to limit Indian claims in general, it does not specifically limit Navajo claims to the NIIP allocation. To do so, the section would have to mention a specific amount of water and name the Navajo. As it stands, it does neither. Given the ambiguity surrounding section 12(a), the canons of construction suggest that it should not be read as a limitation on Navajo rights.

The ambiguity also makes it necessary to delve deeper into the legislative record for further explication of the section. In the hearings, for example, lie some statements that specifically mention limiting Indian

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68. Senate Hearing 1961, supra note 18.
69. House Hearing 1960, supra note 42, at 96, 110 (remark of S. Reynolds, State Engineer, New Mexico.)
claims and appear to suggest that section 12(a) was indeed intended, at least by some, to limit Navajo rights. The starkest statement supporting quantification is in the testimony of New Mexico State Engineer Stephen Reynolds before the Senate Subcommittee on Irrigation and Reclamation in 1961. In a section-by-section explanation of the bill under discussion, he said of section 8, which became section 12(a):

Section 8 of the draft was inserted to give Colorado assurance that all uses from these projects in New Mexico or Arizona will be chargeable to the allocations given New Mexico and Arizona by the Upper Colorado River Basin compact, and that the right to use amounts in excess of those allocations will not be claimed under the Winters doctrine, the 'reservation theory' or some other theory of water law.7

Equally suggestive of legislative intent to limit Navajo rights is an interchange between Congressman Wayne Aspinall of Colorado, chair of the full Committee on Interior and Insular Affairs while NIIP was under discussion, and then-Governor of New Mexico Ed Mecham in House hearings held in 1961. Mecham agreed with Aspinall's statement that "Indian rights as such in New Mexico will be limited to the amount of water provided for in the Navajo part of the project."74

But do these statements amount to congressional intent to quantify Navajo Winters claims? First, they are contradictory on the size of Indian claims and ambiguous on the geographical extent of the limitation. Reynolds's statement suggests, as section 12(a) does, that Winters claims under the two projects (NIIP and San Juan-Chama) are limited to New Mexico's and Arizona's entitlements, which, under contemporary estimates, exceeded the allocation for NIIP alone. Aspinall's statement, to which Mecham assented, limits the Indian claim to NIIP's allocation. But it implies, as does Reynolds's 1961 statement before the Senate Subcommittee on Irrigation and Reclamation, that all Indian claims in New Mexico are folded into NIIP. This ignores the potential claims of the Jicarilla Apache, east and north of the Navajo Reservation but touching tributaries

73. Senate Hearing 1961, supra note 18, at 32 (emphasis added). A similar interchange occurred in 1970 between Reynolds and Colorado Representative Wayne Aspinall in hearings on bills to amend the NIIP legislation to change the project's boundaries and increase its appropriation ceiling. Aspinall asked Reynolds, "Before the San Juan-Chama Navajo project was authorized, the State of New Mexico received from the Navajo Indian Tribe a disclaimer to any use of further amounts of water other than these, isn't that correct?" Reynolds agreed that the "disclaimer [was] still in existence," and that New Mexico considered the disclaimer "a binding contract between the State of New Mexico and the Navajo Indian Tribe controlling the States [sic] right to use of water from the Colorado River." Navajo Indian Irrigation Project: Hearing on S. 203 and H.R. 13011 Before the Subcommittee on Irrigation and Reclamation of the House Committee on Interior and Insular Affairs, 91st Cong., 2d Sess. 45 (1970) [hereinafter House Hearing 1970].

to the San Juan, as well as the many Pueblo tribes along the Rio Grande. Surely it is not possible to quantify the Winters claims of tribes who were absent from the negotiation and never mentioned by any party. Thus, as clear as these statements are in their reference to limitation of Indian water claims, it is hard to conclude that they limit Navajo Winters claims to the NIIP allocation.

Another difficulty with the statements is their status as expressions of individual state views, rather than federal views. Is it possible to take as an expression of congressional intent, meaning the intent of congress as a whole, the view of state-level representatives of New Mexico, which both Reynolds and Mecham were? United States Rep. Aspinall put the words in Mecham's mouth. But it can be argued that he was acting more as a representative of Colorado, whose interests he was protecting to the sharp exclusion of concern for Navajo interests, than he was acting as a federal legislator. Aspinall's position relative to the Navajo exemplifies a fundamental dynamic in Indian affairs—that of state antagonism to Indian interests. Taking Aspinall's state-oriented view as congressional intent also contradicts a fundamental principle in Indian law that the federal government is the site of authority over Indians. Calling Aspinall's statement the intent of Congress masquerades as federal interests what are truly state interests. Hearing records contain many things that do not constitute congressional intent; it is entirely possible that these two statements are examples of remarks that must "be used with discrimination."

These two less than fully clear and consistent statements represent the entire legislative record on section 12(a) that uses express language of limiting Indian claims. However, Winters rights are mentioned elsewhere in the record where sharing shortages is discussed. Understanding whether Navajo Winters claims were quantified with the NIIP legislation requires a close look at that part of the record.

**SHARING SHORTAGES**

A shortage-sharing provision first appears in NIIP's negotiation history in 1957. Sometime that year, the parties to the negotiations agreed to share shortages on the river in times of drought. The Tribal Council

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78. The Tribal Council first agreed to the draft bill on NIIP and San Juan-Chama, which included the shortage-sharing provision, in December 1957. *See* Council Resolution CD-86-57, *supra* note 40. As early as May of that year, the proposed projects did not include a shortage-sharing provision. *See* H. Doc. No. 424, *supra* note 18, at 271-87.
meeting at which the draft NIIP bill, which included a shortage-sharing provision, was approved involved considerable discussion of the provision. Attorney Larry Davis led the discussion. He urged the Council to agree to the section for two reasons. One was that Congress would never pass a bill without the provision. The other was that the Tribe was interested in attracting industries to the basin in order to build an economic base for that part of the reservation. Industries would have no incentive to locate in the San Juan Basin if their priorities to needed water were junior—and water claimants subsequent in time to NIIP and San Juan-Chama would have late priorities. Thus the Tribe agreed to share shortages in the river, and in so doing, relinquished its prior claim under Winters to San Juan waters. Davis said, significantly, "Industrial development . . . is just as important to the Navajo people as irrigation, maybe more so."

The first Senate report on the first NIIP bill reported out of the Committee on Interior and Insular Affairs explained the shortage-sharing provision. According to that report, it "provides adequate protection for irrigation requirements for the Navajo area and at the same time provides a method of cooperation in water uses for downstream mineral and industrial developments on Navajo land." The original Senate bill also authorized (as did subsequent bills) the building of capacity in the 'Main Canal,' which carried water from storage behind Navajo Dam to the eastern edge of the project lands, for municipal and industrial water uses "over and above the diversion requirements for irrigation." At the first hearing, in 1958, in the first few minutes of his testimony, Tribal Council Chair Paul Jones stated that allowing enough capacity in the irrigation project works to permit delivery of water for M&I purposes "is almost as important to the Navajo people as the Navajo Indian Irrigation Project itself." He went on to say that the additional water "will make feasible large-scale industrial development in northwestern New Mexico which, we hope, in conjunction with the irrigation project and private and tribal projects elsewhere on the Navaho Reservation, will permanently solve the Navaho unemployment problem."

In debate on the floor of the House on May 22, 1962, Rep. Joseph Montoya of New Mexico, sponsor of a NIIP bill, described the project's

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79. See supra note 44.  
82. See citations supra note 42.  
83. Senate Hearing 1958, supra note 18, at 4.  
84. Id. at 99. See also Senate Hearing 1959, supra note 18, at 33; House Hearing 1960, supra note 42, at 65–66; Senate Hearing 1961, supra note 18, at 36.  
85. Senate Hearing 1958, supra note 18, at 99. Under recent custom, "Navajo" is the accepted spelling of the tribe's name. Some sources predating the 1960s use the "Navaho" spelling. In quotations from those sources, the original spelling is preserved.
features, including the shortage-sharing provision and the authorized canal capacity for M&I purposes. He then went on to say:

The Navajo Tribe has agreed to this manner of developing and using the water [of the San Juan] by relinquishing its rights under the so-called Winters doctrine for the water necessary to irrigate the Navajo Indian irrigation project in order to provide a feasible and workable plan for the comprehensive development of both the land and industrial resources of the San Juan Basin of New Mexico.86

This statement repeats nearly verbatim Navajo testimony at the 1960 and 1961 hearings. Paul Jones in 1960 said before the House Subcommittee on Irrigation and Reclamation that

[[[the Navajo Tribe has consented to [share shortages], and relinquished its rights under the Winters doctrine for the water necessary to irrigate the Navajo Indian irrigation project, in order to provide a practicable plan for comprehensive development of the resources and industrial potential of the San Juan Basin. We have taken this step because it is necessary for our survival.87

Testimony by Maurice McCabe, Tribal Council Executive Secretary, before the Senate Subcommittee on Irrigation and Reclamation and the corresponding House Subcommittee in 1961 involved precisely the same language.88

Is the shortage-sharing provision really quantification of Navajo rights? And, if the shortage-sharing provision is quantification, what amount is quantified? By relying on the statutory language relevant to Winters claims and pushing the meaning of that language to its logical ends, given the record, one must answer that the Navajo claims were indeed quantified at the NIIP allocation.89 This is the logical implication of

87. House Hearing 1960, supra note 42, at 64.
89. Other answers are possible but are not discussed fully here. One is that, given NIIP Act Section 12(a), the shortage-sharing provision does quantify Navajo claims, but at New Mexico's entitlement. This interpretation agrees with much of the criticism of the answer addressed fully in the text, but goes on to say that New Mexico allocations of San Juan water to non-Indians prior to NIIP are invalid and should be overturned. An analysis of this issue is beyond the scope of this article. Another alternative, the most far-reaching of all, is that the shortage-sharing provision did not quantify Navajo claims because the whole river is Navajo, another issue beyond the scope of this article. This interpretation also requires a decision about the validity of Section 12(a)'s limit on meeting Indian claims with NIIP and San Juan-Chama project works.
the rationale for the provision, combined with section 12(a) and the physical and legal availability of water in the river.

According to New Mexico estimates, approximately 112,000 acre-feet of water per year was available, or not yet committed, out of New Mexico's compact entitlement for M&I uses when NIIP was under discussion. The tribe hoped that industry would locate in the basin and use that water. But rights to that water, under New Mexico law, would have junior priorities. In most years, the Navajo prior claim to NIIP water would cut into deliveries to junior users; in some years, full delivery to NIIP would preclude any delivery to junior users. Uncertainty such as this was an effective deterrent to industry locating in the basin, so the tribe believed it necessary to give up its prior claim to NIIP water and to agree to share shortages ratably in the basin. The implication for quantification of this rationale for sharing shortages is this: for the 112,000 acre-feet to have a junior claim, it could not, by definition, be Indian water with a Winters priority. Thus the Navajo must have assumed that the M&I water was not theirs. Section 12(a) limits all Indian claims to New Mexico's allocation, and there was no reference to other water within the allocation that the tribe might use in the future. Thus by the logic of the rationale for it, the tribe's agreement to share shortages limited its claim to the NIIP allocation.

However, this is not a satisfactory conclusion for several reasons. For the shortage-sharing provision to amount to quantification, it is necessary to refer widely to state law and external facts about water allocation and supply in New Mexico. Such an excursion seems to go beyond the reference to legislative history that strict construction allows to find congressional intent. And the tortuous journey through the legislative record

90. In 1958, New Mexico State Engineer Reynolds estimated New Mexico's entitlement under the compacts at 838,000 acre-feet per year. Of that, 237,000 acre-feet were committed to current and authorized uses. NIIP and San Juan-Chama would use an additional 362,000 acre-feet. That left 238,000 acre-feet “available for future developments.” Senate Hearing 1958, supra note 18, at 86. By 1959, the State Engineer had added 39,000 acre-feet to present and authorized uses, leaving 200,000 acre-feet a year available for future developments. Of this, 112,500 acre-feet were allocated for municipal and industrial water use. The Animas-La Plata Project in New Mexico was to take 33,000 acre-feet. All this left about 20,000 acre-feet for unnamed uses. Senate Hearing 1959, supra note 18, at 19. The State Engineer used the same figures in testimony before the House the following year. House Hearing 1960, supra note 42, at 78. See also Senate Hearing 1961, supra note 18, at 49. Reynolds's figure of 838,000 acre-feet was, as it is now known, overly optimistic, making estimates of future uses, industrial or otherwise, fantasy. But at the time that NIIP was under discussion, few people had admitted that the flow of the Colorado was lower than expected in 1922.

91. The only water discussed for potential Navajo benefit, other than NIIP water, was this M&I water. The 1958 Senate Report spoke of “mineral and industrial developments on Navajo land,” S. Rep. No. 2198, supra note 81, at 86. Paul Jones spoke of solving the Navajo unemployment problem permanently with large-scale industrial development in New Mexico. Senate Hearing 1958, supra note 18, at 99. Other uses were earmarked by New Mexico for nonIndian uses. See House Hearing 1960, supra note 42, at 78; Senate Hearing 1961, supra note 18, at 49.
required for the shortage-sharing provision to mean quantification almost necessarily contradicts the standard of clarity and plainness. If the record is read nonetheless to exhibit congressional intent to quantify Navajo Winters rights, that intent would be implied, and then only obscurely implied. Also, the set of facts required for sharing shortages to equal quantification—indeed, the entire environment surrounding the Navajo decision to share shortages—was the work of the state of New Mexico. The junior priority for industrial users was created by the State Engineer, following the law of New Mexico. The late Stephen Reynolds said in a 1988 interview that the shortage-sharing provision was Paul Jones's idea. Jones "saw the need for M&I development," Reynolds said, "to really create jobs and an economy." According to Reynolds, the late priority date on a water claim filed by El Paso Natural Gas for a coal gasification project on the reservation in the late 1950s spurred Jones to propose the sharing of shortages. But Reynolds himself assigned the late priority to the claim—admittedly, according to New Mexico state law. But in an important sense, Reynolds himself was the author of Jones's worry. Further, it is unclear why Larry Davis told the Tribal Council that Congress would probably not pass the NIIP bill without a shortage-sharing provision. The implication is that important interests other than the Navajo favored equalizing priorities on the river. Rio Grande interests, for example, would benefit from Navajo relinquishment of first priority. This spin on the history of the shortage-sharing provision turns it very much into a situation in which the Navajo were told that they had to limit their water claims to NIIP because additional water, beyond NIIP, was not theirs. But this situation begs the question of Navajo quantification, saying that it happened because there was no other water for the tribe.

Thus the conclusion that the shortage-sharing provision quantifies Navajo Winters rights stumbles against two obstacles: 1) the wide reference to state law and surrounding facts and circumstances required to reach the conclusion; and 2) New Mexico's control of that law and those facts and circumstances: Several other obstacles stand in the way of the conclusion that any provision of NIIP's authorizing legislation quantified Navajo Winters rights: 1) Congress did not, as required by Dion, appreciate the conflict between existing Navajo rights and quantification; 2) Congress

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92. It is possible to reach the conclusion of implied intent using strict construction. "Courts applying a rule of strict construction will proceed to interpret the statute, often resorting to extrinsic interpretational aids, to determine whether the legislature intended to reach the right or power. Thus a court guided by the rule of strict construction may find an implied legislative intent." Wilkinson & Volkman, supra note 52, at 646-47.

93. Interview with S. Reynolds, State Engineer of New Mexico, in Santa Fe, New Mexico (June 18, 1988).

94. Id.

95. In fact, it is arguable that any uses of water on the San Juan other than NIIP (and San Juan-Chama, to which the tribe clearly consented) were illegal usurpations of Navajo rights.
could not have formed the intent to quantify Winters rights in 1962; 3) the NIIP record is peppered with statements of concern that Navajo rights be protected; 4) great ambiguity exists over the size of the Navajo water claim, quantified or not; 5) in 1970 an important congressional player in NIIP’s authorization publicly appeared to doubt that NIIP had limited Navajo water rights for all time; and 6) recognized settlements of Indian Winters claims achieve quantification with unambiguous, straightforward language, contrasting sharply with the language available in the NIIP record. Each of these issues is discussed in the following section.

ARGUMENTS AGAINST QUANTIFICATION

Under the rule articulated in Dion, for Congress to abrogate a treaty right, it must have “actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.” But from a close reading of the legislative record, it is not clear that Congress had any notion of what Winters claims were, much less that by authorizing NIIP it would, in fact, be canceling a significant portion of the tribe’s Winters claims.

For example, the state of New Mexico put together an important document in the early 1950s setting out options and equities involved in the development of the San Juan River. In that document, New Mexico states that it “has never acceded to BIA and tribal interpretations of the so-called Winters case.” However, what exactly New Mexico perceived the BIA and tribal interpretation to be is not specified. “The State’s position is that the rights of the Indians, whatever they may be, have not been determined and cannot be determined except by due process of law. It [was] the view of the State, however, that this situation need not hinder or impede the orderly development of the water resources of the San Juan River in this state.” Indeed, the entire issue of ‘Indian Rights’ receives 11 lines in this report, a treatment following nearly nine pages on state and federal law, the compacts, and international law considered “applicable” to the San Juan issue. Reynolds claimed in 1988 that the state hardly took potential Navajo Winters claims into account in the course of negotiating over NIIP: “We didn’t feel we had to defend against Winters doctrine rights,” he said.

96. 476 U.S. at 739-40.
97. State Engineer of New Mexico, A review of the San Juan Problem in New Mexico 14 (1953).
98. Id.
99. See id. at 5-14.
100. Interview with S. Reynolds, supra note 93.
Throughout the hearing record, non-Navajo witnesses and legislators continually referred to the "so-called Winters doctrine."\(^{101}\) This referral is indicative of their doubt about the viability of the Winters doctrine. In his testimony, Felix Sparks did not even call the case by name; he referred only to "various federal theories."\(^{102}\) In one exchange, between Wayne Aspinall and fellow committee member James Haley of Florida, there is a vague reference to the idea that with NIIP, the Navajo were both giving something up and gaining something. Haley was questioning William Utton, Vice President of the San Juan, New Mexico, County Farm and Livestock Bureau, who was speaking in opposition to the Chama Division. For reasons that are not clear—Utton was not identified as an expert on Indian water law—Haley suddenly asked Utton if NIIP would "take away from the Navajo Indians any water rights that they now have?"\(^{103}\) Utton's response was confusing,\(^{104}\) and Aspinall interjected, presumably to clarify the confusion. What he said is the only hint in the entire record that anyone appreciated the simultaneous relinquishment and attainment of rights that quantification of Winters claims involves. While his remarks are a poor substitute for real understanding, they are worth quoting in full:

The Navajo Tribe would be unable to use any more water than it is using at the present time if it were not for the fact that we have this proposed development for this area. The Navajo Dam has been built, and the reservoir will fill. The Navajos would have had no right to the use of this water, if we did not have this agreement; and they come in here and state at the present time that they are satisfied.... They are getting some value for the value they forego. As far as any water rights that they had which are undetermined, they have made their agreement that they are willing to go along with the water that this calls for the development of their lands.\(^{105}\)

Aspinall does not state clearly what the value is that the Navajo will forego, and he contradicts the notion that the tribe had any preexisting rights to water. What is clear from Aspinall's remarks, however, is the hard political compromise involved in NIIP, a compromise in which the

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103. Id. at 56.
104. Utton said that under literal interpretation of certain treaties, "they [the Navajo] have all the rights to the water," but that NIIP "would not take away from any water that they are presently using," at the same time that "a portion" of the Navajo's rights would in fact be taken away. Id. at 56–57.
105. Id. at 57.
scale and scope of rights that the Navajo brought to the table was vastly under-appreciated.

Thus it is far from clear that the most informed members of Congress on NIIP had the slightest idea of the nature of Navajo Winters rights, specifically that limiting Winters claims to the NIIP allocation involved the sacrifice of a significant portion of the tribe's total claim. How, if this is true, is it possible for Congress to have formed the intent, clearly and plainly expressed or otherwise, to quantify Navajo Winters claims? It seems impossible for Congress to have appreciated the conflict between the full scope of Navajo rights and the smaller claim granted by NIIP, as called for in Dion.

Another point goes to the issue of the formation of congressional intent. Congress authorized NIIP in 1962, the year before the Supreme Court established a standard for quantifying Indian Winters claims with Arizona v. California. Prior to Arizona v. California, legally protected Indian water rights consisted only within the context of priority; there was no basis for estimates of the size of claims. Indeed, the language of the record is limited almost entirely to talk of priority. Whatever the logical implications of relinquishment of priority, given surrounding water law and other sections of the NIIP act, Congress could not have had quantification of Navajo Winters claims in its collective mind when the only firm right that existed before 1962 was priority.

Another point from the record vitiates the argument for quantification. That is that in various places throughout the record, concern is expressed that Navajo rights, including water rights, be protected. James Haley of Florida, member of the Subcommittee, was systematically introduced and referred to as "a friend of Indians." Regularly throughout the hearing record, he expressed concern that Navajo rights were being infringed, either through the San Juan-Chama Diversion, or through NIIP. In 1961, Haley questioned Secretary of Interior Stewart Udall about NIIP.

Mr. Secretary, I want to ask you this direct question: In the construction and operation of this project, is the Navajo Tribe of Indians going to be deprived of any water rights that they now have or will this project in any way interfere with the development of lands belonging to the Navajo Tribe?

106. See, e.g., Wayne Aspinall's statement that "there has been no better public servant in behalf of the Indians than the gentleman from Florida." House Hearing 1960, supra note 42, at 30.


Stewart Udall replied that indeed it would not and, in fact, the project would “allow them to use and establish a water right.”

Udall had previously expressed concern to the Senate Subcommittee over the provision that became section 12(a); when the language first appeared in 1961, Udall wrote to Senator Clinton Anderson, Chair of both the Senate Committee on Interior and Insular Affairs and of the Subcommittee on Irrigation and Reclamation, about the section that became 12(a). Udall said that if it were merely intended to reaffirm Article VII of the Upper Colorado River Basin Compact—which charges to the state in which the use occurs any water use by the United States or its wards, including Indians—the language should be made identical to that article or deleted. On the other hand, Udall wrote, “If it does something more, or limits or restricts the rights of the Indians to the water, its inclusion in the bill is improper.”

Udall eventually agreed to retention of the language that became 12(a) “in light of the clarifying language” contained in the Senate Report of 1961. That language can only be a short paragraph on the section stating that it “prohibits the Secretary of the Interior from servicing any preferential water right of the United States or Indian tribe through the facilities created by this act.” On its face, because it lacks the additional language found in section 12(a) of the authorizing legislation relating to compact entitlements for New Mexico and Arizona, this language means that water for NIIP could not be the satisfaction of a Navajo Winters claim. The logical implication is that NIIP was not intended to quantify Navajo Winters rights. Of course, section 12(a) of the NIIP legislation is worded to keep the satisfaction of Indian claims within compact allocations. The point is that the Secretary of the Interior appears to have believed that important Indian rights were not being compromised with NIIP. Language protecting Indian rights must be construed broadly; the many expressions of concern for those rights in the record argue against congressional intent to limit Navajo rights through quantification.

Another point undermines the notion that the NIIP legislation quantified Navajo Winters rights for all time. That is the ambiguity over just how much water the tribe was granted by the legislation. The statute speaks clearly of an annual 508,000 acre-foot diversion. The later hear-

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109. Id. (statement of S. Udall, Secretary of the Interior).
112. See H.R. No. 685, supra note 66, at 20 (statement of S. Udall, Secretary of the Interior).
114. NIIP Act, supra note 1, §2. See also DuMars & Ingram, supra note 3, at 27–28, 34–35 (providing a discussion of the meaning of the legislation’s choice of diversion rather than depletion).
ing record mentions an annual consumptive use of 252,000 acre-feet.\textsuperscript{115} Another figure emerged when the Bureau of Reclamation, in the course of building the project, decided for economic reasons to shift from the originally planned gravity-flow irrigation to sprinkler irrigation. This decision reduced the diversion required to achieve the same amount of consumptive use to 330,000 acre-feet a year.\textsuperscript{116} Thus there has been confusion over whether the Navajo have rights to the 508,000 acre-foot diversion mentioned in the legislation, the 252,000 acre-feet of consumptive use required to complete the project, or the new 330,000 acre-foot diversion required under sprinkler irrigation to achieve consumptive use of 252,000 acre-feet.\textsuperscript{117} Conflicting Interior Department Solicitor General opinions exist on the issue.\textsuperscript{118} Could it be that the NIIP legislation quantified the Navajo Winters right without specifying a quantity? It seems unlikely.

Two other points, drawn from outside NIIP’s legislative record, contradict the notion that Congress quantified Navajo Winters rights in the course of discussing and authorizing NIIP. Congressman Wayne Aspinall of Colorado chaired the House Committee on Interior and Insular Affairs while NIIP was under discussion. The House committee did not report that a NIIP bill was out until 1961. This was due to Aspinall’s concern that the project, along with the Chama Diversion, would jeopardize his favored project, the Animas-La Plata project. Thus he was the chief congressional force behind section 12(a), delaying NIIP’s passage until the bill included it.\textsuperscript{119} He repeatedly asked witnesses before the House Subcommittee on Irrigation and Reclamation if the Navajo were limiting their requests for water to what they got with NIIP. Indeed, the portions of the record that support most strongly the argument that NIIP represents quantification of Navajo Winters rights were created by Aspinall. So if it is possible to say that Congress intended to quantify Navajo Winters rights with NIIP, Aspinall would be the author of that intent.

Yet, in hearings conducted in 1970 on the issue of amending the NIIP act to change the precise boundaries of the project and to increase the appropriation ceiling, Aspinall spent considerable time asking then Tribal Chair Raymond Nakai if the Navajo were limiting their Winters claims to NIIP. He asked Nakai,

\textsuperscript{115} See Senate Hearing 1959, \textit{supra} note 18, at 19; Senate Hearing 1961, \textit{supra} note 18, at 49. See discussion in BIA testimony of larger consumptive-use figure, \textit{supra} note 18.

\textsuperscript{116} See Bureau of Reclamation, Dep’t of the Interior, \textit{Navajo Indian Irrigation Project}, New Mexico, All-Sprinkler Irrigation System 2 (1974).

\textsuperscript{117} Id. There is even the possibility of another consumptive use figure of 238,000 acre-feet, with sprinklers. The differing figures are explained further in Jacobsen, \textit{supra} note 30, at 171–72.

\textsuperscript{118} See \textit{id.} at 171–77 (further explaining the differing Solicitor General’s opinions).

Are you folks going to be satisfied with the allocation of water that has been decided by the compacts ... [o]r are you going to be, later-on, [sic] relying upon the so-called Winters doctrine which would presumably gain you ... more if you carried it to the fullest extent?  

When Nakai demurred, saying that he was "not a water expert," Aspinall pressed more forcefully. He said that he was "just a little bit hesitant about giving ... support to a project that means so much to you ... [when] ... you might take water from the State of Colorado or the State of Utah or the State of Wyoming."  

I don't think you can get any more [water] out of New Mexico. You might be able to, I don't know. But in the State of Wyoming, where the water is not yet put to use and has not been committed, if your tribe wishes to proceed under the doctrine set forth in that Winters case, we are in for a lot of trouble.  

Nakai eventually, under pressure, said that the tribe would "take the water that we can use for the Navajo Indian Irrigation Project."  

But this statement appears to be designed more to stem the press of questions from Aspinall than to commit the tribe to quantification. And while Nakai says that the tribe will 'take' water for NIIP, he significantly omits saying that it will take no other. In any case, the exchange shows that Aspinall had serious doubts that NIIP limited Navajo Winters when, given his prominent role in the legislative proceedings, he was in the best possible position to know.  

The second point drawn from outside NIIP's legislative record that weakens the argument for quantification is the clarity of the language on quantification in the recognized negotiated settlements of Indian Winters claims. Of the handful of recognized, legislative settlements of Indian Winters rights as of 1991, none has been achieved by language as vague on the point of quantification as the NIIP legislation or its legislative history. In all five cases, the statutory language exhibits clear congressional intent to settle or quantify Indian water rights. The title of each act mentions either water rights, water rights claims, or water rights settlement; settlement of the Indian claims at issue is also mentioned elsewhere in the

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121. Id. at 38.  
122. Id.  
123. Id.  
124. Aspinall's uncertainty is all the more remarkable considering the exchange with Reynolds in that same year discussed supra note 73.  
125. See supra note 24 (citing the titles of the acts in full). It is interesting to note that in 1984, Barry Goldwater said of the 1978 Ak-Chin settlement act that it "represents the first legislative settlement of an Indian tribe's water rights." 138 Cong. Rec. S11836 (statement of Sen. Goldwater).
acts;\textsuperscript{126} four of the five statutes name an amount of water to be received by the tribes annually.\textsuperscript{127} In the Animas-La Plata legislation, the award to the tribes is specified in the negotiated agreement incorporated into the statute,\textsuperscript{128} and four of the five statutes contain explicit language by which the tribes involved waive all other claims to water.\textsuperscript{129} Each settlement is explicitly the central purpose of the legislation. It is not necessary to scour the legislative history for clues to whether Congress intended to quantify Indian water claims. It is not necessary, either, as it is with the NIIP case, to spin out the logical implications of certain provisions of the statutes involved and refer to external facts and conditions.

**CONCLUSION**

The only section in NIIP's authorizing legislation that mentions Indian water rights, section 12(a), prohibits the use of NIIP dams and ditches to satisfy an Indian claim in excess of New Mexico's entitlements to water under the 1922 and 1948 Compacts. The legislative record on that provision reveals that its purpose was to protect Colorado's compact entitlements, particularly for the Animas-La Plata Project. It does not on its face limit Indian, or Navajo, claims to the NIIP allocation. It cannot be said to have quantified Navajo *Winters* rights to the NIIP allocation.

Two statements in the hearing record on NIIP made by representatives of New Mexico offer the clearest evidence that NIIP was to have involved quantification of Navajo *Winters* rights. Both mention limitation of Indian claims. But they conflict on the size of the Indian claim involved and are not clear on exactly which Indians are included in the limitation. Furthermore, they are expressions of state interests, traditionally antagonistic to Indian interests, against which the federal government has traditionally protected Indians.

The agreement by the Navajo to share shortages on the San Juan—made in 1957, embodied in the 1962 legislation and in every bill

\textsuperscript{126} See *supra* note 24. The relevant section for the Ak-Chin settlement is §1(b)(5); for the Papago, §301(4); for the Pima-Maricopa, §2(b); for the Utes, §2; and for the Mission Indians, §103(b).

\textsuperscript{127} For the Ak-Chin, the amount is 85,000 acre-feet (§3 of the 1984 statute); for the Papago, a total of 28,200 acre-feet (§§303(a)(1)(A), 303(a)(2)(A), and 305(a)); for the Pima-Maricopa, 32,000 acre-feet (§2(a)(9)); and for the Mission Indians, 16,000 acre-feet (§106(a)(1)).

\textsuperscript{128} The text of the agreement can be found at H. Rep. No. 932, 100th Cong., 2d Sess. 31–65 (1988). Amounts allocated to the Ute Mountain and Southern Ute tribes are found on pp. 34–50.

\textsuperscript{129} The relevant sections are, for the Ak-Chin settlement, §1(b)(5); for the Papago, §307(a)(1)(D) [the Papago settlement also provides that any waiver will not take effect until the financial support called for in the statute is in place, §§307(d) and (e)]; for the Pima-Maricopa, §10(b)(1); and for the Utes, §8(a). Nothing in the Mission Indians settlement mentions waiver explicitly.
introduced between 1958 and 1962, referred to throughout the legislative record as a compromise of Navajo rights, and made to promote economic development in the San Juan Basin—is the strongest candidate for language quantifying Navajo Winters rights. But it can logically mean quantification only by reference to wide-ranging circumstances and facts created by New Mexico or under that state’s control. Almost by definition, the need to refer so widely to external facts makes it impossible for the provision to represent the clear and plain intent of Congress.

Furthermore, there is no evidence that Congress could have formed the intent to quantify Navajo Winters rights when it authorized NIIP in 1962. First, the record lacks language suggesting that Congress considered Winters rights valid—continual references to the “so-called Winters doctrine” convey the doubt with which Winters was viewed. And second, Congress lacked a firm basis for calculating the size of Winters claims, because NIIP’s passage predated the decision in Arizona v. California that created the foundation for quantification.

Expressions of concern found throughout the record that Navajo rights be respected; ambiguity about the precise amount of water involved; uncertainty eight years after NIIP’s authorization that quantification had occurred—expressed by Wayne Aspinall, author of most of the statements in the record suggesting a limitation on Navajo water rights; and the contrasting clarity of language found in the five widely-recognized Winters settlements are the final arguments standing in the way of the conclusion that Navajo Winters rights were limited for all time to the amount to be used for NIIP.

The story of Navajo Winters claims and whether authorization of the Navajo Indian Irrigation Project quantified those claims for all time is a complex one. But it is worth sorting through that complexity, because of the scale of Navajo claims and their significance in New Mexico’s San Juan Basin.130 Without some certainty about how much of the San Juan is Navajo, future use of the San Juan cannot occur without producing even

130. It is clear from the record that whatever occurred during consideration of NIIP, it only involved Navajo claims to the San Juan in New Mexico. In the House hearing in 1961, Aspinall asked Executive Secretary McCabe whether the tribe’s relinquishment of Winters priority extended “to the whole San Juan Basin as well as just to that part of the San Juan Basin in New Mexico?” House Hearing 1961, supra note 15, at 37. McCabe declined to answer until he could consult with people involved in the negotiations, but sent a letter to Aspinall for the record. It states, “In reaching an agreement with the State of New Mexico and other members of the Upper Colorado River compact, the Navajo Tribe qualified its position in respect to legal rights which the tribe enjoys under the doctrine of Winters v. United States, assuring to it certain paramount rights in respect to waters of the San Juan, among others, in order to accomplish a practical and equitable division of water among all parties concerned. This concession was only agreed to by the tribe in consideration of getting the Navajo irrigation project established in New Mexico . . . . It is clearly understood by all interested parties, I believe, that the tribe’s concession in respect to the Winters doctrine applies to no other situation than this one.” Id. at 46. McCabe also stated that “the Navajo Tribe will not consider itself bound by this agreement unless the irrigation project is in fact established.” Id.
greater complexity. Without proper recognition of Navajo rights to the San Juan, the largest tribe in the United States will be deprived of perhaps its most valuable resource. This analysis has shown that it is an error simply to conclude that NIIP quantified Navajo Winters claims. Obstacles derived from the principles of the trust responsibility and the canons of construction stand in the way of that conclusion. Indeed, the spirit of the trust responsibility suggests that the record on NIIP should be interpreted to conclude that the Navajo did not quantify their Winters rights with NIIP. More precise conclusions than that are not warranted by the ambiguous and often confusing record.