MEMBERS PRESENT: Chairman Jeffrey
Vice Chairman Redelsperger
Assemblyman Dini
Assemblyman Mello
Assemblyman Kovacs (Absent Excused)
Assemblyman Schofield (Absent Excused)
Assemblyman DuBois
Assemblyman Rhoads (Absent Excused)
Assemblyman Polish

OTHERS PRESENT: Peggy Tweedt
Bill Newman, State Engineer
Kelly Jackson
Bud Bradley
Tom Young
Fred Davis
George Vargas

The meeting was called to order at 8:10 A.M. by Chairman Jeffrey.

AB 211 - Provides for temporary water permits for certain purposes.

Mr. Bill Newman, State Engineer, was the first to testify regarding this bill. He stated that he believes they have the authority to do what this bill intends to do under NRS 533.380 which provides the State Engineer with the power to limit the terms of a permit. He stated the only objection he would have to AB 211 is on the fourth line in the word, "shall". This language makes it mandatory for the State Engineer to issue a permit for construction purposes without consideration of concentration of water rights. Also, no opportunity to deny because of concentration and the possibility it might interfere with existing water rights in the area and doesn't comply with the very cornerstone of the water law in issuing permits in the order of priority they are filed. "Shall" is the only concern he has and if it was returned to "may" it would provide the flexibility that is needed to deny if necessary.

Chairman Jeffrey stated that a bill passed in the last legislature and primarily dealt with highway construction. It is his feeling that AB 211 was created primarily for the purpose of contending with the "MX". Mr. Jeffrey wondered if there were problems anticipated with the MX concerning water for construction purposes.

Mr. Newman's reply was that they have the authority to limit in the permit.

Chairman Jeffrey wondered if at the present time existing water rights have to be considered in granting a temporary permit.

Mr. Newman replied that if it adversly effects the existing water rights they will have an opportunity to deny it.

There being no further testimony on AB 211 the public hearing on this matter was closed.

Chairman Jeffrey then called for testimony on SB 164, the proponents on this bill being first to testify.

SB 164 - Relates to the development of geothermal resources; provides for administration and utilization.

Mr. Kelly Jackson, Deputy Director of the Department of Energy was the first to testify in favor of SB 164. He stated that between the previous session and this session of the legislature there was a special interim legislaive committee assigned to review geothermal policy options to stimulate the development of geothermal energy resources of the State of Nevada. SB 164 is the bill that grew out of this study group. There are over 300 individually identified geothermal resources in the State of Nevada. Twenty of those geothermal resources have measured temperatures in excess of 300°F, which is generally considered to be the cutoff below which you could not do any electrical generation. About 100 of these sources have temperatures between 200° and 300° F. The tremendous opportunities in terms of attracting new industry, looking at economic diversification, trying to provide a type of self-sufficiency. Nevada at the present time is a 98% energy importer. Geothermal and solar are two of the resources that can be developed that will help to stabilize energy prices over the state in the next 10 to 20 years. In the past geothermal exploration has been confined to individual needs for space heating and recreational purposes. In the past 4 or 5 years the development of the first major food dehydration facility has been established and is located at the Brady Hot Springs, using geothermal energy. The geothermal energy at that facility displaces about $225,000.00 a year worth of natural gas. The alcohol plant, located at Wabuska Hot Springs near Yerington is still in the formative stages and will produce about 400,000 gallons of the alcohol a year that will be used as a liquid fuel. There is an increase in firms interested in district space hating whereby heating an entire community will be a definite futre possibility. Communities that appear to have that capability at this time are Gabbs, Gerlach, Carlin, Hawthorne, Elko, the South end of the Truckee Meadows and several other communities in the state. SB 164 as it is amended addresses the development of the geothermal resources and asked they be able to review the bill section by section.

The first section addresses the issue of extraction of heat from the source without diversion of the water.A down hole heat exchanger is put in the well and circulated with some fluid whereby the heat is extracted. The water laws are written such that there is a question about wheter or not a person who is doing that can make the sort of filing to get an appropiation and protect their non-diversionary use of the geothermal resource. Section 1 affords that person the opportunity to make an appropriate filing with the state water engineers office to try and protect that sort of use. Section 2 is directed at trying to facilitate the individuals use of the resource. Section 2 would extend the exting water well geothermal resources. If you are drilling a water well on your own property for use in a single family dwelling you don't have to go through the appropriation permit process which would probably cost between $1,000 and $2,000 this is saying if you are going to drill a geothermal well on your property for use in single family dwelling that will apply

the domestic water well rule to that sort of operation. If we want to facilitate the use of the resource by individuals, and this is one of the objectives we should have, this removes a very significant roadblock. There are risks involved. They are going to have to drill a well and they don't know if it will be geothermal well or not. If you add on to that the cost of the appropriation permiting costs that will act as a significant impediment. Section 3, 4 and 5 basically address the issue of trying to come up with a uniform definition of the resource in our statutes. At the present time there are at least two different definitions of the resource in the statute, the agencies who are involved, the division of state lands, taxation, water resources and their agency all agree having this number of statutes is confusing and may give the Federal Government the opportunity to challenge the regulations of our resources. They may use the argument "Look, you are defining this new resource, how you want to get the best impact out to the state and in effect are trying to cut the Federal Government out of the picture." The definition that is proposed herein basically adresses the hear, pressure, and minerals portion of the resource levaing the water portion of it subject to the traditional water law regulation. This is a very important step. All of the agencies involved, believe this definition best protects the State of Nevada and the users in the State of Nevada. Section gives permissive authority to the division of Environmental Protection and says that if you are reinjecting the water or the geothermal fluids into the ground that is not necessarily a pollutant. Section 7, is directed as an issue of trying to come up with a regulatory framework that will encourage district space heating systems to be installed in Nevada. Under the present law if you want to operate a district space heating system, you are subject to full regulation by the Public Service Commission that is the rate of return regulation, service territory regulation, quality of service regulation. There are no district space heating systems in the country that have been identifible. There are only a couple but none that are subject to that sort of regulation. The Earl Warren Legal Institute did a study which dealt with developers to see what impact, subjecting this fairly new risky business to full PSC regulation would have. Most of the developers felt they were not interested in getting into the business if the opportunity for the rate of return was going to be held down to the levels that commissions generally have. With that thought in mind realizing that we still need some consumer protection in this area, this section basically says the PSC would regulate quality of service but would leave the reate issue to be decided between the customer and the utility company. The utility would have to have a contract that extended at least three years. With the customer, that contract would have to clearly set out the rates or how they can make the sort of filing to get an appropriation and protect their non-diversionary use of the geothermal resource. Section 1 affords that person the opportunity to make an appropriate filing with the state water engineers office to try and protect that sort of use. Section 2 is directed at trying to facilitate the individuals use of the resource. Section 2 would extend the existing water well geothermal resources. If you are drilling a water well on your own property for use in a single family dwelling you don't have to go through the appropriation permit process which would probably cost between $1000 and $2000 this is saying if you are going to drill a

geothermal well on your property for use in a single family dwelling that will apply the domestic water well rule to that sort of operation. If we want to facilitate the use of the resource by individuals, and that is one of the objectives we should have this removes a very significant road block. There are risks involved. They are going to have to drill a well and they don't know if it will be a geothermal well or not. If you add on to that the cost of the appropriation permiting costs that will act as a significant impedement. Section 3, 4 and 5 basically address the issue of trying to come up with a uniform definition of the resource in our statutes. At the present time there are at least two different definitions of the resource in the statute, the agencies who are involved, the division of state lands, taxation, water resources and their agency all agree having this number of statutes is confusing and may give the Federal Government the opportunity ot challenge the regulations of our resources. They may use the argument "Look, you are defining this new resource, how you want to get the best impact out to the state and in effect are trying to cut the Federal Government out of the picture." The definition that is proposed herein basically addresses the heat, pressure, and minerals portion of the resource leaving the water portion of it subject to the traditional water law regulation. This is a very important step. All of the agencies involved, believe this definition best protects the state of Nevada and the users in the State of Nevada. Section 6 gives permissive authority to the division of Environmental Protection and says that if you are reinjecting the water or the geothermal fluids into the ground that is not necessarily a pollutant. Section 7, is directed as an issue of trying to come up with a regulatory framework that will encourage district space heating systems to be installed in Nevada. Under the present law if you want to operate a district space heating system you are subject to full regulation by the Public Service Commission that is the rate of return regulation, service territory regulation, quality of service regulation. There are no district space heating systems in the country that havebeen identifible. There are only a couple but none that are subject to that sort of regulation. The Earl Warren legal institute did a study which dealt with developers to see what impact subjecting this fairly new, risky business to full PSC regulation would have. Most of the developers felt they were not interested in getting into the business if the opportunity for the rate of return was going to be held down to the levels that commissions generally have. With that thought in mind realizing that we still need some consumer protection in this area, this section basically says the PSC would regulate quality of service but would leave the rate issue to be decided between the customer and the utility company. The utility would have to have a contract that extended at least three years. With the customer, that contract would have to clearly set out the rates or how the rates were to be calculated. Furthermore, the utility company would have to agree to binding arbitration so that in the event a conflict arose the consumer would have an opportunity to go through a less expensive arbitration procedure where the utility would have the burden of proog. This hasn't been done before in Nevada utility law before and we believe that the geothermal area offers an excellent opportunity to try that process and see what benefits it has to the consumer. Section 8, deal specifically with the PSC. Once again if you read the present law closely and inter-

pret it literally you would come to the conclusion that if a major exploration company or any other comany that is involved in producing geothermal fluids wanted to sell those fluids, for instance to Sierra Pacific Power Company, who in turn would generate electricity with them. The company selling the hot water or steam to Sierra would have to be certificated, for example, Phillips Petroleum Company when they sell oil to a public utility company. Section 8, says, is that if we've got a company that is producing geothermal fluids and they are selling to another utility company or to some other entity that is reselling the fluids we won't regulate them as public utilities either. This removes some uncertainty in the existing law. The existing law is probably unconstitutuional anyway. A basis has to be established whereby you can regulate the sales of gelthermal fluids to one entity when you are not selling them to the public generally. The last section of the bill basically means that if a utility or other entity wants to build an electrical generation plant in the State of Nevada, they would have to get a construction permit from the state Public Service Commission. One of the things that they are supposed to show is that if they are coming in to build a coal plant to show they have evaluated other types of alternatives. What this language does is to clearly specify when a utility is filing to build an electric generation facility that they have to show what examination they have done in using conservation or alternative energy resources like solar and geothermal, as an alternative to the facility. This is not saying that we are going to have every utility building geothermal plants or using solar conservation.

In summary they believe this bill answers many questions that can be identified at this point in time. Geothermal is a growing industry in the State of Nevada. We believe over the next 15 to 20 years we are going to see a real explosion in what happens to geothermal resources and as that happens I'm sure we are going to have to have additional refinements of the law. This gives us the fine points and facilities development of geothermal resources in a rational way without letting the development of those resources get completely out of public control.

Chairman Jeffrey called for further testimony regarding SB 164.

Peggy Tweedt, representing The League of Women Voters of Nevada was next to testify regarding SB 164. She stated the League supports SB 164 and her written testimony is attached hereto marked EXHIBIT "A".

Mr. Bill Newman of the Division of Water Resources stated that the Division of Water Resources would not oppose SB 164 as amended.

Assemblyman Redelsperger wondered if steam was considered water.

Mr. Newman replied the Legislature in 1975 made it appropriate under the water law following the procedures set out by the water laws.

Assemblyman DuBois wondered about possible future depletion of this resource.

Mr. Newman said he is not sure they know all that is needed to know about geothermal reservoirs. Geothermal reservoirs are considered a different source than potable water sources.

Mr. Bud Bradley, representing Bud McKay of McKay Drilling and the Lakeridge Homeowners was next to testify regarding SB 164. He stated they are in the process of hooking individual geothermal wells that are presently in operation or are planned for future drilling. Mr. Bradley commented on the fact that he has a geothermal well that is presently in use in this own home and he isvery satisfied with it and considers it a great energy saver. They support this bill including the amendment that was made after the Senate hearing to include geothermal resources in the domestic well drilling water law proposition.

Mr. George Vargas representing major oil companies doing business in the State of Nevada stated they favor the passage of SB 164 and for the information of the committee, the following act was passed in the 1975 Legislature. Any water and steam encountered during geothermal exploration is subject to appropriation procedures in Chapter 533 and 534 of NRS.

There being no further testimony regarding SB 164 Chairman Jeffrey closed the public hearing on this matter.

Chairman Jeffrey then called for testimony on AJR 32.

AJR 32 — Protests release of water from Stampede Reservoir for spawning during water shortage.

Assemblyman Rusk was first to testify in supprot of the passage of AJR 32. This is greatest importance to Washoe County.

He explained the essence of the bill is that the U. S. Fish and Wildlife service has requested the Secretary of Interior to release the thousand second feet so the spawning program can continue. The release of this water in order to further the spawning program is a great loss and waste of water to the Washoe County area residents, especially during draught years.

Assemblyman Mello wondered if there were plans for further expansion by the hotels in Reno.

Assemblyman Rusk stated that when Mayor Benett of Reno was asked this question her answer was now. However, it is his understanding there is considerable expansion planned in the Sparks area.

Assemblyman Mello wondered what direct effect this legislation would have on the Kiwi fish. The information recently received regarding this fish is that the fish is now able to spawn in the lake itself.

Assemblyman DuBois wondered how the release of water effect the fish?

Assemblyman Rusk replied at the termination point of the River at Pyramid Lake there is a fish hatchery development with fish ladders that provide for the spawning environment of the fish. One of the things that enhances the spawning of the Kiwi is the increased flow of the river. Much of the increase of water is used for lowering the temperature of the water which is needed for spawning. It si the feeling of the Fish and Wildlife Department that this is more necessary than the storage of water in these reservoirs.

Assemblyman DuBois wondered if the release of the water is strictly for the benefit of the fish or is it also to maintain the level of Pyramid Lake.

Assemblyman Rusk stated he is sure that this does certainly have a part of the argument because of the lowering of the Lake, and that although the ability to store water for low water years is there, it has never been utilized. He said that unless we reserve the right to store this water during low water years we will be at the end of our rope as far as potential development in Washoe County in the Reno-Sparks area.

Assemblyman Dini concurred with the testimony given by Assemblyman Rusk, his position being the protection of the water resource is more important than the spawning of fish.

Tom Young, Executive Director of Environmental Action Trust, answered questions that had been raised in earlier testimony. Yes, the Kiwi is an endangered species. He presented an article that reviewed some of the other threatened species in the United States the article went on to say some of thes species after careful monitoring were no longer threatened species but it was almost impossible to get these species off the endangered species list. His feeling regarding this particular study on the Truckee River pertaining to the Kiwi fish is, after years of dumping thousands of gallons of water down the river, it cannot be determined what benefit has been derived from these studies. He has personally sent letters under the Freedom of Information Act and other letters to various agencies trying to find out just what benefit has been derived from the release of all the water. He stated he has never received a reasonable answer yet, from any Federal agency. The original compact that was drawn up for Stampede water was to allocate an annual average flow of water of 29,200 acre feet of water. The reservoir itself holds 220,000 acre feet of water. Since that reservoir has been constructed it has only been full once, this meaning the full potential of the reservoir has never reached and in order to get the 20,000 annual acre feet of water use out of that you have to start at some point where you replenish that water within the reservoir so it can be stretched out over the draught years. The 29,000 acre feet was broken down to be allocated for approximately 16,900 acre feet for municipal and industrial use in California. About 6,000 acre feet for the fish which would allow enough water for the fish to spawn at the fish ladders.

The fish have received hundreds of thousands of feet annually much more than was supposed to be allocate for their use. Another interesting point is that one year the cutthroat is allocated more water because of being an endangered species and the next year the Kiwi is allocated water because of being a threatened species, the cutthroat requires high flows for temperature impacts and the kiwi like low flows. The point of this being that there is a definite conflict going here seemingly without anyone knowing what is happening. Mr. Youngs feeling is that better management is the key to this problem.

Chairman Jeffrey called for additional testimony on AJR 32 at this time.

Mr. Fred Davis, Governmental Affairs Director for the Greater Reno Chamber of Commerce, stated the chamber is in complete accord with this resolution. He reiterated the previous testimony stressing the key to this problem is better management, he also stressed strongly that the needs of the people far exceed the needs of this particular alternative that we are trying to combat. If the fish can be grown and replenished in hatcheries and at substantially less cost to the taxpayers that is the alternative we are seeking. We believe there has been an economic hardship brought on the residents of the Northern part of the State simply because of bad water management, when that was not the intent of that upstream storage water management policies.

Assemblyman Mello stated that the lack of the water has been a problem but he major problem is and has been the terrible planning on the part of the City of Reno, not so much on the part of the upstream users.

Chairman Jeffrey called for further testimony regarding AJR 32 there being none the public hearing on this matter was closed at 9:10 A.M., and the meeting recessed for five minutes.

Chairman Jeffrey called the meeting back to order at 9:20 A.M. and called for action on SB 341.

Assemblyman Dini moved for a DO PASS on SB 341, the motion was seconded by Assemblyman Mello, the motion carried unanimously, Assemblyman Kovacs, Rhoads andSchofield were absent from the vote.

Chairman Jeffrey called for action on AJR 32, Assemblyman Mello moved for a DO PASS, Assemblyman Dini seconded seconded the motion and it carried unanimously with Assemblymen Kovacs, Rhoads, and Schofield absent from the vote.

No action was taken was taken on AB 60, it was decided to hold this bill for further consideration.

Chairman Jeffrey called for action on AB 106, Assemblyman Mello moved to RESCIND THE ACTION whereby they passed out AB 106, the motion was seconded by Assemblyman Polish, the motion carried unanimously with Assemblyman Kovacs, Schofield and Rhoads absent from the vote. The bill will be held in committee with the people from

the Wildlife Commission being recalled for further testimony.

Chairman Jeffrey called for action on ACR 21. Assemblyman Mello moved for an INDEFINITE POSTPONMENT, the motion was seconded by Assemblyman DuBois, the motion carried unanimously with Assemblyman Kovacs and Schofield being the only two members absnet from the vote at this time. Assemblyman Knoads was present for the vote on ACR 21.

Chairman Jeffrey then called for action on SB 5. Assemblyman Dini moved for an AMEND AND DO PASS, the motion was seconded by Assemblyman Mello, the motion carried unanimously. Assemblyman Schofield and Kovacs were absent for the vote.

Chairman Jeffrey then called for a vote on SCR 16. Assemblyman Dini moved for a DO PASS on SCR 16, Assemblyman Mello seconded the motion, it carried unanimously with Assemblyman Kovacs and Assemblyman Schofield absent from the vote.

Chairman Jeffrey called for action on AB 211 Assemblyman Dini moved for INDEFINITE POSTPONMENT, the motion was seconded by Assemblyman Mello, the motion carried unanimously, with Assemblyman Kovacs and Schofield absent for the vote.

Action was then taken on AB 118, Assemblyman Redelsperger moved for INDEFINITE POSTPONMENT, Assemblyman DuBois seconded the motion, it carried unanimously with Assemblymen Kovacs and Schofield absent for the vote.

Also attached hereto is Exhibit "C" Pages 1 through 4 which is a written statement prepared by Evelyn Summers, lobbyist for Native Nevadans. Ms. Summers was unable to attend the hearing on AB 211, but wanted her remarks included in the record.

Also included for record is a paper entitled Indian Water Rights marked EXHIBIT "D" pages 1 through 13.

There being no further business before the committee at this time the meeting was adjourned at 10:00 A. M.

Respectfully submitted,

Judy E. Sappenfield

Judy E. Sappenfield
Committee Secretary

Exhibit B also relates to AB 211

April 15, 1981

ASSEMBLY

AGENDA FOR COMMITTEE ON ECONOMIC DEVELOPMENT AND NATURAL RESOURCES

MONDAY

Date APRIL 20, 1981 Time 8:00 A.M. Room 222

| Bills or Resolutions to be considered | Subject | Counsel requested* |
|---|---|---|
| THIS AGENDA CANCELS AND SUPERSEDES ALL PREVIOUS AGENDAS FOR THIS DATE<br>PLEASE NOTE TIME OF MEETING | | |
| AB 211 | Provides for temporary water permits for certain purposes | |
| AJR 32 | Protests release of water from Stampede Reservoir for spawning during water shortage. | |
| SB 164 | Relates to the development of geothermal resources, provides for administration utilization. | |

*Please do not ask for counsel unless necessary.

7421

4-20-85 Exhibit "A"

# League of Women Voters of Nevada

SB 164

The League of Women Voters of Nevada supports SB 164. We live in a state that imports almost 98% of its energy. The League feels it is necessary to reduce our dependence on other states by promoting Nevada's own primary resources. Since Nevada is abundant in renewable resources such as solar, wind, and geothermal, the League feels the Legislature must do all it can to encourage the utilization of these resources. SB 164 is one needed step in promoting the use of geothermal resources.

The main points of the bill are all directed towards this goal - the promotion of geothermal. First, the bill recognizes geothermal as a beneficial use. Next, it facilitates the use of geothermal on an individual basis by treating it as a domestic use. Finally, the bill provides guidelines for the public service commission which should encourage the development of small geothermal utilities without jeopardizing the consumer. Because SB 164 addresses these points , the League favors its passage.

Exhibit "A"

4/20/81

# Nevadans Opposed to MX

NORTHERN SECTION
P.O. BOX 8212
RENO, NEVADA 89507

contact: Tom Polikalas
Registered Lobbyist,
Nevadans Opposed to MX
786-4220; 322-5762

3/31/81

N.O. MX Attacks A.B. 211

Nevadans Opposed to MX (NO MX) is strongly opposed to AB 211 as currently drafted. The bill, which provides temporary water permits for construction purposes, specifically the proposed MX missile project, mandates that the state water engineer issues permits for water use for construction purposes regardless of the availability of water, and also pre-empts the rights of earlier water applicants. This distortion of state water law must not be allowed.

Subsection 1. , line 3 reads; "If an application to appropriate ground water includes construction or other beneficial uses of a limited duration the state engineer shall issue a temporary permit for the quantity of water to be so used, limited to the estimated time of completion of the construction or the estimated useful life of the project, facility or other beneficial use."

The phrasing "shall issue" lines 4-5 implies that the Air Force is given pre-eminence over previous water right applications. Substituting "may issue a temporary permit" for "shall issue a temporary permit" protects a scarce Nevada resource from being appropriated by the Air Force as it retains the state water engineer's discretionary power and enables him to evaluate each application on a case by case basis.

With the recent Office of Technology Assessment report condemning

the land deployment of the MX and endorsing the sea basing of the MX, Nevadans should strive to make the basing of the MX in our state as difficult as possible for the Air Force. The decision on whether to base the MX on land or sea will be influenced by how strong is Nevada's resistanc to the project. Rolling out the Red Carpet for the Air Force by allowing them priority water use decreases significantly the chances of the MX being based outside Nevada.

STATEMENT OF EVELYN SUMMERS, LOBBYIST, AND NATIVE NEVADANS FOR POLITICAL EDUCATION AND ACTION FOR THE COMMITTEE ON ECONOMIC DEVELOPMENT AND NATURAL RESOURCES REGARDING A.B.211

It is the opinion of Evelyn Summers and Native Nevadans for Political Education and Action; an organization of which she is a member, that A.B.211 is on conflict with Native American water rights in Nevada. Under the federal Indian trust relationship, Indian water rights are prior and paramount to the rights of other users. The trust relationship is based on past treaties with Indian Tribes. This is a factor in the concept of Tribal sovereignty and places Tribes in a position of being land locked, dependant nations within the borders of the U.S. The trust relationship is further demonstrated thru the separate treatment of Indian Tribes with federal legislation, common law, federal court decisions and executive agreements. In 1959 the U.S. Supreme ruled in Williams v. Lee (358 U.S. 217 (1959)), that states have no jurisdiction over Indian lands unless Congress specifically consents to the state jurisdiction and that such state jurisdiction is an infringment on Tribal sovereignty.

Table #1 provides a list of the Indian Tribes in Nevada and their land holdings in Nevada, according to the Bureau of Indian Affairs. Additional land withdrawls are being planned for some of those reservations. The two most probable in the near future being Duckwater and Yomba, respectively.

In the case Winters v. U.S (207 U.S. 564 (1908)), the U.S. Supreme Court ruled that Indian Tribes were the grantors in agreements with the U.S. Government and they retained all



Exhibit "C"

of their right, title, and interest in the reservation which they did not convey to the U.S. The conflict arose in relation to a 1888 treaty with the U.S. and the admission of Montana as a state in 1899. The court found there was an implied reservation with water rights and the admission of Montana to the union did not repeal that right.

There is a similar situation in Nevada. The 1863 Treaty of Ruby Valley was a treaty of peace and friendship and not one of land cessation. In 1864 Nevada was admitted to the union. The 1863 treaty has never been abrogated by an act of Congress. Over the past 30 years there has been a conflict regarding this treaty thru the Indian Claims Commission. There is also current litigation on the matter, Dann v. U.S. is currently in the 9th Circuit Court. Should the courts find in favor of the Western Shoshone People, a total of 24 million acres could be removed from the so called "public domain", and most of that land is in Nevada. (see map)

In Arizona v. California (373 U.S. 546 (1963)), the Supreme Court reaffirmed Winters by saying : "We follow it now and agree that the U.S. did reserve the water rights for Indians effective as of the time the reservations were created" Land reserved for Indians by treaty meets this requirement. Another case, Cappert v. U.S. (426 U.S. 128 (1976) and Arizona both overturned state water permits. The combination of the Western Shoshone land claim and these court cases should cast grave doubt on the wisdom of passing S.B.211. To permit construction projects to be granted temporary for the construction period is to permit mining of water which may not be a state resource. This would stimulate

growth that may not be supportable in the future due to water shortages. Even if the Western Shoshone people do not win their court case and prove title to the land, there will be reservation expansions separate from the land claim. Water is not only the life blood of Indian people, it is the future of Nevada.

The tourism industry accounts for considerable water consumption and it also makes up 50% of the Nevada economic activity. Passage of S.B.211 will create a climate for even greater growth than Nevada has seen in the past decade. It will create the conditions for long and expensive litigation over water rights. Finally, passage of this bill would open the door for the MX missile to by pass the laws in effect at the time the project was originally proposed. The MX missile would be the most destructive project man has ever under taken. The committee would do well to follow the voices of Nevadans, expressed thru a 70% no vote on the MX advisory question on the ballot of November, 1980. Passage of S.B.211 would mean taking the prospect of Indian development away from them. It would mean the loss of our most precious resource. It would mean that by law the state of Nevada is willing to sell the future of it's children and mortgage their futures. I ask that this bill not be passed in the interest of all people in Nevada.

C447

TABLE # 1

| LOCATION | POP.a/o 1980 | ACRES |
|---|---|---|
| Battle Mtn. | 175 | 680 |
| Carson Colony | 184 | 156 |
| Dresslerville | 188 | 835 |
| Duck Valley | 1,047 | 289,850 |
| Duckwater | 135 | 3,785 |
| Elko | 395 | 160 |
| Ely | 165 | 160 |
| Fallon | 669 | 21,861 |
| Ft. McDermitt | 529 | 18,269 Oregon |
| | | 72,000 Nevada |
| Goshute | 170 | 72,000 Nevada |
| | | 39,000 Utah |
| Las Vegas | 105 | 12.25 |
| Lovelock | 163 | 20 |
| Moapa | 189 | 71,174 |
| Pyramid Lake | 653 | 475,086 |
| Reno/Sparks | 507 | 28 |
| South Fork | 123 | 18,009 |
| Summit Lake | 0 | 10,506 |
| Walker River | 930 | 319,547 |
| Wells City | 84 | |
| Winnemucca | 25 | |
| Woodfords | 128 | 80 |
| Yerrington | 363 | 1,166 |
| Yomba | 147 | 4,682 |

# INDIAN WATER RIGHTS

*"There has been a lot said about the sacredness of our land which is our body; and the values of our culture which is our soul; but water is the blood of our tribes, and if its life-giving flow is stopped, or it is polluted, all else will die and the many thousands of years of our communal existence will come to an end."*

Frank Tenorio, Governor
*Pueblo San Felipe, 1975*

Over the past ten years, the litany of woes of the American Indian has been recited many times: the highest infant mortality rate, the lowest life expectancy, the highest school dropout rate, the lowest per capita income, the highest unemployment, etc. The answer to the majority of the "Indian plight" lies in the economic development of the Indian reservations, and the potential for such economic growth is there.

"Indian country" comprises some 90 million acres of land, much of it containing valuable natural resources and minerals. Indian lands are known to hold energy resources of oil, coal, and uranium; some of the reservations have great potential in agricultural development for produce or cattle raising; others hold potential for timber, fisheries or recreation facilities.

Many non-Indians express dismay at the apparent inability of Indians to develop their lands and natural resources. They recall the struggle of their own ancestors scratching out a livelihood on the arid lands of the West, and they cite successes of their pioneer forefathers in turning deserts into lush paradises. They puzzle at the failure of the Indians to do the same, and they reason that "Indians don't deserve their lands if they don't use them."

Indians rightfully maintain that their land is their private property, protected by the Constitution the same as that of others, and they can do with it as they please, or decline to do anything with it. But, the charge that Indians have never used their lands does not hold up in historical fact. The tribes have efficiently used their lands for centuries before the white man came to these shores. Agricultural development found in the New World was largely responsible for the survival and growth of Europe and for the agricultural success of modern America. However, modern technology and commerce has resulted in the inability of Indians to live in a purely subsistence society (although subsistence hunting, fishing and gathering remain extremely important to the tribes.)

It is very important to realize that the greatest hindrance to the economic growth of the American Indian people on their lands has been the *manifest destiny* policy of the United States through the years—the self-fulfilling prophecy that Indians would disappear, either through physical attrition or assimilation into the white society, and that there would no longer be an "Indian problem" without any Indians. Of course, this theory means the opening up of Indian country to white take-over and exploitation—a factor that continues to be the overriding motivation behind *manifest destiny*.

*Manifest destiny* policy called for depriving the Indians of development opportunities on their lands for, if the Indians were to develop their lands and resources, they wouldn't disappear as prophesied. And whereas non-Indians in the West were beneficiary to massive federal development projects, Indians were systematically denied them. The most glaring example of such deprivation is in water development. The majority of tribal leaders wish to develop Indian lands and resources, and they need water now and in the future to do it.

A formidable body of law favorable to American Indian people has been developed which, if properly administered and applied, will protect the Indians against divestiture of their water rights, and enhance their potential for greater economic growth. In the past, Indian water rights have been neglected and violated, most often through the actions of the party charged with the responsibility of upholding and enforcing those rights—the U.S. government. This has had, and continues to have a direct effect on the abilities of tribes to develop economic projects of either agri-

Exhibit D

cultural or industrial nature which are dependent on water.

Indian water rights arise from the tribes' original ownership and control over lands within the present United States. The entry of non-Indians in greater and greater numbers and the creation of the United States government led to treaties in which land, rights, powers, goods, and services were exchanged and promised. Eventually, Indian tribes owned smaller pieces of these lands which they reserved in the treaties for their exclusive use.

The federal courts long ago recognized that each of the various treaties between the U.S. and Indian tribes "was not a grant of rights to the Indians but a grant of rights from them . . . a *reservation* of those rights not granted."

Included among the rights retained by the Indians and recognized by the Supreme Court is what has become known as the *Winters Doctrine*: "command of the lands and waters—command of all their beneficial use whether kept for hunting, and grazing roving herds of stock, or turned to agriculture and the arts of civilization."

In *Winters*, the Supreme Court held that Indian tribes by their treaties had retained rights to the waters of their reservations for all purposes. Later decisions uphold the *Winters Doctrine* water rights as private rights belonging to the Indian people to meet their present and future needs.

In a system of Western water law where users have prior rights, Indian tribes by virtue of their ownership of the lands from time immemorial have water rights paramount to those of all other users. In addition, in areas where tribes, such as the Pueblos, hold unextinguished aboriginal land title, there are "concommitant appurtenant unextinguished aboriginal" water rights.

It is this paramount priority to meet present and future Indian requirements that has caused the white land and water exploiters to attack Indian rights with the objective of destroying them.

Recently, the General Accounting Office (GAO) attempted to address the Indian water rights "problem" and recommend to Congress some solutions. Reiterated throughout the draft of the GAO report is this statement:

> "Federal and Indian reserved water rights are a source of growing uncertainty and intensifying controversy in the Western states because the quantity and nature of such rights, with certain exceptions, have not been determined."

That report to Indian leaders' thinking reflects a process underway in state and federal water policy making of "blaming the victim." The federal government is the trustee of Indian land and water rights, and is held to the most exacting fiduciary standards in its dealings with respect to Indian property. Nonetheless, in this instance, the trustee is almost wholly responsible for the situation for which the victim, the Indians, are being blamed. Throughout history, but particularly since the passage of the *Reclamation Act* of 1902, the federal government has encouraged the settlement and occupation of the West by non-Indians through massive subsidies for water development. This fact was noted in the GAO report: "The federal government led the way in developing the West for non-Indian beneficiaries." The fact was acknowledged as well in the *President's Water Policy Message* of June 6, 1978.

This massive federally-subsidized growth has resulted in a new resource crisis in the Western states—an inadequate water supply; and the federal government is reluctant to impose controls or limitations on the unharnessed, irresponsible growth which is demanding more and more water, already overextended and overappropriated.

The "answer" to the problem, as seen by the GAO and members of Congress, is the "quantification" of Indian water rights—to most Indian leaders, a euphemism for the *limitation* of Indian water rights, or the outright *theft* of Indian water rights.

Unlike the massive federal funding for water development projects in the non-Indian sector of the Western states, the Indian tribes have not had the benefit of water and land development assistance. One must note, however, that millions of acres of Indian land have been inundated in the construction of federal water projects to benefit the same forces who now seek to take the remaining Indian water.

Legislative proposals now seek to "strike a balance between the competing considerations of fulfilling the Federal government's trust responsibility in the Indians' reserved water rights, and of achieving fair and equitable treatment of (non-Indian) holders of water rights . . . ," and to "weigh reasonableness and equity with existing legal doctrine in seeking resolution of the controversies. . . ." The courts, of course, are bound to uphold the law as it exists; but the legislative proposals conclude that the existing law supporting Indian reserved rights is detrimental and inconvenient to non Indian interests and must therefore be changed.

In observing the developing Indian water legislation and national water policy of the White

House, Indian leaders are quick to recall the statement of President Kennedy regarding Soviet attitudes toward negotiations over the Berlin crisis in 1961: "We cannot negotiate with those who say, 'what's mine is mine and what's yours is negotiable.' " Indian leaders see that same attitude in the federal government and the state governments in their efforts to solve the "problem" of Indian reserved water rights. And they are as quick to reject it.

Proposed legislation fails to consider the fact that Indian water rights are protected by the *Fifth Amendment* of the *Constitution*. Any compromise or expropriation of Indian water rights pursuant to the proposed legislative "solution" will entitle tribes to compensation under the *Fifth Amendment*. It must be understood that the expropriation of Indian water rights could cost the U.S. billions of dollars in compensation of the tribes. Yet, Congressional proponents of legislation to "quantify" or limit Indian water rights do so under the justification that such action would "reduce the need for costly and long-drawn-out litigation which would otherwise be necessary to resolve issues of Indian water rights. . . ."

To the majority of Indian leadership, a legislative solution is not the answer to the acknowledged conflict. It makes far more sense to allow the present process of resolution of water rights conflicts through litigation and negotiation to take its course. Some tribes may want to quantify their rights immediately, and will therefore satisfy the concerns of states and non-Indians who wish to know the extent of the Indian rights. A number of tribes have quantified their rights through legislation or litigation already (although it must be noted that even those quantified rights have been repeatedly ignored and violated).

Those wishing to appropriate and develop water and are concerned about potential impending unquantified Indian reserved rights can protect themselves by negotiating appriate agreements and financial arrangements with the tribes in the particular watershed in which they wish to use water. This has been done successfully in a number of instances.

The first and fundamental step toward honorable resolution of the growing conflict is recognition and respect for Indian water rights as enunciated in the *Winters Doctrine*. Such recognition and respect on the part of federal and state parties is a basic requirement for any negotiation that tribes may wish to enter into over water usage.

Good faith dealings with the Indian tribes is essential, and no honorable resolution can be secured without good faith. In this respect, the federal government should lead the way by asserting its trust responsibility in the "most exacting fiduciary standards." The federal government should promote legislation to assure that federally-protected water rights of the Indian tribes are heard only in the federal courts as they should be. And the federal government should assure that adequate funds are appropriated to protect Indian water rights and to provide the necessary protection of Indian water rights.

A reasonable manifestation of recognition and respect for Indian water rights would be immediate legislative or executive provision for tribal representation on all Interstate Stream Commissions and Interstate Commerce Commissions responsible for watersheds in which Indian lands are located.

And, finally, substantial funding must be made available to the tribes for water development planning and for actual development of Indian water projects. Such federal assistance would not be unfair, particularly in light of the fact that the Indians have suffered historically from the "manifest destiny" syndrome that has prevaded water policy decisions. Those who, knowing that the tribes have been deprived and prevented from utilizing their water rights, are telling the tribes to "use it or lose it," are the same groups that are beneficiary to the most generous federal subsidization in American history—the Western water development projects.

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# INDIAN CLAIMS

*A certain rich man was enjoying a banquet. As he sat at the groaning table he could see outside the window, at the door of his home, an old woman, half starved, weeping. His heart was touched with pity. He called a servant to him and said, "That old woman out there is breaking my heart. Go out and chase her away." Something of the same attitude has characterized our attitude towards the Indians on our national doorstep. Where we have not physically called on our public servants to chase them away from the doorstep, we have often disposed of them spiritually by denying their existence as a people, or by taking refuge in the Myth of the Vanishing Indian, or by blaming our grandfathers for the wrongs that we commit. In this way we have often assured ourselves that our national sins were of purely antiquarian significance.*

Felix Cohen
*The Legal Conscience*

Recently, several Indian land claims in the Eastern United States have stirred considerable controversy over an issue which, in past years, has caused little notice. That which caused the most controversy, however, was the claim to some 12 million acres in the state of Maine by the Penobscot and Passamaquoddy tribes. The reluctant decision by the Justice Department to join the tribes in their suit increased the furor.

Maine's Governor and state Attorney General embarked on a campaign of hysteria to rile public indignation over the claim and thus to secure support for legislation in the U.S. Congress to override the claims before they could reach fruition in the likelihood of a court decision favorable to the Indians. Even the most responsible press, *The Washington Post*, joined in the controversy and published an editorial referring to the "Indian raid" on the state of Maine and the Indians "laying seige" in the courts. (Indians who occupied Alcatraz in 1970, the Bureau of Indian Affairs in 1972, and Wounded Knee in 1973 were somewhat befuddled at the press which, at that time, admonished them to work "within the system," and are now describing their efforts in the courts as "raiding" and "laying seige.")

Anti-Indian groups adopted as part of their strategy scare tactics of revealing bizarre conspiracies on the part of the federal government, in collusion with high-paid legal counsel representing the tribes, to give America back to the Indians and drive the non-Indians out of the country. In a pamphlet titled *Are We Giving America Back to the Indians?*, published and distributed widely by the *Interstate Congress for Equal Rights and Responsibilities*, the major national anti-Indian organization in the country, the following misinformation regarding Indian claims is given:

Q — How are they able to do this? Do they buy the land or is it given to them?

A — It is being given to them. They often make a claim, then go through the courts to get it. They know the momentum of the court decisions is in their favor and they are making more and larger claims.

The pamphlet then cites cases of alleged wholesale "giveaway" of federal land to the Indian tribes: 48,000 acres to the Taos Pueblo in 1970, 21,000 acres to the Yakima tribe in 1972, and 346,000 acres to 18 tribes in 1975. The pamphlet implies that these are but an example of much more massive land returns to Indians. The truth is that these cases represent nearly all the land transfers to Indians to date. These cases are explained later in this article, after we deal with the *facts* of Indian claims.

The United States Constitution designated the Congress as the branch of government to regulate commerce with Indian tribes, and the most important subject of trade between Indians and whites was inevitably the land which the Indians owned and the white immigrants needed.

Through treaties and statutes, the federal government assumed the protection of Indians in an arrangement which is referred to as the federal-Indian trust relationship. It is important to realize that what the federal government undertook to protect was not only the welfare of the Indians but the rights of the Indians as well; and such rights

include rights of personalty, rights of self-government, and rights of *property*. This principle of federal protection of Indian rights has proved to be of special importance in the maintenance of Indian land rights since the United States undertook to protect the Indian tribes in their possession of vast areas of land.

Virtually all the lands acquired by the United States from the Indian tribes were *purchased* through treaty or agreement. However, major problems have arisen because of the manner in which the transactions were often conducted. Errors were made in determining the boundaries of lands sold by the Indians or reserved by them; sometimes the money that was to be given to the Indians in form of agreed-upon merchandise or services was diverted to other unauthorized purposes; or payment was promised to the Indians for lands if and when the U.S. received payment from individual homesteaders, and the funds were never collected from the homesteaders.

If any of these difficulties arose in the course of land transactions between private citizens, resort to the courts would be the natural channel of redress. But, as a sovereignty, the United States is exempt from suit except in so far as it permits injured parties to bring suit. In 1863 Congress barred any claims that arose from Indian treaties if such a claim was not pending before the Court of Claims before December 1, 1862. This action by Congress denied legal recourse to the tribes, although in subsequent years, Congress did enact special statutes allowing particular tribes to bring suit in the Court of Claims for injuries arising under various treaties and agreements. However, the effect of that discriminatory Act of 1863 had been to inject gross delays into the judicial settlement of treaty claims. The tribes had to resort to years of the political process to get Congress to enact special legislation to allow their claims to be brought to the Court of Claims, and then had to go through the lengthy process of litigation.

By 1915, Congress had passed special statutes that allowed some 185 cases to be brought to the Court of Claims. Of those, less than 30% resulted in judgments for recoveries to the Indians; and the recoveries amounted to considerably less than the cost to the U.S. for litigation of the cases.

The cumbersome and inefficient (and unfair) system of legislating rights to the Court of Claims on an individual tribal basis brought up the need for a special court to settle treaty violations and other Indian claims against the United States. The idea of a special Commission rather than a court to consider Indian claims was developed in the late 1930's and became a reality in 1946. It was then that Congress established the *Indian Claims Commission* to hear and settle legal and equitable Indian claims against the United States in matters resulting from treaty violations, unauthorized taking of lands, and conflicts arising under the Constitution, laws and executive orders of the U.S.

The *Indian Claims Commission* was intended to be a streamlined solution to Indian claims; unfortunately, the *Commission*—half administrative agency, half court—was not wholly acceptable to the tribes. A principal objection of the tribes was that the *Commission* offered relief only in form of monetary compensation; and many of the Indian people felt that, to accept such payment, meant that they gave up claims to their aboriginal lands forever.

The settlements were not always that just or lucrative to the tribes. In the negotiations, the federal government claimed offsets—or deductions from the money granted, for services and materials provided to the tribe from the time of the injury claimed. And the tribes, from their settlement, had to pay for legal counsel, historical research, anthropological support and technical work done in the litigation of their claims. Claims that have dragged on for years resulted in massive expenses that the tribes had to pay from their settlement monies.

A few tribes, after lengthy and costly claims litigation, had to consent to indignities and injustices even in victory. After settlement in the *Commission*, Congress had to enact appropriations to pay the tribe involved in the claim, yet another lengthy process. In one classic example of Congressional blackmail, the Menominee Tribe had to submit to *termination*—the severance of their special relationship with the federal government—in order to secure the funds due them as a result of their claims settlement.

The *Indian Claims Commission* expired in September 1978, and all remaining claims were transferred to the *Court of Claims*. In hearings for unsuccessful legislation to extend the life of the *Indian Claims Commission*, witnesses for the *Court of Claims* maintained that, due to the existing backlog of cases, and due to its lack of experience and expertise in Indian claims, the process of adjudicating Indian claims would be lengthier and more cumbersome than in the *Indian Claims Commission*. The many tribes with pending claims have a long and costly wait ahead of them.

So, although the *Interstate Congress for Equal Rights and Responsibilities* promotes the ideas that Indians at this late date are trying to take advantage of a non existent atmosphere of guilt-ridden liberalism to recover claims for injustices done to them in the past, the tribes have been in the claims process for decades.

As to the cases of actual *return of lands* to Indian tribes the following accounts are offered:

## THE MAINE LAND CLAIM

In 1777, the brand new American government negotiated a treaty with the Penobscot and Passamaquoddy tribes that promised, among other things, to protect their hunting grounds. In a show of good faith in the new treaties, those two tribes fought valiantly on the side of the Americans during the Revolutionary War. When the conflict was over, however, the two Indian nations were ignored, and in a series of transactions beginning in 1794, Maine and Massachusetts took practically all their lands and left them destitute.

For years, the Passamaquoddy and Penobscot nations sought redress through the legal system. In 1971, their legal prospects brightened when it was discovered that, even though the 1977 federal treaty had never been ratified by the Senate, the state transactions were legally void under the 1790 *Non-Intercourse Act*.

Even then, when the tribes asked the federal government to represent them in their claims, they were refused and told that the Non-Intercourse Act did not protect them. The tribes sued the federal government and in 1975 won a decision holding that the Non-Intercourse Act did indeed protect them. In that court decision, the federal government was ordered to investigate the claims, and subsequently the Justice Department announced that they had concluded that the tribes have valid claims and that they intended to file suit for the return of between five million and eight million acres of land to the tribes and monetary damages for wrongful use of the land. A deadline was set for the filing of the suit unless a settlement could be negotiated before that time.

The Indians in Maine had patiently pursued their grievances through the courts. They had consistently offered to negotiate their claims, but were met with distain from the state of Maine. They consistently expressed concern for the established homeowners and small businessmen, and worked out plans to litigate or negotiate in the least economically-disruptive manner to the people of Maine. At the tribes' request, the suit was to be directed at a handful of large paper and timber companies which occupy the vast bulk of the land in the claims.

The Governor, Attorney General, and Congressional delegation of the state embarked on a massive publicity campaign claiming economic chaos in light of their temporary inability to sell municipal bonds, and the inability of businessmen to secure loans pending title clearance of lands in question. The fact that, after assurances by the tribes of non disruptive suits, Morgan Guaranty Trust issued some $15 million in municipal bonds for that area was played down by the state leaders in their propaganda campaign.

The Maine Congressional delegation, even while claiming that they were confident of winning in the courts, introduced legislation to extinguish the Indian title to the land in question. The legislation still hangs over the heads of the tribes in their efforts to negotiate or litigate a just settlement.

## TAOS BLUE LAKE

In 1906, in an era of ruthless dispossession of Indians from lands rightfully theirs, 48,000 acres of land was taken from the Taos Pueblo in Northern New Mexico and placed in the Carson National Forest. That land included Blue Lake, the area where the most sacred rites of traditional Taos religion were held from time immemorial.

After over 65 years of effort, including nearly a decade of intensive pleading with the Congress, legislation was enacted returning the land to the Taos Pueblo people. That legislation restricted the land to religious and ceremonial use by the tribe, and required that the land be kept forever in a state of wilderness. This requirement posed no problem for the tribe—it was what they had in mind for centuries anyway.

## SUBMARGINAL LANDS

In 1975, pursuant to the *Submarginal Lands Act* of 1933, Congress enacted legislation for the transfer of certain lands to be placed in trust for certain tribes. In virtually all instances, the lands were already within the boundaries of the reservation to which they were transferred. Rather than a "grant" of lands to the tribes, the transfer was the fulfillment of law enacted forty years earlier.

In 1933, during the "dust bowl" days of the great depression, many individual farmers and ranchers were being driven out of business by the lengthy drought and the state of the economy. Rather than allow the banks to foreclose on their lands and force them into destitution, the federal government purchased the lands from the farmers and ranchers and turned the acreage over to adjacent or surrounding municipal and state governments, national parks and grasslands, and Indian tribes. It should be noted that the term "submarginal" refers to the economic state of the farms and ranches at that time of depression and not to a barren state of the lands.

The municipal and state governments, and the federal parks and grasslands received their "submarginal" lands immediately following the enactment of the 1933 law; the tribes received theirs forty years later, after lengthy and costly lobbying.

# ABROGATION OF INDIAN TREATIES

*The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights, and liberty, they shall never be invaded or disturbed . . . but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.*

*The Northwest Ordinance, 1787*

The "discovery" of America by the European nations required them to look at various doctrines of international law to formalize their relationship with the Indian nations on this continent. By the time the United States came into existence as a nation, European governments had come to recognize that Indian nations were sovereign and as such, the only legal and civilized way of establishing relations with them was by treaty.

Simply stated, a treaty is a binding international agreement between two or more sovereign nations. Since the birth of the nation, over 400 treaties stand as evidence that Indian tribes were recognized and treated by the United States as sovereign nations.

Through treaties, Indian nations granted certain rights to the United States and reserved lands and rights for themselves. Treaties are therefore very important in understanding the rights of Indian people today. The treaty rights of tribal members result from the distinct political identity of Indian governments recognized in the treaties.

Today, for reasons of racism and greed, some organized forces are working to destroy tribal governments and are challenging the validity of Indian treaties, saying that the treaties are not real treaties, that the treaties have become invalid with age and circumstance, and that they should be abrogated for the benefit of Indian and non-Indian citizens alike. And there are many sympathetic people who, being unfamiliar with Indian history and Indian law, fail to support Indian treaty rights, believing that the breach or violation of the treaties on the part of the United States has somehow nullified them. But age has not invalidated the treaties any more than it has invalidated the *Constitution* which recognizes them as the "supreme law of the land." Nor does breach or violation of treaties nullify them any more than does the act of committing a crime nullify the law that forbids the crime.

*Are the treaties that important to the Indians of today?* To Indians, treaties are vital for many reasons. First, they represent a legal and binding agreement made between the tribal governments and the United States. Often, before a treaty agreement was reached, many had given their life in wars to protect the land and rights guaranteed by the treaty. The United States signed treaties with Indian governments because of the political, economic and territorial advantages gained. In exchange for millions of acres of land, the U.S. agreed that Indian governments would be able to reserve forever for themselves certain lands, and that the Indian people would be able to live there in peace and harmony, governing their nations as they had done from time immemorial. In addition, the United States promised to protect the Indian nations from harm by its own citizens or foreign nations.

*Should Indian treaties be important to the United States?* If the United States cares about its honor and integrity, and does not want to breach both its *Constitution* and international law, the Indian treaties are very important to the country.

A bill was introduced in the 95th Congress by Rep. John Cunningham (D-Wash.) calling for the abrogation by the President of all treaties entered into by the United States with Indian tribes. Deceptively titled *The Native American Equal Opportunities Act*, that legislation calls for the

unilateral abrogation of treaties, the termination of the trust relationship between the tribes and the federal government, and the liquidation of all tribal lands and assets for distribution to individual tribal members.

Abrogation of treaties means the termination of the special relationship between the tribes and the federal government. An Indian policy which has failed miserably in times past, *termination* ends the federal programs for Indians in health, education, economic development, and other areas. States can expect to assume financial responsibility for health, education, law enforcement and other services in the event of federal termination of its responsibility.

In addition, since treaties are the supreme law of the land and are protected by the *Constitution*, the United States would have to pay fair compensation for every treaty right it abrogates. Since the more than 400 treaties cover the protection of many rights, including human rights, governmental rights, and property rights, the United States could expect to pay billions of dollars in compensation to the Indians for the loss of rights and resources resulting from abrogation.

*So, is it really worth it to abrogate Indian treaties?* To the Indian people the answer is "no!" since it could amount to the loss of Indian culture and sovereignty, and no amount of money could compensate for that. And to the United States, the answer should be obvious, for as Supreme Court Justice Black once said, "Great nations, like great men, should keep their word," and if this nation means to live up to its *Constitution*, if it has any sense of morality and justice, and if it cares about its integrity in the world, then it will respect the solemn promises made in its treaties with the Indian nations.

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# TRIBAL JURISDICTION

*The Congress shall have power . . . to regulate commerce with foreign nations, among the several states, and with Indian tribes.*

*Article I, Section 8,*
*The Constitution of the United States of America*

Prior to the independence of the United States, all nations that dealt with the Indian tribes on this continent dealt with them on a nation-to-nation basis recognizing tribal sovereignty. The *Constitution*, in its *Commerce Clause* (Art. I, Sec. 8) recognizes the Indian tribes as governments. Since the founding of this nation, tribal governmental powers have been recognized by the courts, and by the executive and legislative branches of the federal government.

As governments, Indian tribes have general powers to 1) make laws governing the conduct of persons, including non-Indians, in Indian country; 2) establish bodies such as tribal police and courts to enforce the laws and administer justice; 3) exclude or remove non-members from the reservations for cause; and 4) regulate hunting and fishing, land use, and environmental protection.

The power of tribes to make their own laws has been recognized in a number of areas including domestic relations, taxation, and property use. The power of the tribes to enforce laws also extends generally to the exercise of criminal jurisdiction over persons who commit crimes on reservations.

The power of the tribes to establish courts is also firmly founded in the law. In *Iron Crow v. Oglala Sioux Tribe*, a federal court of appeals upheld the jurisdiction of a tribal court to punish members of the tribe for violating a tribal law, and to enforce a tribal tax on non-Indians who leased lands on the reservation. The court stated that the power of the tribe to establish courts to enforce its laws was not dependent upon any federal law, but was inherent in the tribe's sovereignty.

Another aspect of an Indian tribe's power to administer justice is its power over the extradition of persons accused of crimes. A federal appeals court has upheld the power of a tribal government to determine whether or not it will extradite an Indian within its jurisdiction for trial in another state. In that case, the court said that extradition was governed by tribal law, not the law of the state.

Although the power of Indian tribes to make and enforce laws has been recognized as an aspect of Indian sovereignty, federal courts have said that this power is subject to limitation by treaty or express acts of Congress. For example, the *Major Crimes Act* of 1885 allows certain crimes committed within tribal jurisdiction (murder, rape, robbery, etc.) to be tried in federal courts. The *Indian Civil Rights Act* of 1968 requires tribal governments and courts to guarantee certain individual rights such as the right to trial by jury in criminal cases.

Opponents of tribal government (including some well-meaning people who felt that, in order to save the Indians, they had to destroy their tribes) have, through the years, imposed on Congress to limit or destroy tribal sovereignty and all its attributes. Congress responded to such pressures and, in 1953, enacted *Public Law 83-280* which essentially authorized certain states to assume jurisdiction over tribes within their boundaries. Over the past quarter century since its enactment, P.L. 280 has been condemned a failure by tribal leaders universally. Tribal leaders cite example after example of state and county law enforcement officers either refusing to respond to calls for assistance on Indian reservations, or overzealously reacting and brutalizing Indians when they did respond. Overzealousness and brutilization was widely attributed to racism;

refusal to respond is largely attributed to white resentment over reservation exemption from state taxation—attitudes of, "Why should we protect you when you don't pay taxes and our salaries?"

In 1975, legislation was introduced by Sen. Henry M. Jackson that provided for reacquisition of jurisdiction from the states by the tribes. In hearings on that bill (S. 2010) Indian leaders hailed its provisions and, surprisingly, a number of spokesmen for key states affected by P.L. 280 joined in support of its passage.

James Dolliver, representing Gov. Dan Evans of the State of Washington (a P.L. 280 state) testified, "Let me begin by saying it is the policy of the Governor . . . that we believe in retrocession (of jurisdiction from the state to the tribes)." He concluded, "We feel that Indians are fully competent to conduct their affairs, and if retrocession is what they desire, we support it."

Jack Olsen, District Attorney for Umatilla County of Oregon, in supporting the bill, said, ". . . those very principles which we consider dear to the hearts of every American citizen, those very principles which served as the catalyst to the development of this great land—liberty and the right to self-determination—are in fact still being denied to that very group of Americans who first settled this continent."

Regarding the practical application of the law, Olsen stated further, "it is essential that jurisdiction be returned, at least to the Umatilla Indian Reservation . . . (which encompasses) some 286,000 acres. With these vast areas, state and county law enforcement simply cannot provide the protection it ought to be providing. This applies both to the Indian and non—Indian living on or passing through the reservation."

The office of the Nebraska Attorney General opposed the bill for fear of loss of state tax revenue with the loss of state jurisdiction over the tribes. That question was subsequently mooted by the Supreme Court in the case of *Bryant v. Itasca County* wherein it was decided that P.L. 280 does not grant the state the right to tax the reservations with the assumption of criminal and civil jurisdiction.

To the extent that Congress has not expressly limited the exercise of power, Indian governments remain free to exercise their sovereign rights to administer justice and enforce tribal laws. The tribes are optimistically in process of upgrading their law enforcement capabilities and their court system. The American Indian Lawyers Training Program, the American Indian Tribal Court Judges Association, and the American Indian Law Center are all involved in programs to assist the tribes in their judicial development. The National Congress of American Indians will in the near future launch a national association of tribal police.

The tribes are determined to retain their sovereign rights, and to continue to progress as governments with the attributes of sovereignty including jurisdiction over their lands.

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# TRIBAL GOVERNMENT

*Self-government is not a new or radical idea. Rather, it is one of the oldest staple ingredients of the American way of life. Indians in this country enjoyed self-government long before European immigrants who came to these shores did. It took the white colonists north of the Rio Grande about 170 years to rid themselves of the traditional pattern of the divine right of kings . . . and to substitute the less efficient but more satisfying Indian pattern of self-government. South of the Rio Grande the process took more than three centuries, and there are some who are still skeptical as to the completeness of the shift.*

Felix Cohen
*The Legal Conscience*

Many people look on Indian reservations as internment camps in which Indians were confined and forgotten by their European conquerors. Others see the reservations as wildlife sanctuaries where a threatened species of mankind is protected for future generations of superior species to behold. And others view the reservations as temporary holding pens where atavistic Indians are allowed to live out fantasies of a long-dead lifestyle until such time a they can be willingly or unwillingly brought into the "mainstream of American life."

In truth, Indian reservations are the land base for tribes of people who have exercised sovereignty from time immemorial, and who refuse to surrender their right of self-government. Indian reservations are the homelands of Indian tribes, and Indian tribes are legal "dependent sovereign" nations within the nation.

Tribal governments were recognized as nations by the earliest Europeans that dealt with them—the Dutch, the Spanish, the French and the English. Yet, in spite of that inherent sovereignty, and in spite of its repeated affirmation in old and recent United States law, many Americans believe that tribal governments were created by treaties and conferred upon Indians as a benevolent dispensation of federal law. The reverse is true: the tribal government entered into treaties and conferred certain rights to the colonials, and later to the United States.

The United States makes treaties only with other governments, and for over 200 years has recognized the governments of Indian nations and tribes. In relating to tribal governments, the federal government acts under authority of provisions of the *Constitution*. In *Article I, Section 8*, the Constitution states: "The Congress shall have power . . . to regulate commerce with foreign nations, among the several states, *and with Indian tribes*."

The relationship between the Indian nations and the United States government is unique in a number of respects. First, the Indians are the only group specifically identified in the Constitution. Persons unfamiliar with Indian law mistake this distinction as one of a *racial* nature. Such is not the case. Indian tribes are *distinct political entities*—governments with executive, legislative, and judicial powers. Members of the tribes may be citizens of both their Indian nation and the U.S.

Many of today's tribal governments have been shaped or influenced by the *Indian Reorganization Act*. In 1934, Congress enacted the *Indian Reorganization Act* in an effort to correct many destructive federal Indian laws enacted previously, and to provide for the "formalization" of the tribal governments through written constitutions and charters.

While many of the tribes adopted a *written* constitutional form of government as provided for in *IRA*, others did not. However, a tribe's right to retain a *traditional* form of government with an unwritten constitution has been reaffirmed many times by the Supreme Court. The Pueblos and the Iroquois and examples of federally-recognized tribes with traditional constitutions. It must also be noted that the Cherokees, Choctaws, Creeks and Chickasaws had written constitutions and legal codes in force as early as 1830.

Dramatic improvements have taken place as tribal governments have begun to assume legal, contractual and administrative responsibilities for the many-sided aspects of modern economic and social concerns. Tribal governments are improving their courts and expanding their judicial role, and are more actively encouraging and regulating economic enterprise. They are taking greater initiatives to protect their natural resources and environment, and to deliver educational and social services to their people.

The tribal governments have not always had the opportunity to perform many of their governmental functions. The Bureau of Indian Affairs is the federal agency with the greatest responsibility to deliver services and exercise the trust responsibility inherent in the federal-tribal relationship. And, over the years, the BIA has been guilty of a kind of paternalism which one Senator described as "the most subtle and sophisticated form of tyranny," and the Supreme Court described as "bureaucratic imperialism."

The *Economic Opportunity Act* of 1964 acted indirectly to break the BIA monopoly over funding sources and services to Indians. As an alternative to the BIA, the *Act* provided an opportunity for tribal governments to develop versatility and administrative initiative. And in 1973, the *Indian Self-Determination Act* provided the administrative mechanisms for the tribes to contract for and fully administer federal funds for services that were previously delivered solely by the bureaucracy. The tribes have demonstrated repeatedly that they are more effective administrators of their own programs than their federal tutors and administrative overseers.

This local control and exercise of *sovereignty with federal aid* is akin to what *Federal Revenue Sharing* is to state sovereignty. But there are those who, through ignorance or prejudice, ask the question, "If tribes want to be self-governing and self-sufficient, why do they ask for federal subsidy?" The answer is quite simple when one compares the 287 tribal governments with the more than *80,000* state, county and municipal governments in the United States.

As governments, the tribes receive assistance on the same basis that state and other local governments receive federal subsidies for road and school construction, for impact aid in education, for public transportation, for urban renewal, and for other projects and services.

The tribes receive federal assistance for many of the same reasons that private industries receive assistance in form of tax relief, direct funds for research and development, and payroll and overhead subsidies for participating in job training programs.

Tribal governments are often painted in derrogatory terms by anti-tribal groups who describe them as inept and corrupt. A quote from *The Legal Conscience* by Felix Cohen, who is known among Indians as "the father of modern Indian law," probably best answers that charge:

> "Not all who speak of self-government mean the same thing by the term. Therefore, let me say at the outset that by self-government I mean that form of government in which decisions are made not by the people who are wisest, or ablest, or closest to some throne in Washington or in Heaven, but rather by the people who are most directly affected by the decisions. I think that if we conceive of self-government in these matter-of-fact terms, we may avoid much confusion.
>
> "Let us admit that self-government includes graft, corruption, and the making of decisions by inexpert minds. Certainly these are features of self-government in white cities and counties, and so we ought not be scared out of our wits if somebody jumps up in the middle of a discussion of Indian self-government and shouts 'graft' or 'corruption.' "

The tradition of self-government is not a foreign idea, but one of the native concepts that guided the founding of the United States. As in the past from time immemorial, tribes will continue to be permanent ongoing political institutions exercising the basic powers of government necessary to fulfill the needs of tribal members.

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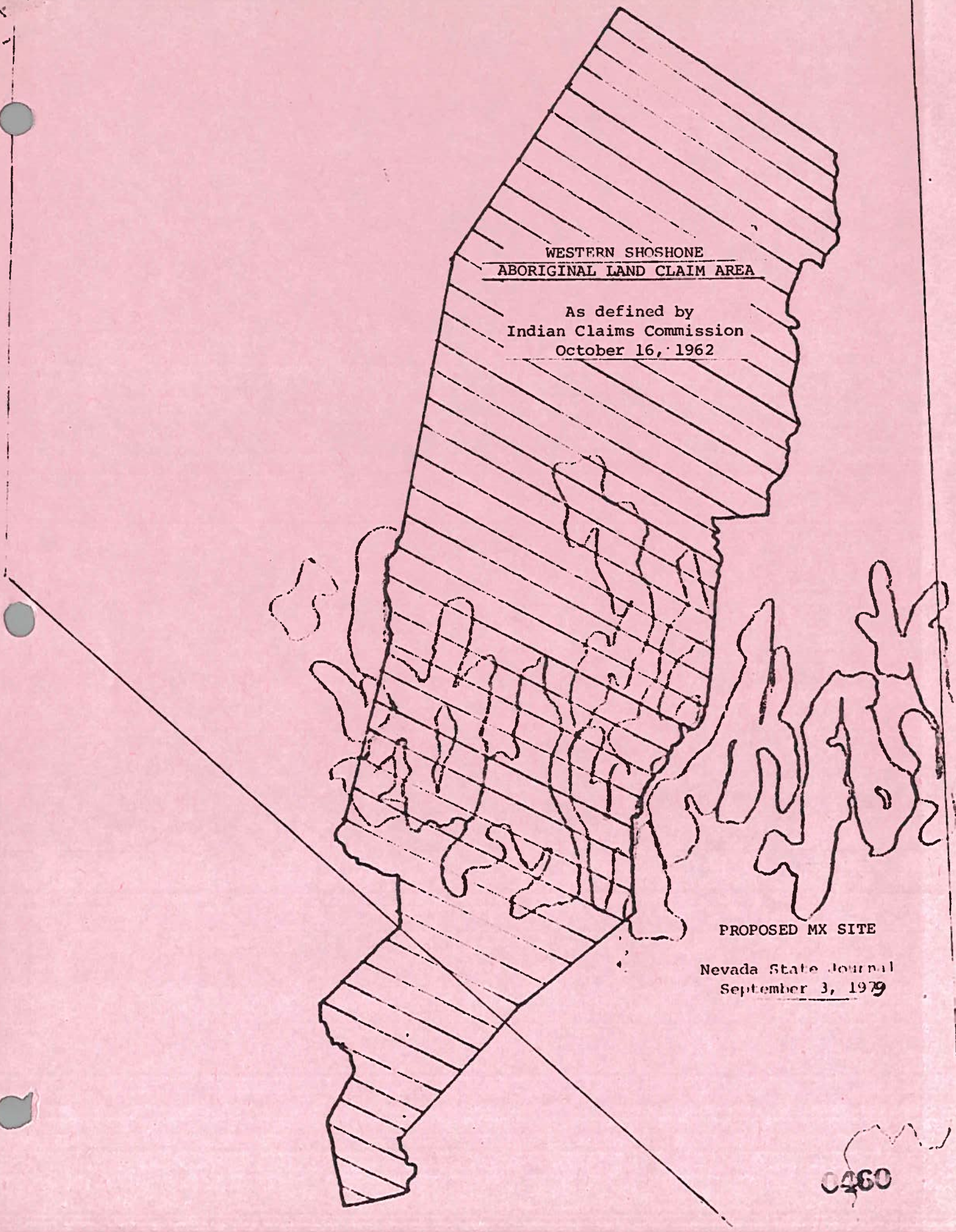
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As defined by
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