

Tribe prepares for water negotiations with State

"Water rights are inherent" in the treaty signed in 1855 by the United States government and the Warm Springs tribes. The treaty reserved exclusive fishing rights on all waters running through and

bordering the reservation. "If you have fishing rights, you must have water," says Warm Springs water-master Deepak Sehgal. The Winter's doctrine in 1908 reaffirmed that right. The supreme

court held that the creation of a reservation carried with it sufficient water to support the people and their interests. The amount of water was not defined. Water rights issues when taken

to the courts resulted in high expenditures. More and more cases were entering the courtroom. For that reason during the Carter administration (1977-81) the president encouraged tribes and states to

quantify water for use on the reservation and negotiate for a defined water right. The Warm Springs Tribe was involved with the State of Oregon in litigation regarding Pelton Dam. This case established the Tribe's right to utilize water in the Deschutes and gave it a voice in allowing Portland General Electric to build the dam.

Shortly after that the Warm Springs Tribe began preliminary steps to negotiating its tribal water rights with the State of Oregon. Water rights had become an issue across the nation and according to Warm Springs tribal attorney Dennis Karnopp, "a suit could be filed against the Tribe at any time," demanding quantification of water. On the Warm Springs reservation "water is relatively abundant," says Sehgal. Tribal land holdings are approximately 95 percent. "No major conflicts exist for water rights," he adds, and the Deschutes River has a stable flow.

Also, "good relations exist with the state and our neighbors," says Karnopp. Negotiations taking place at this time would run more smoothly because of the good relations. Based on this premise, "It would be easier to come to an understanding," he adds. "Warm Springs was a good candidate for negotiations with the State and Tribal Council was 'amenable' to the idea, says Karnopp. A tribal negotiating task force was appointed in May 1985 consisting of tribal secretary-treasurer Larry Calica, Fiscal Services branch manager Doug McClelland, tribal attorneys Jim Noteboom and Dennis Karnopp, tribal consultant Ken Smith and tribal-employed engineer Tom Stetson. The Water Management Task Force was charged

with developing a procedure to begin the work of collecting data and to begin work towards negotiations with the state.

Other users of the Deschutes and Metolius Rivers, both of which border the reservation, have expressed concern as the Tribe nears the negotiation stage. The Tribe agrees that consideration must be given to all uses of the river. "The Tribe is not out to take all the water," explains Sehgal. The effort is aimed at quantifying the water and placing a value on it. It involves defining current and future use. Currently, says Sehgal, "The Tribe uses very little water," approximately one cubic foot per second is drawn for domestic use from the Deschutes River's 3500 cfs flow.

Stetson Engineering has been employed to work with the Tribe in a technical capacity. The company is experienced in collecting data for water rights negotiations. The firm is involved in part of the research on hydroelectric use and fish use, water sources, potential crops and determining the practicable amount of irrigable acreage on the reservation.

The Warm Springs Water Department is also involved in collecting data. The department has streamflow data available from past surveys by the U.S. Geological Survey as well as some of its own data. Through the quantification team funded by a P.L. 638 contract and grant, "We now have three years of data" on streamflow and water quality, says Sehgal.

Five weather stations at various elevations and locations provide data on moisture and conditions on the reservation. This data will help to determine areas that could be practically irrigated.

The State's involvement with the Tribe's request for negotiations began with getting authorization from the legislature which was accomplished in the 1967 legislative session.

Three entities will sit at the negotiating table including the Tribe, representatives of the U.S. government and a three-person negotiating team from the State of Oregon. According to State of Oregon Water Resources Department adjudication manager Larry Jebousek, the negotiations will involve reviewing submitted data from the Tribe. The team will be relying on state agencies such as the Oregon Department of Fish and Wildlife for assistance. "We'll be analyzing the accuracy of the data submitted." These agencies will also help with recommendations.

Negotiations will be open to the public, relates Jebousek, but input must be submitted to the Water Resources Department director 10 days prior to negotiations. Negotiations "are open to the public but not open to public comment."

The State's interest in the negotiations is one of cooperation with the Tribe. "We are responding to a request," says Jebousek. "Everyone in the State has the right to have their water rights quantified."

Meetings with the State to begin negotiations have not yet been scheduled but the tribal Water Management Task Force continues to meet to discuss data collection and negotiations. The negotiations, says Karnopp, are being approached from the standpoint of future use. "The Tribe needs to be satisfied that ample provision for future use on the reservation is made."



Beginning at Trout Lake, Mill Creek flows through the reservation. The amount of water is data to be used during tribal water negotiations between the Tribe and the State of Oregon.

Winter's Doctrine affirms tribal water rights

"Water holds the potential for economic development on many Indian reservations. It is also necessary for maintaining traditions, religions and culture of the people and the land."

Attorney and water resources consultant from Santa Fe, New Mexico Steven Shupe points out in the American Waterworks Journal (October 1986) that in the past the U.S. government failed to protect Indian water rights. Now, he explains, efforts are being made by Indians to obtain physical and jurisdictional control over water resources.

When reservations were set aside little if anything was said about water rights. A water provision

was implied, however, and was upheld in a decision called Winters vs. U.S in 1908.

The Winter's case revolved around non-Indian settlers diverting water from a stream that was the water source for two tribes on the Fort Belknap Reservation in Montana. In 1905 a drought caused upriver users to take water from the stream before it reached the reservation. It was determined that Indian users had prior right.

Judge Wm. H. Hunt decided that when the reservation was set aside there was implicitly reserved to the tribes enough water to meet their reasonable needs. Treaties were, then, interpreted the way the Indian nations understand the words not according to the technical

meaning of the words. In the Winter's case tribes did not give up their rights to take water when they ceded their land.

Recent controversy regarding water rights centers around the "reasonable needs" of Indians. The Winter's Doctrine cited "reasonable" to include irrigation, stock watering and domestic use. Other decisions have expanded that use to fisheries and hydroelectric power based on the idea that the purpose of Indian reservations is to serve as a homeland for the tribe's residents and provide economic self-support. The interpretation of the Winter's Doctrine would vary over time.

Water use planning by other users in a watershed has brought

Indian water uses to court. In Arizona vs. California the court felt that the amount of water allocated to tribes should be fixed based on technological and economic conditions in order to enhance planning and investment decisions.

Following this decision lawsuits demanding quantification of water were initiated. Water fluctuations and changes in the number of water users over time had to be considered in this theoretical plan. Hypothetical irrigation plans had to be drawn. Groundwater questions had to be considered.

During the Carter administration a ten-year plan was installed to

negotiate water rights with tribes. Each state was encouraged to negotiate with tribes residing within its boundaries.

On January 15, 1975 Interior Secretary Roger Morten established a moratorium on ordinances and codes by tribes including water codes, until guidelines for adoption of such codes were formulated. The question of non-Indian allotment owners' use of reservation waters was answered when in 1981 it was decided that tribes could not prevent current users from using tribe's reserved water until the tribe is prepared to make beneficial use of such reserved water.

Tribes have responded in various ways to this moratorium, some by ignoring it and enforcing water codes without secretarial approval while other tribes are in various stages of the process of formulating water codes. Some tribes such as the Confederated Tribes of Warm Springs initiated water codes prior to the effective date of the moratorium and therefore are able to manage their own water.

Many tribes, according to Shupe "have made a commitment to comprehensive water management and policies." He feels, "The moratorium on water codes should be reexamined and cooperation between state and tribal agencies encouraged."

Conservation needed to meet water demands

An unsettled air has long existed about western water rights. The key elements of western water law were developed in the 19th century when water was viewed for use in mining and irrigation.

Today's consumptive uses go beyond the needs of the past. Today water use includes recreation, fish and wildlife, aesthetic values and hydroelectric power. Obligations under water rights laws and obliga-

tions to Indian tribes are current issues in water legislation.

Irrigation consumes 90 percent of all water in the west but cities are now demanding a greater share as people migrate to urban areas. At one time there was little need for conservation measures. Water was abundant. In general, according to attorney and Colorado governor Richard D. Lamm, "We treat our most valuable resource as worth-

less." Past price structures reward the waste of water with no incentives for conservation. Agricultural areas are now being asked for their water. Political resistance and water rights laws in some states prohibit the sale and transfer of water from these areas.

"We are in the process of re-evaluating water law," explains attorney Charles F. Wilkinson (American Water Works Association Journal, October, 1986). Concerns regarding water are many, however, with need for reform in most of these areas. Policy concerns include federal budgetary restraints, scrutiny of wasteful practices as the west's population increases, discovery that groundwater supplies may easily be mined out and the discovery that conjunctive management of surface and groundwater is important. Water pollution abatement has become a high priority along with riparian law. The rights of Indians, too, must be taken into account, says Wilkinson.

National interests are beginning to be a part of state's water policy. Federal subsidies will most likely be reduced, says Wilkinson, but national participation in western

water projects will continue. And, "There will be few, if any, new projects without an Indian component," adds Wilkinson. In spite of bitter opposition from development interests, environmentalists, too are working in many states to lobby Congress and the public land agencies for in-stream flows to protect recreation and wildlife on federal lands.

The creation of regional bodies with state representation may be created. In Oregon, for example, the Northwest Power Planning Council, established by the Northwest Power Act of 1980 to set energy and fisheries policy in the Columbia River Basin, is already at work. The Power Planning Council, created by federal law, must meet a congressionally established mandate, but is not a federal agency. members from four states are directed among other things to protect Indian fishing and water rights, instream flows and wild fish runs.

Besides the establishment of regional committees, conservation is likely to be a second development in state and federal policy. Seeing that enough water is available for both old and new uses is essential.

Irrigation efficiency must be improved along with incentive programs developed. As Wilkinson states, "The incentive to save water can be diminished so long as water can be obtained at an artificially low cost....Federal irrigation water is priced at 19 percent of its real cost."

Water for recreation and wildlife has also been recognized by the western legislatures as a beneficial use. Many western states have already adopted in-stream flow programs that leave water in the stream for fish, wildlife, recreation and aesthetics.

The "use it or lose it" mentality of water rights supported by past court decisions is outdated. The values of a century ago are not adequate today. With a developing "watershed ethic" states are finding that water rights are not as fixed as once commonly believed. Good conservation techniques on overappropriated rivers can make more water available which may reconcile demands for water, for energy instream uses and Indian tribes.

Pollution becoming valid concern

No one knows how much of the 80 trillion gallons of water consumed annually in 22 states west of the Mississippi is tainted by toxic waste.

Thirty percent of this water is pumped to the surface or reaches the surface naturally. Toxic wastes may have seeped below the ground's surface to degrade the quality of much of this water.

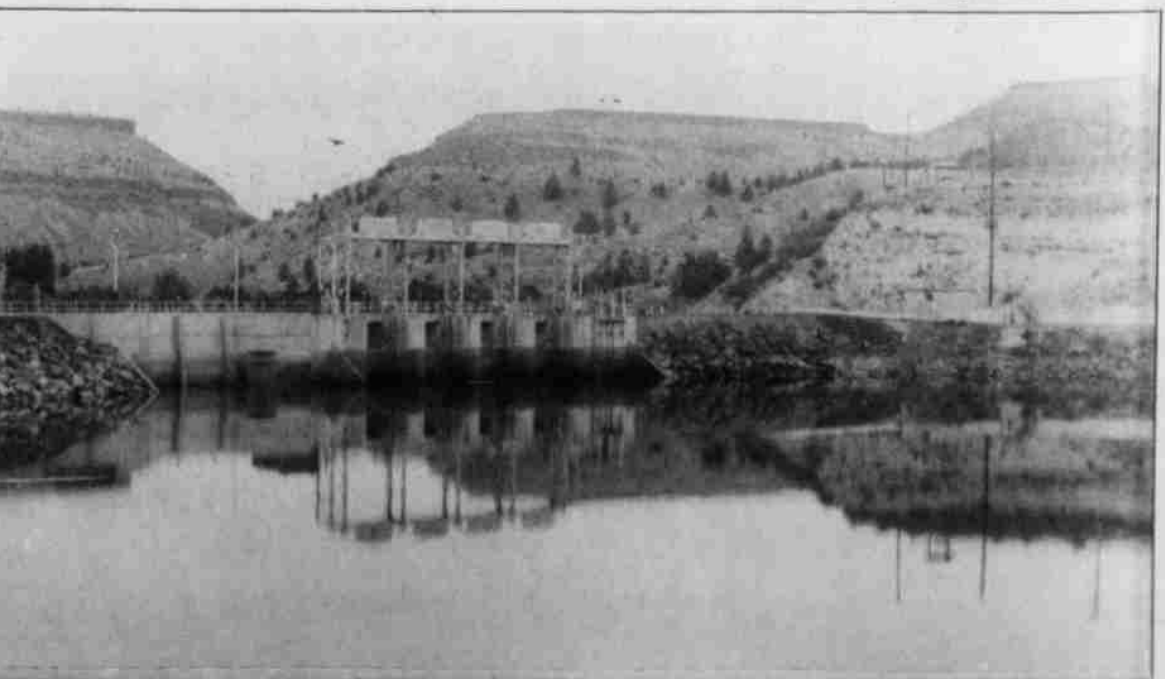
The worst pollution of underground water occurs in industrial and agricultural regions. The State of California has done extensive research on pollution and finds no region free of the problem, including population-free areas.

The California Department of

Health found detectable levels of organic chemicals, mainly industrial solvents and refrigerants, agricultural herbicides and soil fumigants in more than 18 percent of 2,947 city wells tested. The California Assembly Research Office estimates as much as 40 percent of California's ground water eventually could be polluted.

Water officials say it will take decades and billions of dollars to cleanse the water. They feel it is much easier and cheaper along with being more effective to prevent pollution than to have to clean it up, later.

national participation in western



The Warm Springs Tribe established the right to utilize water from the Deschutes River during the Pelton Dam case. In 1956 the Pelton Reregulating Dam was constructed by Portland General Electric with support by the Tribe.



Rattlesnake Springs near Kah-Nee-Ta provides a continuous flow of water from an underground spring.