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United States Senate

COMMITTEE ON
AERONAUTICAL AND SPACE SCIENCES
WASHINGTON, D.C. 20510

July 1, 1969

Mr. S. E. Reynolds
State Engineer
State Capitol
Santa Fe, New Mexico 87501

Dear Steve:

I thought you would like to have the attached story that appeared in the Washington Post Sunday. I am also sending you a copy of the DNA Navajo publication, "Law in Action," dealing with the Navajos and their water.

You need not acknowledge this.

Sincerely yours,



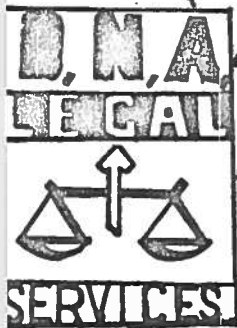
Claude E. Wood

Administrative Assistant

CEW/or
Enclosures

STATE ENGINEER OFFICE
SANTA FE, N.M.
1969 JUL -7 AM 11:07

Claude
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LAW IN ACTION

Vol. 1, No. 12, June 13, 1969

DNA LEGAL SERVICES PROGRAM - A COMMUNITY ACTION PROGRAM

THE NAVAJOS AND WATER

Everyone knows that there is not much water on the Navajo Reservation. Often Navajo sheepherders must travel far to find a few drops of the precious liquid to feed their animals. One can see sand dunes and dry mesas all over. The ground water table is getting lower and lower.

Yet not far from the middle of Navajoland flows one of America's mightiest rivers, the Colorado. All of the water from the Rocky Mountains in Wyoming, Colorado and New Mexico runs into this great river, as well as the water from Utah, Arizona, Nevada, and California. So much water fills the Colorado River that its water has quickly filled the 180 mile long Lake Powell behind Glen Canyon Dam near the reservation.

If the Tribe could use the water in that River it could make the reservation bloom, just like parts of California and Arizona which were once desert before they were irrigated. But can the Tribe claim any of this water?

The answer is, yes. The United States Supreme Court in 1908, gave Indian Tribe's extensive rights to the use of water on or near their Reservations.

The law established by the Supreme Court reserves enough water for each Indian reservation to take care of all the needs of the Indians both presently and in the future. Along with land, in other words, on which the Indians could live, the U.S. Government granted water rights in nearby lakes, rivers and streams to fulfill the aims of the treaties or orders setting up the reservations.

STATE ENGINEER OFFICE
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This Indian claim to water is a powerful one which, if properly asserted by the Navajo Tribe, will meet all the water needs of the Navajo Indians for the future. Recently the Supreme Court of the United States declared that the tiny Lower Colorado River Indian Tribes had a right to about 1,000,000 acre-feet of Colorado River water a year because of their reserved water rights. By contrast, the whole State of Arizona got only 2.8 million annual acre-feet, while California got 4.4 million annual acre-feet. And these small tribes, with only 135,000 irrigable acres of land, had a right to this water even before they used it. The Supreme Court thus took care of all possible future tribal needs and disregarded the relatively small amount of water now being used by the tribes.

The Navajo Tribe's water claim does not depend upon the amount of water now being used by the Tribe. Nor does it depend upon Arizona's Upper Basin allocation of 50,000 acre-feet. The amount of water to which the Navajo Tribe is entitled depends only upon what the Tribe needs now and in the future. And those needs are extensive. The 50,000 acre-feet mentioned in Res. CD-108-68 is owned by Arizona and not by the Navajo Tribe. The

Tribe's claim is directly against the 13,000,000 annual acre-feet in the Colorado River.

Moreover, the Supreme Court has stated many times that the Indian water need not be used for any special purpose. Indians may thus use their water for agriculture, livestock, industry, or sale to others. Water is extremely valuable in the Southwest. This means that water owned by Indian tribes in the area is worth its weight in gold or oil. While the Tribe's land is valuable, the water is invaluable.

Unfortunately the Navajo Tribe, which is the nation's largest Indian tribe and thus may potentially have the largest Indian claim to water, has not yet perfected its rights to water. In fact, no one has yet even studied the exact amount of water which would be necessary to make the reservation bloom.

When the Navajo Tribal Council passed Resolution CD-108-68 on December 11, 1968, it waived the Tribe's water rights for 50 years. Fifty years from now, the Tribe will have a very difficult time actually acquiring the Colorado River water because long before then, all of the water will be under actual use by the states.

In order to obtain the power plants provided for in Resolution CD-108-68, the Navajo Tribe does not need to waive its water rights. The Tribe could guarantee the power companies sufficient water to run the plants and retain its claim against the remainder of the river water.

On May 28, 1969, the water rights of the Tribe were again before the Tribal Council. On that day, DNA distributed a complete memorandum on the water rights of the Tribe to each Tribal Council member who was present at the Council Chambers. We felt that it was important to do that because so far as we could tell, the Councilmen had never been fully informed about the Tribe's water rights.

On June 3, 1969, the Tribal Council passed a Resolution which they intended to save the Tribe's water claim. The Resolution is supposed to rescind or take back the Tribe's waiver made in December. From a careful study of the June 3rd Resolution, however, it appears that the legal effect of the Resolution does not save the Tribe's water claim. DNA is still studying the matter to determine exactly what should be done.

Fortunately it is not yet too late to protect the Navajo's interests to water. It is possible to recall and redraft CD-108-68 and the resolution concerning Page to protect the Tribe's rights while still guaranteeing the power companies a minimum annual amount of water to run the power plant. The Tribe's rights to water are too valuable and important to be thrown away without this type of detailed reconsideration. The Council could delegate authority to a Special Water Committee to investigate all aspects of the water issue: legal rights, extent of tribal claims, and ways to protect this water and use it. And the Special Water Committee should take the time necessary to thoroughly study the matter.

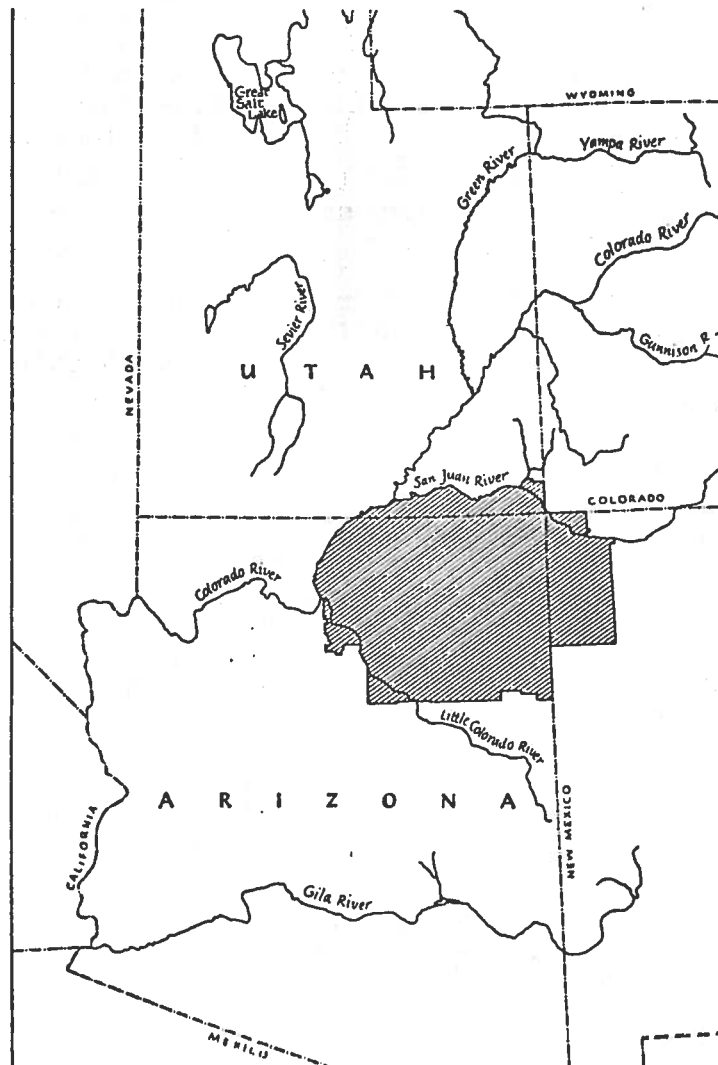
In the very near future, the Tribe, or the United States government in association with the Tribe, should bring an action in court to perfect the Tribe's water claim and obtain a court order awarding the Tribe a certain amount of water for its exclusive ownership.

The question has been raised about how the Tribe can get the water out of the Colorado or San Juan Rivers to put it to actual beneficial use on the Reservation. It is true that it costs money to pump the water out of the River and transport it to various places on the Reservation where it may be used. But the Navajo Tribe can seek the funds to develop use of its water from the same place Arizona seeks funding of Central Arizona Project - the United States Congress. And if the Tribe pushes well and hard enough, like Arizona has, it can obtain the necessary funds.

Water is absolutely vital to the continuation and development of the Navajo Indian Reservation. The Tribe has a valid legal claim to enough water from the Colorado River system (including its tributaries) to make the Reservation productive. Rather than waiving that right, the Tribal Council should assert it and perfect it and begin taking steps to have the water pumped out of the River and piped to places all over the Reservation. But the Tribe has the claim to the water whether it has used the water or not in the past. The right to use any water awarded the Tribe is owned by the Tribe, just like the Tribe now owns its oil, gas, uranium, timber and coal.

The Navajo Tribe is in the same situation as the Indians on the Lower Colorado (Yuma, Cocopah, Chemehuevi, Fort Mohave, Colorado River) who were awarded about 1,000,000 annual acre-feet in Arizona v. California in 1963. In that case the Supreme Court said at 373 U.S. 598-599:

"Most of the land in these reservations is and always has been arid. If the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries. It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind - hot, scorching sands - and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised."



The Navajos have the right to use as much water from the Colorado, San Juan and Little Colorado Rivers as is necessary to make the Reservation productive.

A Tribal Water Fight

Washington Post June 29, 1969

By William Greider

Washington Post Staff Writer

TO SATISFY the demands of a powerful Western Congressman, the Interior Department persuaded the Navajo tribe to surrender its untested legal claim to water from the Upper Colorado River for use on its arid and desolate reservation in northern Arizona.

The Government officials assured the Indians it was to their advantage to do so and the Navajo leaders took their word for it. But the Indians recently had second thoughts and have tried to undo their decision.

The episode, which started in the closing days of the Johnson Adminis-

tration, provides a rare glimpse into the way relations between Congress and the Executive Branch are influenced by the Byzantine politics of Western water fights. It also has produced arguments, both on the reservation and in Washington, over who speaks for the Indians' best interests.

Aspinall's Price

LAST DECEMBER, with some urgency, Secretary of Interior Stewart Udall dispatched one of his departmental attorneys to the vast Navajo Reservation in Udall's home state. The lawyer, H. B. Tolliver, delivered a draft resolution to the Navajo Tribal Council at Window Rock, Ariz., and urged the Indians to adopt it as their own.

Among other things, the resolution provided that the Navajos would waive for up to 50 years any claims to water in excess of 50,000 acre-feet per year from the Upper Colorado for use in Arizona. That was part of an agreement to guarantee that adequate water would be available for a new power-generating plant to be built on the reservation, promising jobs and new tribal income.

Tolliver, who has since left the department, remembers the transaction as a good deal for the Indians. So do the offices of Arizona Congressmen and the tribe's own legal counsel. But an organization of young legal activists, serving the Navajos under a grant from the Federal Government's war on poverty, has called it a "sellout" of immense proportions.

For what it's worth, one Washington attorney who is familiar with water law and with the Navajo dispute but does not wish to be drawn into the controversy by name thinks that the war-on-poverty lawyers are right.

In any case, it is clear that Interior did not seek the Indians' waiver of water rights because it was essential to the agreement for construction of the

power plant. The waiver was needed, Tolliver said, because it was demanded by Rep. Wayne Aspinall (D-Colo.), chairman of the House Interior Committee. That committee oversees not just Indian affairs but Western reclamation projects and all of the other diverse activities of the Interior Department.

Aspinall speaks for the Upper Colorado River states, which would stand to lose the most if the Navajos successfully pressed their historic claim to the Colorado's water.

"The Upper Basin states didn't want to have to defend against claims," Tolliver recalled. "There are certain influential Congressmen who have enough muscle to have this done down the line."

The former Interior attorney said that Aspinall and others made it clear that they would oppose development of the power plant if they didn't get the assurances from the Navajos. In Tolliver's judgment, it was the tangible economic benefits of the power plant versus "theoretical rights and speculative uses which are never going to materialize.

"The tribe gave up a legal point, but I was convinced that they didn't give up anything of value or I would never have proposed it."

The young lawyers who have attacked the deal ask, in so many words: If the Navajos weren't giving away anything of value, then why did Rep. Aspinall and the Upper Basin states want it?

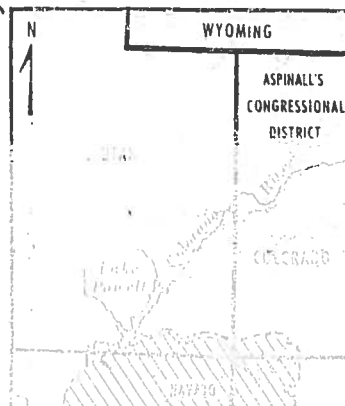
An Untested Cloud

LIKE SCORES of other Indian water claims in the West, the Navajos' is untested and unmeasured, a cloud that has long hung over economic development plans in the water-scarce states.

In the thicket of Western water law, no one can say precisely what that claim might mean to the impoverished tribe if it were someday fought for and won.

Some contend that the value of Indian water claims is exaggerated; that they provide wonderful academic arguments but, as a practical matter, would not amount to much if pursued in court. Others believe that a spirited legal fight would yield vast benefits to the tribes; that only governmental indifference and the pressures of non-Indian development have prevented the Indians from capitalizing on their legal right to the West's most precious resource.

See NAVAJOS, Page C2, Column 1



Water Fight Raises Issue

NAVAJOS, From Page C1

These arguments are likely to draw more attention in the future, partly because water is crucial if there is to be substantial economic development on the reservations and partly because legal services groups like the one at the Navajo Reservation are urging the Indians to pursue their claims.

In the Navajo case, the argument about water rights stems from the massive development plan known as the Central Arizona Project, approved by Congress last year after decades of wrangling. The Central Arizona Project calls for taking millions of acre-feet of water (an acre-foot is an acre of water one foot deep) from the river in the lower basin south of the Navajo Reservation and pumping it overland for the budding economies of the Tucson and Phoenix areas. Once developed, CAP insures a bright future for the southern half of the state.

In order to pump the water, the project needs an electric power plant and Secretary Udall, together with Navajo tribal leaders, labored to make sure that the plant is located on the reservation rather than at a competing location in southern Utah. For Indians, the power plant would mean some new jobs, tribal income for lease of the plant site and, most important, royalties from the Navajo-owned coal which would fuel the generators.

The tribal resolution adopted at Interior's instigation last December guaranteed that 34,100 acre-feet of water a year would be available for cooling purposes at the power plant for the next 50 years or the lifetime of the plant, whichever is shorter. That water would come from the 50,000 acre-feet per year which is the state of Arizona's share under the Upper Colorado compact, a five-state agreement made in 1948 (Arizona shares in water from both the upper and lower basins of the Colorado).

No one quarreled with the power plant guarantee. The controversial aspect of the resolution was the tribe's additional guarantee that it would limit its own water use in the Arizona portion of the reservation to the Upper Basin allotment of 50,000 acre-feet provided Arizona. Thus, after the 34,100

was assigned to the power plant, 15,900 acre-feet would remain for the tribe to use. In consideration, the tribe was to receive \$125,000 for the Navajo Community College from the Central Arizona Project.

At the time, the tribal council adopted the resolution without any special fuss, and Interior emissary Tolliver returned to Washington. A month later, the department completed a contract with Central Arizona Project officials for the power plant.

'Troublemakers' Act

THE FIGHT started in May when the tribal council was asked to pass a companion resolution setting aside 3000 acre-feet of the water for development of the Navajo community of Page. This resolution was tied to a bill pending in Congress to return about 750 acres of shoreline property on Lake Powell to the tribe for development as a recreation area. Both the bill and the second resolution repeated the tribal agreement to limit its use of Upper Basin water to 50,000 acre-feet, including the 34,100 needed for the power plant.

Before the council could act, an angry protest was lodged by Dinebeilna Nahiilna Be Agaditah—"attorneys who contribute to the revitalization of the Navajo people." DNA is a legal service organization financed with an \$800,000-a-year grant from the Office of Economic Opportunity. Its legal challenges have provided the reservation with controversy on a variety of issues; DNA lawyers have been called troublemakers by a lot of people, including tribal officials.

In this instance, DNA Director Theodore R. Mitchell submitted a 23-page brief to the tribal council outlining the legal precedents for a vast claim to the Colorado waters and arguing that the language of the two resolutions would hopelessly damage the Navajo case. Mitchell urged the council to reverse itself and, earlier this month, it did.

It adopted the second resolution but directed the tribal lawyer to delete the waiver language and to insert a disclaimer. The council declared it had never intended "a waiver or relinquishment of the present or prospective water rights of the Navajo tribe," either in

June or in the previous December.

The core of Mitchell's argument is the long-debated doctrine that the treaties establishing Indian reservations also reserved for the Indians the priority rights to the water from their streams. Those rights, it is argued, take precedence over any state laws or interstate water compacts that came along later. (The Supreme Court established this broad principle in a 1908 case and it has been reaffirmed in others since, but the issue is still loaded with questions that the courts have never fully answered.)

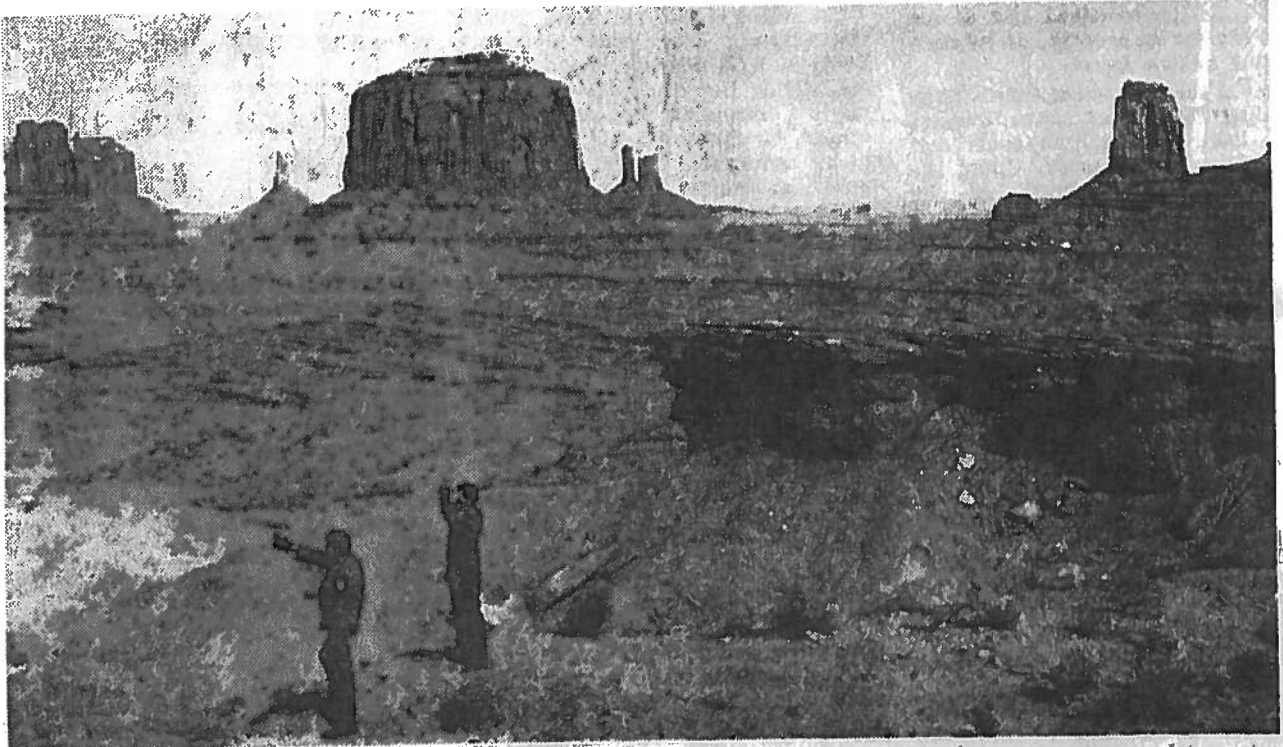
The Navajo Reservation, Mitchell contended, could pursue a vast claim against the entire Colorado River and its tributaries, demonstrating that the Indians need millions of acre-feet for irrigation or other development projects.

That, of course, would challenge the Upper River compact and its apportionment of water to Colorado, Utah, Wyoming, New Mexico and Arizona. Mitchell argued that the damaging effect of the two resolutions would be that the tribe, by accepting Arizona's share from the Upper River compact as its own, would be recognizing the validity of the compact and its limitations.

"The tribe's claim to water is entirely independent of the compact," Mitchell said. "By trying to get the tribe to agree to Arizona's limitation, they were trying to prevent other claims."

If all that Interior wanted was to insure a future water supply for the power plant, he said, that could have been accomplished by resolution without prejudicing the tribe's historic claim (a point with which Tolliver agrees). The real reason for getting the waiver, Mitchell claims, was that Aspinall and Upper Basin congressional delegations could still create trouble for the development of the Central Arizona Project.

The DNA director acknowledges that irrigation surveys would have to be made and complicated legal questions would be involved if the tribe were to pursue its claim successfully. But, he said, "It's a failure on the part of the Government not to make the irrigation surveys and to file the lawsuit. It's



The Navajo reservation is scenic—but exceedingly dry.

Who Speaks for Navajo

never made any effort in that direction."

The intervention by DNA and its successes in getting the tribal council to disclaim its earlier action have produced a confusing variety of reactions, most of them hostile.

Tolliver, the Interior lawyer who proposed the resolution in the first place, gives Mitchell and his colleagues credit for good intentions but contends that they grossly overestimate the importance of the waiver. The portion of the reservation that lies within the drainage basin of the Upper Colorado is so desolate, he said, that "there is no practical possibility that any demands for water will put them over the 50,000 limit."

"It's the most Godforsaken country in the world. Agricultural or industrial development possibilities just don't exist."

In Window Rock, William McPherson, assistant general counsel for the tribe, insisted that DNA has completely misread the legal implications of the documents. McPherson said it was true that Interior's original resolution would have waived the Navajos' water rights, but "we saw that and we tried to rewrite it to avoid that. We thought we did it effectively." (Tolliver, for one, doesn't agree.) Nevertheless, McPherson said the tribe's lawyers were happy to add the disclaimer to put any fears to rest.

A Bureau of Reclamation official dismissed DNA's charge as groundless, too. "I don't fully understand their activities out there," he said, "but I know they are causing a helluva turmoil among a lot of innocent people." The offices of two Arizona Congressmen—Rep. Sam Steiger (R) and Rep. Morris Udall (D)—also added their assurances that DNA's controversy was of no consequence. According to Mitchell, Rep. Steiger has asked the Government Accounting Office to audit DNA, and the legal services organization expects a fight when its OEO funds come up for renewal this summer.

A Bill in Committee

CURIOUSLY, one source who agrees with Mitchell's contention that the Navajos gave up something of value is Rep. Aspinall's staff man on the House Interior Committee.

Sidney L. McFarland, the committee's staff director, said the Upper Basin states had every right to assurances that the power plant project, intended to benefit Arizona and the Navajos, would not lead to further demands on the river beyond the state's present allotment.

"Since the Upper Basin is short anyway," he said, "they want to be very sure that Arizona doesn't use any more than 50,000 acre feet . . . They're concerned that, let's say, the Indians won

a lawsuit. The power plant would be pumping water out of the reservoir, and once it's in operation, you couldn't just shut it down."

By McFarland's estimate, the division of the 50,000 acre-feet between the tribe and the power plant "means that the Indians could not expand their uses and would probably have to restrict them to some small amount."

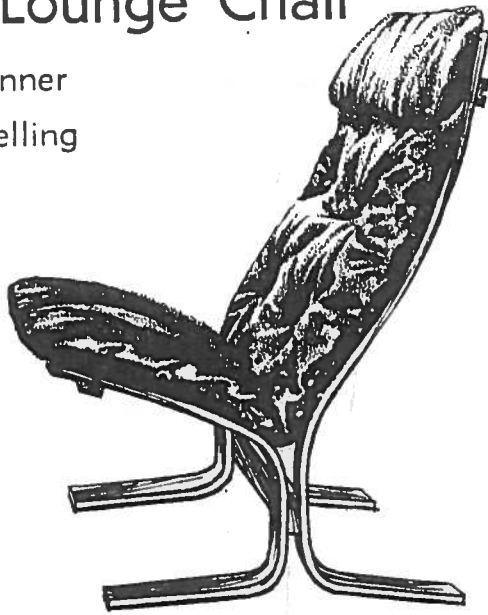
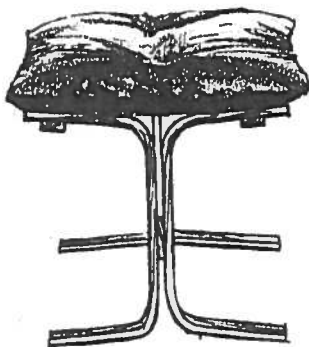
Though the tribal council enacted its disclaimer, that does not settle the matter. The bill to return the Lake Powell shoreland to the tribe, introduced by Arizona's three Congressmen, is pending before Aspinall's committee. McFarland said that, unless the tribe agrees to the water limitation, "I don't believe this legislation would pass."

Tolliver, the man whose trip to Window Rock started the controversy, fears that DNA's good intentions will wind up hurting the tribe. "I'm afraid," he said, "that if they want to play around with their theoretical rights or theoretical values, they're going to lose that power plant."

DNA's Mitchell is confident that the short-run gains from the power plant are meager compared to the potential of the water claim. "Whatever the tribe's ultimate allocation would be determined by the court to be," said the DNA brief, "it is foolhardy in the extreme for the tribe to waive its rights before they are determined."

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