
NATURAL RESOURCES JOURNAL

Volume 46
Issue 2 *Moving Beyond the Current Paradigm: Redefining the Federal-Tribal Trust Relationship for This Century In Collaboration with the American Indian Law Center, Inc.*

Spring 2006

Indian Water Rights and the Federal Trust Responsibility

Robert T. Anderson

ROBERT T. ANDERSON*

Indian Water Rights and the Federal Trust Responsibility

ABSTRACT

Although federal policy shifted from assimilation to pro-tribal positions, the federal courts have quite consistently supported Indian reserved water rights. Indian water rights, however, were neglected by Congress in favor of non-Indian agricultural development in the arid West. Modern litigation over tribal rights takes place primarily in state courts that are tempted to interpret the few U.S. Supreme Court cases in ways that protect existing non-Indian uses over senior tribal water rights. Modern Indian water rights settlements tend to protect existing non-Indian uses while providing substantial benefits for tribes, but in a haphazard manner. This article examines the history of Indian water rights and concludes that the traditional practicably irrigable acreage quantification standard should be adhered to by the courts – supplemented by the homeland theory that awards water to fulfill all purposes behind creation of a reservation. The author also argues that the Executive Branch should adopt firm budgetary policies that promote settlements as an Administration priority in order to ameliorate historic inequities in western water development.

I. INTRODUCTION

The struggle by Indian tribes to maintain their property and survival as distinct communities is revealed by examining the status and treatment of Indian water rights by the federal government. Indian reserved water rights are trust property with legal title held by the United States.[1] They were first recognized in 1908 in *Winters v. United States*.[2] As such, one might expect to find that by now a trustee would

* Associate Professor of Law and Director of the Native American Law Center, University of Washington School of Law.

1. *See* Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (Mar. 12, 1990) ("Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians."). *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19 (Nell Jessup Newton et al. eds., 2005).

2. 207 U.S. 564 (1908).

have developed an effective system for defining and protecting the trust corpus.[3] However, instead of protecting Indian water rights, the federal government has consistently expended the vast majority of its resources developing water projects for non-Indian use.[4] The National Water Commission in 1973 concluded that, "[i]n the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters."[5] The Commission recognized the trust responsibility of the United States to tribes with respect to water and went on to recommend that the United States quantify Indian water rights exclusively in federal court.[6] The Commission also recommended that some accommodation be made to non-Indians who the United States encouraged to use water owned by Indian tribes.[7]

The recommendations of the Commission have substantial merit, but the federal government has not implemented them except in isolated instances. In recent years, the United States has initiated only a few cases to protect Indian water rights,[8] but states have commenced many general stream adjudications to determine Indian reserved rights in state courts.[9] The litigation has not resulted in the delivery of

3. *See* COHEN, *supra* note 1, § 19.06, at 1221 (outlining the basis for federal trust obligations). For a discussion of breach of trust litigation in the water rights arena, see Cohen, *supra* note 1, § 19.06, at 1223–26. *See also* Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307, 1362–64 (2003).

4. LLOYD BURTON, AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF LAW 23 (1991). *See also* CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 258–59 (1992) [hereinafter WILKINSON, CROSSING THE NEXT MERIDIAN]; MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER (1986); Harold Sheperd, *Conflict Comes to Roost! The Bureau of Reclamation and the Federal Indian Trust Responsibility*, 31 ENVTL. L. 901, 913–17 (2001).

5. NAT'L WATER COMM'N, WATER POLICIES FOR THE FUTURE: FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES 475 (1973). *See also* DANIEL MCCOOL, NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA 36 (2002) ("[T]he Bureau of Reclamation operates 348 reservoirs that provide water for ten million acres of farmland and 31 million people....But the BIA has never finished an irrigation project.").

6. NAT'L WATER COMM'N, *supra* note 5, at 477–79.

7. *Id.* at 481–83.

8. Before the United States filed suit in *United States v. Washington*, 375 F. Supp. 2d 1050 (W.D. Wash. 2005), in 2001 to assert water rights on behalf of the Lummi Nation, the last federal court litigation commenced by the United States appears to be *United States v. Adair*, 478 F. Supp. 336 (D. Or. 1979), filed in 1975.

9. Most litigation over Indian water rights now takes place in state courts pursuant to the McCarran Amendment. 43 U.S.C. § 666 (2000). *See* Scott B. McElroy & Jeff J. Davis, *Revisiting* Colorado River Water Conservation District v. United States—*There Must Be a Better Way*, 27 ARIZ. ST. L.J. 597, 612–49 (1995) (summarizing proceedings in several states). *See infra* Part III.

significant amounts of water for use on Indian reservations,[10] although recent settlements hold more promise.[11] Most Indian tribes have not quantified their reserved rights to water and potential tribal claims are large.[12]

This article briefly traces the erratic course of Indian law to provide context for the treatment of Indian water rights. It then reviews in some detail the legal framework of Indian reserved water rights, including an analysis of the cases prosecuted by the United States prior to the 1960s. The modern standards for measurement of Indian rights are examined in detail, along with the recent trend toward settlements. The article closes with recommendations designed to further settlement of Indian water rights and improve the federal government's performance as trustee.

II. INDIAN LAW AND POLICY

Federal policy respecting Indian affairs has vacillated greatly over the course of U.S. history and the changes in course have had huge adverse effects on the security of Indian rights.[13] Through it all, however, the United States has recognized the Indian tribes as possessing inherent sovereign powers as governments,[14] as well as property rights as landowners.[15] And while the federal government has worked hard to divest tribes of their property and some governmental powers, the Supreme Court has stated that the United States "has charged itself with moral obligations of the highest responsibility and trust."[16] These

10. W. WATER POL'Y REV. ADVISORY COMM'N, WATER IN THE WEST: THE CHALLENGE FOR THE NEXT CENTURY 3-45 (1998).

11. *See* COHEN, *supra* note 1, § 19.05[2], at 1210-20.

12. *See* W. WATER POL'Y REV. ADVISORY COMM'N, *supra* note 10, at 3-48 to 3-50.

13. *See generally* COHEN, *supra* note 1, § 1; CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY (1987) [hereinafter WILKINSON, AMERICAN INDIANS]. Professor Frickey sums it up well: "If the 'life of the law' for legal formalists is logic and for legal pragmatists is experience, then federal Indian law is for neither. More than any other field of public law, federal Indian law is characterized by doctrinal incoherence and doleful incidents." Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1754 (1997) (footnotes omitted).

14. *See* United States v. Lara, 541 U.S. 193 (2004); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

15. *See* Menominee Tribe v. United States, 391 U.S. 404 (1968); United States v. Shoshone Tribe, 304 U.S. 111 (1938).

16. Seminole Nation v. United States, 316 U.S. 286, 297 (1942). *See also* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975) (examining whether the trust responsibility itself creates legally enforceable duties for the federal government).

standards are manifest in rules of statutory interpretation holding that "tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous."[17] Despite past efforts to assimilate Indians into mainstream society, modern statutes like the Indian Reorganization Act[18] and the Indian Self-Determination Act[19] have bolstered the standing, independence, and capacity of tribal governments in the United States.[20]

Early nineteenth century rulings set the basic contours of the federal-tribal relationship regarding the United States' view of the nature of tribal land ownership and governmental status. In *Johnson v. M'Intosh*,[21] the Court reviewed a title contest between two parties claiming title from the Illinois and Piankeshaw nations on the one hand and the United States on the other. The Court noted that the Indian tribes "were in rightful possession of the land they sold" to Johnson's predecessors in 1773 and 1775.[22] According to the Court, however, the discovering European Nations obtained "the sole right of acquiring the soil from the natives, and establishing settlements upon it."[23] It therefore followed that the conveyances made by the tribes in 1773 and 1775 without British Crown approval did not pass clear title to Johnson's predecessors.[24] The title obtained by McIntosh from the United States, on the other hand, was valid since the transactions between the tribal nations and the United States comported with the Indian Trade and Intercourse Act of 1790,[25] which made it illegal for state or private parties

---

17. COHEN, *supra* note 1, § 2.02[1], at 120.

18. Indian Reorganization (Wheeler-Howard) Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2000)).

19. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 450 *et seq.* (2000)).

20. *See* WILKINSON, AMERICAN INDIANS, *supra* note 13, at 21; COHEN, *supra* note 1, § 1.05, at 84.

21. Johnson v. M'Intosh, 21 U.S. 543 (1823).

22. *Id.* at 571–72.

23. *Id.* at 573.

> While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy. The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.

Id. at 574.

24. *Id.* at 592–94.

25. Act of July 22, 1790, ch. 33, 1 Stat. 137. The Act was temporary but was continued in various forms and is now codified at 25 U.S.C. § 177 (2000).

to acquire Indian land without the consent of the United States.[26] The statute established a federal monopoly with respect to acquisition of Indian land and ensured that Indian land was protected (in law at least) from non-Indian encroachment. Thus, no land in the United States was legally available for non-Indian occupation until tribal aboriginal rights of use and occupancy were extinguished pursuant to transactions approved by treaty or federal statute.[27] The requirement of federal approval of transfers of land and water implies a duty to protect Indian aboriginal lands that is at the foundation of the federal-tribal relationship.[28] "Unquestionably, it has been the policy of the federal government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States."[29]

In *Worcester v. Georgia*,[30] a case rejecting Georgia's assertion of criminal jurisdiction over a non-Indian present within the Cherokee Nation, Chief Justice Marshall explained the sovereign status of Indian tribes under international and federal law in the following terms:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than

---

26. *Id.* § 4. *See* COHEN, *supra* note 1, § 15.06. In *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974), the Court affirmed the rights of Indian tribes to sue in federal court for recovery of land ceded to third parties in violation of the Act. For the latest in this long-running litigation, see *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). *See also* Oneida Indian Nation v. Madison County, 401 F. Supp. 2d 219, 222 (N.D.N.Y. 2005) ("A district court should not permit the taking of a sovereign nation's land against its will by foreclosure or any other means, without the express approval of the United States Government. In this country such an extraordinary remedy—taking a sovereign nation's land against its will—has never been legally sanctioned.").

27. *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234, 240 (1985).

28. Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1495–98. Professor Wood notes that "[t]he vast cessions of land by the native peoples were premised on federal promises that the native peoples could continue their way of life on homelands of smaller size, free from the intrusions of the majority society." *Id.* at 1496. As discussed below, reservations of water have been routinely implied in order to fulfill these promises. *See infra* Part II.B.

29. United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 345 (1941) (quoting Cramer v. United States, 261 U.S. 219, 227 (1923)). The Court also noted that the Indian "'right of occupancy is considered as sacred as the fee simple of the whites.'" *Id.* (quoting Mitchel v. United States, 34 U.S. 711, 746 (1835)).

30. 31 U.S. 515 (1832).

> the first discoverer of the coast of the particular region claimed....
>
> ...
>
> The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of [C]ongress. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States.[31]

The recognition of the tribes' sovereignty and ownership of the territory they occupied in the early days of the United States established the legal basis for modern claims to ownership and governmental power over water.[32] In these formative years of the nation, Congress passed many laws governing Indian affairs pursuant to the Indian Commerce Clause.[33]

Treaty negotiations with western tribes took place as the United States gained new territory from foreign nations.[34] Between 1778 and 1871, the United States negotiated and ratified 367 treaties with Indian tribes.[35] The federal government intended the treaties to further peaceful

---

31. *Id.* at 559–61. Earlier, the Court had ruled that the Cherokee Nation was not a foreign nation entitled to invoke the Supreme Court's original jurisdiction to challenge Georgia state laws purporting to regulate the Nation. Cherokee Nation v. Georgia, 30 U.S. 1, 20 (1831). For criticism of the Discovery Doctrine, see Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219. For an argument that federal law does not apply to Indian tribes absent their consent, see Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595 (2004).

32. The right of occupancy when confirmed included ownership of all resources in the tribal territory. United States v. Shoshone Tribe, 304 U.S. 111 (1938).

33. U.S. CONST. art. I, § 8, cl. 3. For a scholarly critique of the notion that the Indian Commerce Clause gives the federal government power to govern tribes, see Robert N. Clinton, *There Is No Federal Supremacy Clause for Indians*, 34 ARIZ. ST. L.J. 113, 133 (2002) ("The Indian Commerce Clause grants broad Indian affairs powers, but the power is broad vis-à-vis the states; it does not affect the powers or sovereignty of the Indian tribes."). In *United States v. Lara*, the Supreme Court repeated the conventional view when it described federal power over Indian affairs as plenary and exclusive and as rooted in "preconstitutional powers necessarily inherent in any Federal Government." 541 U.S. 193, 200–01 (2004).

34. *See* COHEN, *supra* note 1, §§ 1.03[5]–[6], at 60–69.

35. FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 1 [hereinafter PRUCHA, AMERICAN INDIAN TREATIES] (1994). Felix Cohen noted that, "[u]ntil the last decade of the treaty-making period, terms familiar to modern

relations with the tribes and, perhaps more importantly, obtain cessions of vast areas for land hungry settlers.[36] The federal removal policy, which called for *voluntary relocation* of Indian tribes from the eastern states to the Oklahoma Territory and other parts of the West, aided those efforts.[37] In exchange, the United States agreed to recognize permanent homelands, or reservations, and sometimes recognized reservations of off-reservation hunting and fishing rights.[38] Most of the "permanent" homelands promised in treaties, however, were dramatically reduced in size when non-Indian settlers sought land previously "guaranteed" by treaty.[39] In negotiation or implementation of treaties, tribes frequently alleged fraud on the part of the United States,[40] but tribes with such complaints were left to appeal to Congress.[41] None of the treaties or

---

international diplomacy were used in the Indian treaties" and "[m]any provisions show the international status of the Indian tribes, through clauses relating to war, boundaries, passports, extradition, and foreign relations." FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 3[A], at 39 (1942).

36. *See, e.g.*, Act of June 5, 1850, ch. 16, 9 Stat. 437 (authorizing the President "to appoint one or more commissioners to negotiate treaties with the several Indian tribes in the Territory of Oregon, for the extinguishment of their claims to lands lying west of the Cascade Mountains; and if found expedient and practicable, for their removal east of said mountains; also, for obtaining their assent and submission to the existing laws regulating trade and intercourse with the Indian tribes in the other Territories and of the United States").

37. Act of May 28, 1830, ch. 148, 4 Stat. 411. *See* COHEN, *supra* note 1, § 1.03[4][a], at 54 (noting that by 1850 the majority of Indian tribes had been removed from the eastern states); FRANCES PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834, at 224-28 (1962).

38. *See, e.g.*, Treaty with the Chippewa, 1837, July 29, 1837, 7 Stat. 536, *construed in* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) and Treaty with the Nisqualli, Puyallup, Etc. 1854 (Treaty of Medicine Creek), Dec. 26, 1854, 10 Stat. 1132, *construed in* Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

39. For example,

> in September 1874, General Sheridan sent instructions to Brigadier General Alfred H. Terry, Commander of the Department of Dakota, at Saint Paul, directing him to use force to prevent companies of prospectors from trespassing on the Sioux Reservation. At the same time, Sheridan let it be known that he would "give a cordial support to the settlement of the Black Hills," should Congress decide to "open up the country for settlement, by extinguishing the treaty rights of the Indians."

United States v. Sioux Nation, 448 U.S. 371, 377-78 (1980). Not long thereafter, in 1877, Congress took the Black Hills through an "agreement" that amounted to a taking of the tribe's recognized title to the land for which compensation was required under the Fifth Amendment. *Id.* at 378-86, 423-24.

40. *See, e.g.*, PRUCHA, AMERICAN INDIAN TREATIES, *supra* note 35, at 173-74 (1994); COHEN, *supra* note 1, § 1.03[4][a], at 52-54.

41. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); COHEN, *supra* note 1, § 5.04[2][a], at 413-14.

agreements spoke directly to water rights, but many provisions made it clear that access to and use of water was critical to the tribes.[42]

Treaties of the 1850s contained provisions authorizing the breakup of tribal lands into individual "allotments."[43] The objective was "to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large."[44] This policy culminated with adoption of the General Allotment Act[45] and reduced the Indian land base from 156 million acres in 1881 to approximately 48 million acres in 1934.[46] It resulted in a checkerboard pattern of land ownership within reservations, which introduced vexing jurisdictional problems[47] and great complexity in determining the water rights of non-Indians who acquired allotted lands from Indians.[48] Congress ended treaty-making with tribes in 1871 when the House of Representatives refused to appropriate funds to implement existing treaties unless the Senate agreed that it would no longer participate in the treaty process with tribes.[49] The statute provided, however, that "no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe

---

42. *See, e.g.*, Idaho v. United States, 533 U.S. 262, 266-71 (2001) (negotiations over reservation boundaries centered on the inclusion of parts of Lake Coeur d'Alene and the St. Joe River); Treaty with the Chippewa, Bois Fort Band, 1866, art. 3, Apr. 7, 1866, 14 Stat. 765, (reservation to include Nett Lake and mouth of Deer Creek).

43. Treaty with the Omaha, art. 6, Mar. 16, 1854, 10 Stat. 1043; Treaty with the Dwámish, Suquámish, and other allied and subordinate Tribes of Indians in Washington Territory, art. 7, Jan. 22, 1855, 12 Stat. 927.

44. County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 254 (1992). *See* D.S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (Francis Paul Prucha ed., 1973); Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001).

45. General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (formerly codified at 25 U.S.C. §§ 331-333). The Dawes Act provided authority for the President to divide communal tribal lands into individual parcels to be held by tribal members. For a period of 25 years, the federal government protected these "allotments" from taxation and tribal members could not sell them without the consent of the Secretary of the Interior. *Id.* § 5. At the conclusion of the 25-year period, the Secretary of the Interior could extend the restrictions on alienation or convey the land to the Indian in fee simple status. *Id.* Further, the government could declare the remaining lands on an allotted reservation "surplus" and return them to the public domain. *Id. See generally* COHEN, *supra* note 1, § 16.03.

46. COHEN, *supra* note 1, § 1.04, at 78-79.

47. *See* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989); Seymour v. Superintendent, 368 U.S. 351 (1962); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

48. In *United States v. Powers*, the Supreme Court recognized that allotments included reserved water rights. 305 U.S. 527 (1939). For a survey of issues related to water rights of allottees and subsequent owners, see COHEN, *supra* note 1, § 19.03[8].

49. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2000)). The United States continued to negotiate agreements with Indian tribes that were then ratified by Congress.

prior to March 3, 1871, shall be hereby invalidated or impaired."[50] The Act manifested the shift of the balance of power between tribes and the federal government and the federal domination of treaty negotiations since the 1830s.

With the adoption of the Indian Reorganization Act (IRA) in 1934,[51] Congress returned to earlier policies supporting the protection of the Indian land base. The IRA "halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands."[52] Today, Indian land holdings are put at 56 million acres, with tribes owning approximately 45 million and 11 million held in the form of individual trust or restricted fee allotments.[53] Less than 20 years after passage of the IRA, Congress adopted a resolution calling for the "termination" of the federal-tribal relationship with certain Indian tribes, which interrupted this return to support of tribal self-government and a secure Indian land base.[54] Although the termination period quickly fell into disfavor, it resulted in the end of the government-to-government relationship between the United States and about 100 federally recognized Indian tribes and transferred jurisdiction over those tribes to the states.[55] President Nixon repudiated the termination policy and ushered in an era supportive of the federal-tribal relationship when he announced the policy of "self-determination without termination."[56] Congress followed suit with the Indian Self-Determination Act of 1975,[57] which allows for the transfer of federal programs from the Bureau of Indian Affairs to the tribes.[58] In a host of other statutes and administrative actions, the United States today encourages and supports tribal governmental institutions.[59] However,

---

50. *Id.*

51. Indian Reorganization (Wheeler-Howard) Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2000)). *See* COHEN, *supra* note 1, § 1.05.

52. County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 255 (1992).

53. COHEN, *supra* note 1, § 15.01, at 965, § 16.04[a], at 1048.

54. H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953) (directing the Secretary of the Interior to recommend tribes for termination). *See* COHEN, *supra* note 1, § 1.06, at 94–95.

55. *See* COHEN, *supra* note 1, § 1.06.

56. H.R. Doc. No. 91-363 (1970).

57. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 450 *et seq.* (2000)).

58. COHEN, *supra* note 1, §§ 5.03[4], 22.02.

59. *See, e.g.*, Indian Tribal Regulatory Reform and Business Development Act of 2000, 25 U.S.C. § 4301(a)(6) (2000) ("[T]he United States has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency among Indian tribes."); Exec. Order No. 13,175. 3 C.F.R. § 13175 (2000), reprinted in 25 U.S.C. § 450 (2000) (affirming the federal

actions to fully ameliorate the effect of past policies have not accompanied the modern shift in support of tribal rights. For example, the IRA ended the allotment and assimilation era, but the non-Indians and their transferees who acquired much of the 100 million acres of land removed from tribal ownership remain within Indian reservations.[60] The allotments remaining in individual Indian ownership are frequently held by hundreds of individuals as tenants in common.[61]

When Congress has addressed the nature of tribal land ownership and governance, the policies have generally been clear and national in scope.[62] Congress never, however, addressed water resource development by Indians on tribal lands in any comprehensive manner.[63] Indeed, the United States aggressively enabled non-Indians to use the same water that was necessary for tribal use and protection of treaty resources.[64] While the government's duty to protect Indian water rights is clear,[65] a variety of circumstances have frustrated attempts at consistent adherence to the federal trust obligation.[66] The dramatic turns in federal policy generally took no account of Indian water rights.[67] The treaties and agreements by which tribes ceded their aboriginal lands, however, implicitly guaranteed Indian access to and use of water for new pursuits such as agriculture, as well as traditional hunting, fishing, and gathering. Until significant settlement occurred in the arid west,

---

trust responsibility to Indian tribes). An exhaustive discussion of federal programs can be found in COHEN, *supra* note 1, § 22.

60. WILKINSON, AMERICAN INDIANS, *supra* note 13, at 21–23; Royster, *supra* note 47, at 30.

61. *See* COHEN, *supra* note 1, § 16.05[2][c][iii], at 1068; Babbitt v. Youpee, 519 U.S. 234, 237–39 (1997).

62. The major exception is termination, which was a national policy implemented on a tribe-by-tribe basis for a brief period in the 1950s. *See supra* text accompanying notes 54–55.

63. *See* W. WATER POL'Y REV. ADVISORY COMM'N, *supra* note 10, at 3-47 (1998) (noting the lack of funding to construct and maintain seventy-seven Indian irrigation projects). *See also* MCCOOL, *supra* note 5, at 20–22 (describing the tribes' use of only a small fraction of water rights because of the failure by Congress to adequately fund water projects); BURTON, *supra* note 4, at 23.

64. *See* WILKINSON, CROSSING THE NEXT MERIDIAN, *supra* note 4, at 219–59 (1992) (discussing the role of the Bureau of Reclamation and other federal agencies in promoting out-of-stream uses of water).

65. *See* Wood, *supra* note 28, at 1513–14.

66. *See* Juliano, *supra* note 3.

67. One exception is the General Allotment (Dawes) Act of 1887, which requires the Secretary of the Interior to secure water for irrigation by individual allottees. 24 Stat. 388, 390, 25 U.S.C. § 381 (2000). *See* United States v. Powers, 305 U.S. 527, 532 (1939); Sol. Op. M. 3692 (Mar. 30, 1995), at 7. *See also supra* note 45.

however, there was little competition for water. That changed by the late nineteenth century.[68]

III. INDIAN RESERVED WATER RIGHTS

A. Origins

The landmark case involving federal reserved water rights in general and Indian reserved water rights in particular is *Winters v. United States*.[69] In *Winters*, the Court construed a congressionally ratified agreement between the Indians of the Fort Belknap Reservation and the United States.[70] In the agreement, the Gros Ventre and Assiniboine Bands of Indians surrendered most of their larger reservation and retained a much smaller reservation adjacent to the Milk River in Montana.[71] The 1888 agreement recited that the reservation set aside in 1874 was "wholly out of proportion to the number of Indians occupying" that reservation "and greatly in excess of their present or prospective wants."[72] The preamble to the agreement concluded by stating that the "Indians are desirous of disposing of so much thereof as they do not require in order to obtain the means to enable them to become self-supporting, as a pastoral and agricultural people...."[73] Of course, the purpose of the agreement was not simply to provide for the Indians, but also to clear the way for the settlement of the West by whites.[74] Non-Indians who had settled upstream of the reservation claimed paramount rights to use water from the Milk River based on the prior appropriation doctrine.[75]

---

68. *See* JOHN SHURTS, INDIAN RESERVED WATER RIGHTS: THE *WINTERS* DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT, 1880S–1930S (2000).

69. 207 U.S. 564 (1908). *See* SHURTS, *supra* note 68, at 15–157 (containing an exhaustive analysis of *Winters*); MCCOOL, *supra* note 5, at 9–14 (discussing the history and legacy of *Winters*).

70. Act of May 1, 1888, ch. 213, 25 Stat. 113 (1889). As noted above, treaty-making ended in 1871. *See supra* note 49.

71. The larger tract of land had been set aside for "the use and occupation of the Gros Ventre, Piegan, Blood, Blackfoot, River Crow, and such other Indians as the President may, from time to time see fit to locate thereon" in 1874. Act of Apr. 15, 1874, ch. 96, 18 Stat. 28; SHURTS, *supra* note 68, at 17–18.

72. Pmbl., 25 Stat. at 113.

73. *Id.* The agreement also provided for reservations at Fort Peck, 25 Stat. at 116, Fort Belknap, 25 Stat. at 124, and the Blackfeet Agency, 25 Stat. at 129.

74. *See* COHEN, *supra* note 1, § 1.03[6], at 64–69.

75. All of the western states in the continental United States follow some form of the prior appropriation doctrine.

> Under that doctrine, one acquires a right to water by diverting it from its natural source and applying it to some beneficial use. Continued beneficial

If the Indians were to be able to grow crops as contemplated by the agreement creating the reservation, they would need water being used by the non-Indians. The United States filed suit on behalf of the tribes and claimed that Congress had reserved the water to fulfill the purpose for establishing the reservation, i.e., to turn the Indians into farmers and to serve as a homeland for the tribes.[76] In opposition, Henry Winter argued that under the state law of prior appropriation the non-Indian use superceded any rights claimed by the United States.[77] The trial court ruled in favor of the United States on the theory that the agreement with the Indians was intended to reserve water to fulfill the agricultural purposes set out in the ratified agreement and to provide "permanent homes" for the Indians on the various reservations.[78] The Supreme Court affirmed, reasoning that

> [t]he reservation was a part of a very much larger tract which the Indians had the right to occupy and use, and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such, the original tract was too extensive; but a smaller tract would be inadequate without a change of conditions. The lands were arid, and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government.[79]

---

use of the water is required in order to maintain the right. In periods of shortage, priority among confirmed rights is determined according to the date of initial diversion.

Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 805 (1976) (footnote omitted). *See generally* WATERS AND WATER RIGHTS § 12.02 (2001 Repl. ed.).

76. Bill of Complaint at paras. 4, 8, United States v. Anderson, No. 747 (D. Mont. filed June 26, 1905). *See also* SHURTS, *supra* note 68, at 59–62 & nn.5–6.

77. SHURTS, *supra* note 68, at 72. Although the United States alleged in its pleadings that Indian use actually preceded the non-Indian diversions, the evidence produced at the hearing in the district court indicated that most of the actual tribal use of water had commenced after the non-Indian appropriations. *Id.*

78. *Id.* at 72–74 & n.9 (quoting *Anderson*, No. 747, Memorandum Order (D. Mont. filed Aug. 7, 1905)).

79. Winters v. United States, 207 U.S. 564, 576 (1908).

The Supreme Court ruled that the federal government had the power to exempt waters from appropriation under state water law,[80] and that the United States and the Indians intended to reserve the waters of the Milk River to fulfill the purposes of the agreement between the Indians and the United States.[81] The Court stated that, "ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it."[82] When the question of federal power to reserve water was next addressed by the Supreme Court in *Arizona v. California*,[83] the Court rejected state objections based on the equal footing doctrine and held that the reservation of water for federal or Indian purposes can occur either before or after statehood.[84] While the cases involved implied reservations of water to irrigate Indian reservation lands, Congress may reserve water for federal purposes without a corresponding reservation of land.[85]

---

80. "The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be." *Winters*, 207 U.S. at 577 (citing United States v. Rio Grande Dam & Irrigation Co., 174 U. S. 702 (1899)); United States v. Winans, 198 U.S. 371 (1905). Indian and federal rights to water may be expressly reserved as well as implied. *See, e.g.*, An Act to Establish the El Malpais National Monument § 509, 16 U.S.C. § 460uu-49 (2000) ("Congress expressly reserves to the United States the minimum amount of water required to carry out the purposes [of this Act]."); Alaska National Interest Lands Conservation Act, Pub. L. 96-487, § 303(7)(B), 94 Stat. 2371, 2392-93 (1980) (codified at 16 U.S.C. 668dd (2000)) ("The purposes for which the Yukon Delta National Wildlife Refuge is established and shall be managed include—(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, shorebirds, seabirds, whistling swans, emperor, white-fronted and Canada geese, black brant and other migratory birds, salmon, muskox, and marine mammals;...[and] (iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge."). For an example of expressly reserved Indian water rights, see Act of June 6, 1900, ch. 813, art. 8, 31 Stat. 672, 674 (ratifying an agreement with Indians at the Fort Hall Reservation in Idaho: "The water from streams on that portion of the reservation now sold which is necessary for irrigating on land actually cultivated and in use shall be reserved for the Indians now using the same, so long as said Indians remain where they now live").

81. *Winters*, 207 U.S. at 576-77.

82. *Id. See also* COHEN, *supra* note 1, § 2.02 (discussing canons of construction of Indian law).

83. 373 U.S. 546 (1963).

84. *Id.* at 597-98.

85. In an exhaustive analysis of federal water rights, the U.S. Department of Justice's Office of Legal Counsel determined that the power to reserve waters for federal use does not require a federal set-aside of land, but that "the Supremacy Clause provides Congress with ample power, when coupled with the commerce power, the Property Clause, or other grants of federal power, to supersede state law." Federal "Non-Reserved" Water Rights, 6

The question of whether the United States or the *tribe* did the reserving deserves further treatment. It is generally accepted that the priority date of a reserved water right under the *Winters* doctrine is the date of establishment of the reservation,[86] based on the theory that it was the United States that did the reserving for a use not previously engaged in by the tribe.[87] There is, however, language in *Winters* indicating that it was the tribe that did the reserving.[88] If the tribe was reserving water it already owned, it would follow that any priority date should be linked to the term of the tribe's aboriginal occupancy of an area, i.e., time immemorial. In *United States v. Winans*,[89] the Supreme Court considered the rights of Yakama Tribe members to cross privately owned land in order to exercise off-reservation treaty rights to fish at usual and accustomed stations. The tribes had ceded most of their land to the United States in exchange for exclusive rights to occupy a smaller reservation, along with "the right of taking fish at all usual and accustomed places, in common with citizens of the territory."[90] The private landowners argued that the "in common with" language meant that the Indians should be subject to exclusion just as non-Indians could be excluded from private property.[91] After all, they argued, their patents

---

Op. Off. Legal Counsel 328, 363 (1982). The opinion "still expresses executive branch policy." John D. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the-Century Evaluation*, 4 U. DENV. WATER L. REV. 271, 288 (2001). This is an important point to consider when evaluating the continued existence of Indian reserved rights on those reservations where significant amounts of land have passed out of Indian ownership pursuant to allotment and surplus land acts. *See supra* text accompanying notes 46–51. Simply because much of the land has been transferred out of Indian ownership does not mean that water is no longer necessary to provide for tribal needs other than irrigation.

86. Thus, a reservation established by treaty in 1868 would have a reserved right with an 1868 priority date, and rights established prior to that date under state law would have priority over the Indian reserved right.

87. *See* COHEN *supra* note 1, § 19.02, at 1173.

88. "The Indians had command of the lands and the 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. Did they give up all this?" Winters v. United States, 207 U.S. 564, 576 (1908). In its brief to the Court, the United States stated that the Indians "retained or were granted by the United States the right to divert and use for domestic, irrigation and other beneficial purposes so much of the Milk River as was sufficient to meet their needs and to carry out the objects and purposes sought to be effected by said agreement." Brief for the United States at 12, Winters v. United States, 207 U.S. 564 (1908) (No. 158). *See* WATERS AND WATER RIGHTS § 37.01(b)(2), at 37-13 (2004 Repl. ed.) (noting the ambiguity).

89. 198 U.S. 371 (1905).

90. Treaty between the United States and the Yakama Nation of Indians art. 3, June 9, 1855, 12 Stat. 951, 953.

91. The right to exclude is often cited as one of the principal rights of a property owner. JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY § 1.2.1 (2d ed. 2005).

from the United States government said nothing about an easement for access to Indian fishing sites on the now private land. The Court rejected the argument, noting that "[t]he reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein."[92] The Court reasoned that the reserved easement followed from the principle that Indian treaties are not "a grant of rights to the Indians, but a grant of right from them,—a reservation of those not granted."[93] Any surrender of such rights must be clear and express. Thus, under the *Winans* rationale, courts need not look to congressional action *conferring* water rights on a tribe if the tribe was the original owner of an area. Instead, the inquiry looks to whether the tribe surrendered such rights by treaty or through other congressional action.[94] The Ninth Circuit used this reasoning in evaluating the Klamath Tribe's water rights.

> [T]he 1864 Treaty [with the Klamaths] is a recognition of the Tribe's aboriginal water rights and a confirmation to the Tribe of a continued water right to support its hunting and fishing lifestyle on the Klamath Reservation.
>
> Such water rights necessarily carry a priority date of time immemorial. The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights.[95]

Despite the language in *Winters* indicating that it was the tribe that did the reserving,[96] courts and commentators (and the United States as trustee) generally assert that *Winters* rights pertain to uses that are non-aboriginal in nature and have a priority date as of the establishment of the reservation.[97] In some cases, the priority date may not be the date

---

92. *Winans*, 198 U.S. at 381. The Court found that
> [t]he right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed.

Id.

93. *Id.*

94. COHEN, *supra* note 1, § 2.02[1], at 120 ("[T]ribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous.").

95. United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1984), *cert. denied*, 467 U.S. 1252 (citing Washington v. Washington State Passenger Fishing Vessel Ass'n, 443 U.S. 658, 678–81 (1979)).

96. *See supra* note 88 and accompanying text.

97. *See* Arizona v. California, 373 U.S. 546, 600 (1963) (characterizing *Winters* as a case where the government had reserved water for Indians as of the date of the agreement

of the actual set-aside of the land, but when Congress set in motion the events leading to the withdrawal.[98] By definition, the reserved right's existence does not depend on putting water to actual use as in the prior appropriation system[99] and is not subject to the state law doctrine of forfeiture for non-use.[100]

With such a solid foundation set nearly 100 years ago, one might think that most issues surrounding the existence and measure of Indian reserved water rights would be settled by now. They are not.[101] The *Winters* case involved an action for an injunction against non-Indian diversions and did not determine the full quantity of water resources reserved for the Indians of the Fort Belknap Reservation. It also did not touch upon the reservation of water for uses other than agriculture, such as domestic uses, or additional uses necessary to make Indian reservations suitable as permanent homelands for the tribes. These and other issues are the subject of much protracted litigation with little dispositive resolution. The remainder of this article explores these issues in greater detail, along with the role played by the United States in the efforts to quantify, protect, and utilize water resources.

B. Establishment and Measure of Indian Reserved Rights

1. The Era of Open-Ended Decrees

In the few cases after *Winters* and before 1963, lower courts generally adhered to the practice endorsed in *Winters* of enjoining interference with extant tribal uses while leaving the door left open for expansion of the reserved right as tribal needs increased. For example, in *Conrad Investment Co. v. United States*[102] the court of appeals considered a dispute very similar to that in *Winters*, but went further than simply

---

setting aside the reservation); United States v. Anderson, 736 F.2d 1358, 1361 (9th Cir. 1984); COHEN, *supra* note 1, § 19.03[3], at 1179.

98. United States v. Walker River Irrigation Dist., 104 F.2d 334, 338-39 (9th Cir. 1939); State *ex rel.* Martinez v. Lewis, 861 P.2d 235 (N.M. Ct. App. 1993) (holding that date of peace treaty set priority date even though land was not withdrawn until 20 years later); COHEN, *supra* note 1, § 19.03[3], at 1179 n.82.

99. *Id.* § 19.01[1], at 1168-69.

100. *Id.* § 19.03[1], at 1174-76. *See also* United States v. Orr Water Ditch Co., 309 F. Supp. 2d 1245, 1248 (D. Nev. 2004), *aff'd sub nom.* United States v. Truckee-Carson Irrigation Dist., 429 F.3d 902 (9th Cir. 2005); United States ex rel. Ray v. Hibner 27 F.2d 909, 912 (D. Idaho 1928) ("but the failure of the Indians to use their water will not cause either an abandonment or a forfeiture of their rights thereto").

101. *See* Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers*, 30 TULSA L.J. 61 (1994).

102. 161 F. 829 (9th Cir. 1908). The complaint in *Conrad* was actually filed six months before the *Winters* case. Shurts, *supra* note 68, at 61-62.

enjoining non-Indian interference with current tribal uses on the Blackfeet Indian Reservation. Instead, the court quantified the Indian rights at the level of existing use and explicitly provided the tribe with leave to seek additional quantities should the tribe's needs increase:

> [W]henever the needs and requirements of the complainant [the United States on behalf of the tribe] for the use of the waters of Birch creek for irrigating and other useful purposes upon the reservation exceed the amount of water reserved by the decree for that purpose, the complainant may apply to the court for a modification of the decree.
>
> This is entirely in accord with complainant's rights as adjudged by the decree. Having determined that the Indians on the reservation have a paramount right to the waters of Birch creek, it follows that the permission given to the defendant to have the excess over the amount of water specified in the decree should be subject to modification, should the conditions on the reservation at any time require such modification.[103]

In *United States v. Ahtanum Irrigation District,* [104] the court concluded that the Treaty with the Yakama[105] included a reservation of water "not limited to the use of the Indians at any given date but...extend to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation."[106] The United States brought suit on behalf of an individual allotment owner in *Skeem v. United States,*[107] which involved a treaty with an explicit provision protecting actual Indian use at the time the treaty was signed.[108] The court agreed with the United States that reserved rights should be implied for future uses in addition to the actual uses expressly protected by the treaty.[109] In *United*

---

103. *Conrad Inv. Co.*, 161 F. at 835.

104. United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied,* 352 U.S. 988 (1957). For a description of the Secretary of the Interior's apparent breach of trust to the Yakama Nation, see *infra* note 202.

105. Treaty between the United States and the Yakama Nation of Indians, June 9, 1855, 12 Stat. 951, 12 Stat. 951 (June 9, 1855).

106. *Ahtanum Irrigation Dist.*, 236 F.2d at 327.

107. 273 F. 93 (9th Cir. 1921).

108. Act of June 6, 1900, ch. 813, § 1, 31 Stat. 672, art. 8 (1900) (ratifying "an agreement with the Indians of the Fort Hall Indian Reservation in Idaho" that had been reached on Feb. 5, 1898).

109. *Skeem*, 273 F. at 94-95.

States ex rel. Ray v. Hibner, the court described claims made on behalf of individual Indians in the following terms:[110]

> The contention of the government as guardian for the Indian wards of the land allotted to them, is that, under the treaties and acts relating to the reservation, its wards have a superior right to the stream, which does not depend upon occupancy or possession of their lands, and which the defendants could not defeat or impair by first appropriating the water and actually applying it to their beneficial use, and that the Indian lands are entitled to a continuous flow through the entire year of a sufficient amount of water from Toponce creek for domestic and irrigation purposes for such portion of their lands as are susceptible to irrigation, regardless of whether or not they have placed under cultivation and actually irrigated all of such lands.[111]

Thus, by the middle of the twentieth century it was clear that Indian reservations with an agricultural purpose included water rights sufficient for irrigation and that the amount of water with a date of reservation priority would increase as tribal needs increased.[112] This made perfect sense, since one could not ascertain the future needs of the tribes with certainty at any given time. On the other hand, it left many rights acquired under the prior appropriation system on shaky ground, since the potential increase in Indian use could not be predicted.[113]

The court in *United States v. Walker River Irrigation District*[114] foreshadowed modern concerns with large potential claims of Indian tribes under the *Winters* doctrine. Although there were irrigable tribal

---

110. 27 F.2d 909 (D. Idaho 1928).

111. *Id.* at 910-11.

112. The same policy was followed with respect to lands allotted to individuals under the Dawes Act. United States v. Powers, 305 U.S. 527, 532 (When allotments of land were made, "the right to use some portion of tribal waters essential for cultivation passed to the owners."); *Skeem*, 273 F. 93, 96 (9th Cir. 1921) (water rights not lost when allotments leased to third parties). For a discussion of the allotment policy, see *supra* text accompanying notes 43-50.

113. *See* Reid Peyton Chambers & John E. Echohawk, *Implementing the* Winters *Doctrine of Indian Reserved Water Rights: Producing Indian Water and Economic Development Without Injuring Non-Indian Water Users?*, 27 GONZ. L. REV. 447, 448 (1992) (The reserved rights doctrine "strikes widespread fear into the hearts of non-Indian water users."). *See also* Martha C. Franks, *The Uses of the Practicably Irrigable Acreage Standard in the Quantification of Reserved Water Rights*, 31 NAT. RESOURCES J. 549 (1991) (discussing the limitations of PIA methodology).

114. 104 F.2d 334 (9th Cir. 1939).

lands on the Walker River Paiute Reservation in the amount of "approximately 10,000 acres," the court decreed enough water to irrigate only 2100 acres—26.25 cubic feet per second.[115] The United States had requested that 150 cubic feet per second be awarded—enough to irrigate all 10,000 irrigable acres on the reservation.[116] The district court rejected the United States' claim on the theory that executive order reservations did not carry an implied reservation of water.[117] When the United States objected to the court's holding and asked for reconsideration, the district court was frank in stating its view of the equities involved in the matter:

> Briefly, the facts, as disclosed by the evidence and narrated in this court's opinion in 11 F. Supp. 158, show that, after the establishment of the reservation in 1859 (then and thereafter the Indians being at war with the whites), commencing in 1860 the whites acquired title from the United States to lands above the Indian Reservation, bordering on and adjacent to the Walker river and its tributaries; that they also acquired water by prior appropriation for a beneficial use, and actually irrigated and reclaimed such lands; that they have enjoyed undisputed and undisturbed possession of such lands and such water rights for more than 50 years; that to dispossess them now would bring ruin to long-established settlers, and return to waste the lands which they, by their industry and with the acquiescence of the government, reclaimed from the desert.
>
> Under such facts and circumstances this court is not moved to give a decree destroying the rights of the white pioneers.[118]

The court of appeals subsequently reversed the holding that the *Winters* doctrine did not apply to executive order reservations and also held that the priority date of the reservation was 1859, which was before the United States actually promulgated the executive order creating the reservation.[119] However, the court of appeals affirmed the award of only enough water to irrigate 2,000 acres, without leave to increase the allocation as tribal needs might change. The court concluded that "actual

115. *Id.* at 335, 340.
116. *United States v. Walker River Irrigation Dist.*, 11 F. Supp. 158, 159, 162–63 (D. Nev. 1935).
117. *Id.* at 167.
118. United States v. Walker River Irrigation Dist., 14 F. Supp 10, 11 (D. Nev. 1936).
119. United States v. Walker River Irrigation Dist., 104 F.2d at 337–39.

diversion and use" over 70 years demonstrated that additional water would not be necessary to satisfy tribal needs.[120] The decision ratified the district court's explicit statement of a desire to protect the "white pioneers."[121] This urge to protect existing non-Indian uses and to accommodate non-Indian development planning lurks in the background of every Indian reserved water rights case,[122] and forms the backdrop for most Indian water rights settlements.[123] That same court of appeals did not follow the *Walker River* approach in *United States v. Ahtanum Irrigation District*,[124] where the court noted that "[i]t is obvious that the quantum [of reserved water] is not measured by the use being made at the time the treaty reservation was made. The reservation was not merely for present but for future use."[125] The court accordingly rejected the suggestion that the present and future needs of the Yakama reservation be determined by the Indian use as of 1908, which the non-Indian water users argued was a "reasonable time" under the *Walker River* standard.[126] The second half of the twentieth century provided some major changes respecting the substance and procedure for determining Indian reserved water rights.

2. The Importance of Finality

In 1963, the Supreme Court decided *Arizona v. California*[127] and announced a standard to measure the water required to satisfy present and future needs of certain Indian tribes along the Colorado River. The case began in 1952 when the State of Arizona invoked the original jurisdiction of the Supreme Court by suing the State of California and seven of its public agencies over their respective rights to the waters of the Colorado River and its tributaries. The United States intervened in the case to assert reserved rights for various non-Indian federal reservations and on behalf of Indian tribes. Just as it had done in the *Walker River* case, the federal government claimed enough water for all

120. *Id.*

121. *Walker River Irrigation Dist.*, 14 F. Supp. at 11.

122. *See* MCCOOL, *supra* note 5, at 36–39. *See also* Byers v. Wa-Wa-Ne, 169 P. 121, 127–28 (Or. 1917) (no reserved rights for lands that were not arid and purportedly did not need irrigation). The precedential value of *Byers* was rejected by the Solicitor of the Department of the Interior on the ground that the state court lacked jurisdiction to adjudicate the Indian water rights. Letter from Solicitor John D. Leshy to Martha Pagel, Oregon Director of Water Resources (Feb. 10, 2000).

123. *Id. See also* Chambers & Echohawk, *supra* note 113, at 467–70.

124. 236 F.2d 321, 327 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957).

125. *Ahtanum Irrigation Dist.*, 236 F.2d at 326.

126. *Id.* at 328.

127. 373 U.S. 546 (1963).

the arable lands capable of irrigation.[128] The Supreme Court agreed with the United States that a formula for a once-and-for-all determination of the quantum of Indian rights was appropriate.[129] Special Master Rifkind's Report to the Court explained some options for measuring the tribal reserved rights:

> One possibility would be to adopt an open-end decree, simply stating that each Reservation may divert at any particular time all the water reasonably necessary for its agricultural and related uses as against those who appropriated water subsequent to its establishment. However, such a limitless claim would place all junior water rights in jeopardy of the uncertain and the unknowable. Financing of irrigation districts would be severely hampered if investors were faced with the possibility that expanding needs on an Indian Reservation might result in a reduction of the project's water supply.[130]

The Master rejected the argument that Indians should be required to obtain water pursuant to state law,[131] as well as the states' argument that the court should base a water right award on the prediction of the ultimate needs of the Indians on a given reservation.[132] He concluded that the United States intended the reservation to be the permanent home of the Indians with enough water to satisfy the future as well as the present needs of the tribe.[133] The Supreme Court agreed with Special Master Rifkind and adopted the "practicably irrigable acreage" (PIA) standard to determine the quantity of water reserved for the Indian reservations involved in that case.[134] Thus, the era of open-

128. *Id.* at 596.

129. *Id.* at 600-01.

130. Report from Special Master Simon H. Rifkind, at 263-64, Arizona v. California, 373 U.S. 546 (1963) (No. 8, Original) (report filed as 364 U.S. 940 (1961)), *available at* http://www.westernwaters.org/ (search for "Rifkind") [hereinafter Rifkind Report]. *See also* Rebecca E. Wardlaw, Note, *The Irrigable Acres Doctrine*, 15 NAT. RESOURCES J. 375 (1975) (describing alternative proposals to measure Indian water rights for present and future needs).

131. Rifkind Report, *supra* note 130, at 261.

132. *Id.* at 264.

133. *Id.* at 262.

134. "We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." 373 U.S. at 601. Application of the PIA standard is discussed *infra* notes 155-168.

ended decrees drew to a close and Indian reserved rights would be determined on a once-and-for-all time basis in most future litigation.[135]

In 1983, the Court reemphasized the importance of determining a fixed amount of water when it rejected claims by the United States and tribes to water for lands omitted from the claims made in the 1963 proceeding. The Court noted that "[a] major purpose of this litigation, from its inception to the present day, has been to provide the necessary assurance to states of the Southwest and to various private interests, of the amount of water they can anticipate to receive from the Colorado River system."[136] Other language in the Court's opinion clearly implied that the United States and tribes should consider themselves fortunate. The Court noted that, "[t]he standard for quantifying the reserved water rights [in *Arizona I*] was also hotly contested by the States, who argued that the Master adopted a much too liberal measure."[137] In *Nevada v. United States*,[138] the Court rejected efforts by the United States and the Pyramid Lake Paiutes to re-open the Orr Ditch decree in which the federal government had failed to assert all tribal claims. Despite the existence of a clear conflict of interest on the part of the United States, the Court held that principles of *res judicata* precluded either the tribe or the United States from asserting a claim for water for the tribal fisheries.[139]

The foregoing cases made it clear that tribes were entitled to water under the reserved rights doctrine and that once generally asserted in litigation, there would be but one opportunity to establish the measure of the right for all time. The latter fact has caused many tribes to be reluctant to assert their rights in litigation based on fear that the litigation climate is hostile to tribal interests, or sometimes on the basis that it is simply inappropriate to measure and divide such a critical cultural resource.[140] Parties would soon invoke Termination era

---

135. In some cases, the parties have stipulated to litigate more narrow issues. *See, e.g*, United States v. Washington, 375 F. Supp. 2d 1050 (W.D. Wash. 2005) (litigation limited to dispute over groundwater ownership on limited portion of reservation). There is no statute or Supreme Court ruling that mandates a once-and-for-all quantification, but the reasons underlying adoption of the McCarran Amendment make it the preferred outcome for at least the state and private parties. *See infra* Part IV.

136. Arizona v. California, 460 U.S. 605, 620 (1983).

137. *Id.* at 617. In the latest iteration of this case, the Supreme Court held that the Quechan tribe of the Fort Yuma Reservation could assert additional claims for lands within reservations with disputed boundaries at the time of the 1963 proceeding. Arizona v. California, 530 U.S. 392 (2000). A final settlement of the claims was lodged with the Court on February 24, 2006, and would conclude this long-running litigation.

138. 463 U.S. 110 (1983).

139. 463 U.S. at 142–44. For an insightful analysis of the case, see Juliano, *supra* note 3, at 1341–55.

140. *See* McCool, *supra* note 5, at 75–76.

legislation to permit the involuntary adjudication of Indian water rights in state courts.

IV. LITIGATION AFTER 1963

In the Termination era of the 1950s,[141] Congress adopted the McCarran Amendment,[142] which waived the United States' immunity from suit and thus provided states with authority to adjudicate federal water rights.[143] The Supreme Court has held that the statute requires that the adjudications be comprehensive, i.e., inclusive of the rights of all owners on a given stream, in order for a state court to assert jurisdiction over federal claims.[144] General stream adjudications are huge proceedings, as several experienced adjudicators write:

> Modern general stream adjudications, most of which have been filed since the 1970s, are characterized by their enormity and longevity. These complex lawsuits are among the largest civil proceedings ever litigated in state or federal courts. For instance, 28,500 persons have filed more than 100,000 claims to water rights in the Arizona general stream adjudications. Parties have filed over 150,000 claims for water rights in Idaho's Snake River adjudication. Also, in

---

141. *See supra* text accompanying notes 54–55.

142. The McCarran Amendment states,

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. § 666 (2000 and Supp. 2005).

143. For a succinct history of the amendment, see John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. DENV. WATER L. REV. 355, 449–58 (2005).

144. Dugan v. Rank, 372 U.S. 609 (1963). *See also* United States v. Dist. Ct. In & For Eagle County, Colo., 401 U.S. 520 (1971); United States v. Puerto Rico, 287 F.3d 212 (1st Cir. 2002); United States v. Oregon, 44 F.3d 758 (9th Cir. 1994), *cert. denied*, Klamath Tribe v. Oregon, 516 U.S. 943 (1995).

> Montana, approximately 80,000 persons have filed 218,000 water rights claims in the statewide adjudication.[145]
>
> The cases are also expensive to litigate. One estimate put the state's cost of attorneys' fees at $14 million for 12 years of litigation in Wyoming's Big Horn River adjudication.[146]

Although the statute on its face says nothing about state court authority to adjudicate federal *reserved* rights, or Indian *reserved* water rights,[147] courts have interpreted the McCarran Amendment to allow states to assert jurisdiction over both federal[148] and Indian reserved water rights.[149] This is the case even in states that disclaimed jurisdiction over Indian tribes in the enabling acts that paved their way for entry into the Union.[150] While the Supreme Court upheld state court jurisdiction to adjudicate Indian reserved rights, the Court cautioned that

> our decision in no way changes the substantive law by which Indian rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.[151]

---

145. Thorson et al., *supra* note 143, at 358–59 (footnotes omitted).

146. Chambers & Echohawk, *supra* note 113, at 456 n.54.

147. General rules of Indian law preclude the exercise of state regulatory or adjudicatory jurisdiction over Indian tribes, their members and their property within Indian country. *See supra* text accompanying notes 26–30.

148. United States v. Dist. Ct. in & for Eagle County, Colo., 401 U.S. 520 (1971).

149. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). The Colorado River Court also held that, while the Amendment does not deprive federal courts of jurisdiction over Indian water rights cases, they should abstain from asserting jurisdiction over water rights disputes when a state is asserting jurisdiction over the same matter. *Cf.* United States v. Adair, 723 F.2d 1394, 1404 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984) (abstention not required when federal court has already substantially proceeded to determination of merits of whether tribe has reserved rights). *See also* United States v. Idaho *ex rel.* Dir., Idaho Dep't of Water Resources, 508 U.S. 1 (1993) (McCarran Amendment waiver does not permit States to require federal government to pay exorbitant state court filing fees).

150. Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983). States may not join the tribe itself in the state court adjudication, but tribes will be bound since the United States as trustee may represent the tribe's interests in water. *See* Nevada v. United States, 463 U.S. 110 (1983).

151. *San Carlos Apache Tribe*, 463 U.S. at 571. Whether this is true remains to be seen.

As a result of these rulings, state courts are at the forefront of the effort to determine the nature and scope of federal and Indian reserved water rights.[152] There are approximately 30 water rights adjudications involving Indian water rights underway in the states of Washington, Idaho, Oregon, Montana, California, Nevada, New Mexico, and Arizona.[153]

The centerpiece of the substantive law for the measure of Indian water rights since the decision in *Arizona v. California*[154] has been PIA.[155] In the litigation over reserved right claims on the Big Horn River in Wyoming the parties agreed that PIA consisted of "those acres susceptible to sustained irrigation at reasonable costs."[156] The Wyoming Supreme Court recognized a substantial reserved right for the tribes of the Wind River Reservation and the Supreme Court affirmed the decision in a 4-4 vote.[157] In its brief to the Supreme Court in *Wyoming*

---

152. For a review of general stream adjudications in many of the western states, see McElroy & Davis, *supra* note 9. McElroy and Davis, who are seasoned Indian water litigators, write,

> [T]here are frequent indications that tribes, the United States, and the states are weary of the fray and are beginning to question the incredible outlay of resources required for such massive adjudications. For example, in Arizona, the parties have struggled for the last ten to fifteen years just to establish a procedure to deal with the complexities of the federal rights of the United States and Indian tribes.

Id. at 600 (internal footnotes omitted). *See also* Gregory J. Hobbs, Jr., *State Water Politics Versus an Independent Judiciary: The Colorado and Idaho Experiences*, 5 U. DENV. WATER L. REV. 122 (2001).

153. Brief of the United States in Response to the Skokomish Indian Tribe's Petition for Additional Rehearing by the En Banc Panel or Full Court Review of the En Banc Opinion Dated March 4, 2005 at 13 (Apr. 20, 2005), Skokomish Indian Tribe v. United States, 401 F.3d 979 (9th Cir. 2005), *opinion superceded*, 410 F.3d 509 (9th Cir. 2005). As of 1989, the State of New Mexico had "ten active stream adjudications involving the water rights of eighteen Indian Tribes and Pueblos and approximately 20,000 non-Indian claimants." Brief of the State of New Mexico as Amicus Curiae, at 1–2, Wyoming v. United States, 492 U.S. 938 (1989) (No. 88-309). Since then, the Jicarilla Apache Tribe's claims were settled by federal legislation, Pub. L. 102-441, 106 Stat. 2237 (1992), and the Mescalero Apache Tribe's claims were finally decreed. New Mexico *ex rel.* Reynolds v. Lewis, Nos. 20294 and 22600, Judgment and Decree on Mandate (Chaves County Dist. Ct. June 3, 2003).

154. 373 U.S. 546 (1963).

155. As of 1990, the PIA standard was a central component in more than a dozen water Indian rights cases in the western states. Brief for the United States at 48, n.46, Wyoming v. United States, 492 U.S. 406 (1989) (No. 88-309).

156. *In re* General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76, 101 (Wyo. 1988), *aff'd by equally divided court sub nom.*, Wyoming v. United States, 492 U.S. 406 (1989). *See* Richard B. Collins, *The Future Course of the* Winters *Doctrine*, 56 U. COLO. L. REV. 481, 484–85 (1985) (discussing PIA).

157. Wyoming v. United States, 492 U.S. 406 (1989), *affirming In re* General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76 (Wyo. 1988).

v. United States, the Solicitor General pointed out that "the PIA standard has generated significant expectations, reliance, and investment, both legal and financial. For example, it forms the basis of proof in ongoing litigation, or is the cornerstone of current settlement negotiations, in virtually all western water rights quantifications."[158] There has been no further word from the Court on the substance of the quantification of Indian reserved water rights, although a draft opinion for the Court by Justice O'Connor before her recusal advocated change in administration of the PIA standard.[159]

Some courts and commentators have criticized the PIA for providing Indians with too much, or too little, water in various circumstances.[160] The example of too much that is most often cited is *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*,[161] in which the court recognized a reserved right to approximately 500,000 acre feet of water to irrigate approximately 100,000 acres of the Wind River Reservation.[162] On the opposite pole is *State ex rel. Martinez v. Lewis*,[163] in which the court awarded only 2322.4 acre feet of water for irrigation and other purposes to the Mescalero Apache Tribe.[164] These criticisms seem questionable. The reservation of water for the tribes of the Wind River Reservation seems consistent with the application of the PIA standard applied in *Arizona v. California*, in which the tribes were decreed 905,000 acre feet for 135,000 acres of PIA.[165] The small amount of water awarded to the tribe in *State ex rel.*

158. Brief of the United States, at 48–49, Wyoming v. United States, 492 U.S. 406 (1989) (case citations omitted).

159. *See* Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in* Wyoming v. United States, 68 U. COLO. L. REV. 683 (1997); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1640–41 (1996).

160. *See* COHEN, *supra* note 1, § 19.03[5][b]; Barbara A. Cosens, *The Measure of Indian Water Rights: The Arizona Homeland Standard, Gila River Adjudication*, 42 NAT. RESOURCES J. 835, 843–44 (2002) (summarizing criticism from both tribes and states).

161. 753 P.2d 76 (Wyo. 1988), *aff'd by equally divided court sub nom.*, Wyoming v. United States, 492 U.S. 406 (1989).

162. About 54,000 acres had been historically irrigated. 753 P.2d at 106–07.

163. 861 P.2d 235 (N.M. Ct. App. 1993).

164. The district court found that the Mescalero Apache reservation was intended to be a permanent homeland for the tribe and that water was accordingly reserved for "recreation, agriculture, domestic, stock, commercial, industrial and other uses for the 'arts of civilization.'" New Mexico *ex rel.* Reynolds v. Lewis, Nos. 20294 and 22600, Final Judgment at 9 (Chaves County Dist. Ct. July 11, 1989).

165. Arizona v. California, 376 U.S. 340, 344–45 (1964). At the time of the Court's judgment, the tribes were actually irrigating around 35,000 acres. *See* Chambers & Echohawk, *supra* note 113, at 453.

Martinez v. Lewis[166] may have resulted from an overly stringent application of the PIA doctrine, but the facts reveal a difficult case, and the court did award water based on a variety of homeland purposes.[167] The PIA standard is the measure that the Supreme Court approved for reservations with a clear agricultural purpose, and it should not be disregarded because a particular court has a view that it provides "too much."[168]

While the Court in *Arizona I* noted that the United States established various reservations as the tribes' permanent homes, the Special Master awarded water only for PIA, with other uses subsumed in that claim.[169] Many courts have taken a similar course and noted that Indian reservations were set aside as "homelands" for tribes and have measured water for agricultural purposes by PIA, but have also recognized claims to water for other purposes, such as instream flows to support tribal fisheries. Thus, in *Colville Confederated Tribes v. Walton*,[170] the court ruled that water must be awarded to accommodate the broad purpose of providing a home for the Indians, with consideration given to the Indians' "need to maintain themselves under changed circumstances."[171] After concluding that the reservation, like most in the West, had been set aside for agricultural purposes, the court supplemented its award of water under the PIA standard with water for instream flows to support tribal fisheries.[172] Likewise, in *United States v. Adair*,[173] in answer to the argument that an Indian reservation could have but a single agricultural, purpose, the court stated,

> Neither *Cappaert* nor *New Mexico* requires us....to identify a single essential purpose which the parties to the 1864 Treaty intended the Klamath Reservation to serve....In fact, in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 630

166. 861 P.2d 235 (N.M. Ct. App. 1993).

167. *See supra* note 164.

168. *See infra* text accompanying notes 184–189.

169. *See* Rifkind Report, *supra* note 130, at 265–66. Nearly all courts have recognized that, when PIA is used to quantify tribal water rights, the water may be used for other purposes. *See* cases discussed in COHEN, *supra* note 1, § 19.03[6], at 1189.

170. 647 F.2d 42, 47–49 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981).

171. *Id.* at 47.

172. *Id.* at 48. The court did so despite its recitation that it was following the primary-secondary purpose test applied to non-Indian federal reservations in *United States v. New Mexico*, 438 U.S. 696 (1978). 647 F.2d at 47. The court also stated that "Congress envisioned agricultural pursuits as only a first step in the 'civilizing' process." *Id.* at 47 n.9 (citing 11 Cong. Rec. 905 (1881)). "This vision of progress implies a flexibility of purpose." *Id.*

173. 723 F.2d 1394 (9th Cir. 1983).

> (1981), this court found that provision of a "homeland for the Indians to maintain their agrarian society," *id.* at 47, as well as "preservation of the tribe's access to fishing grounds," *id.* at 48, were dual purposes behind establishment of the Colville Reservation.[174]

Other courts, both state and federal, have recognized rights to water to provide habitat for reserved fishing rights on reservations with fishing as a purpose.[175]

---

174. 723 F.2d at 1410. In the non-Indian federal reserved right context, the Supreme Court held that federal reserved rights will only be implied where needed to fulfill the "primary purposes" of the reservation and only if that primary purpose would be "entirely defeated" without an implied reservation of water. United States v. New Mexico, 438 U.S. 696 (1978). This rigid standard should not be applied to Indian reservations. *See* COHEN, *supra* note 1, § 19.03[4], at 1181 ("The significant differences between Indian reservations and federal reserved lands indicates that the [primary-secondary] distinction should not apply."). One state court used that test to limit the award of water under the *Winters* doctrine. *In re* All Rights to Use Water in the Big Horn River System, 753 P.2d 76, 99 (Wyo. 1988), *aff'd sub nom. by an equally divided court,* Wyoming v. United States, 492 U.S. 406 (1989) (applying primary purpose test strictly and holding that domestic, municipal, and commercial uses were subsumed within agricultural right).

175. The Washington Supreme Court recognized that tribes with treaty language or history reflecting a reservation of aboriginal rights to fish also have water rights for instream flow habitat protection. Dep't of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306, 1317 (Wash. 1993) ("Water to fulfill the fishing rights under the treaty may be found to have been reserved, if fishing was a primary purpose of the reservation." The parties agreed that water was reserved for fisheries, so the court's statement cannot be described as a holding.). On remand, the trial court explicitly held that the Yakama Nation's instream flow right extended off the reservation to support usual and accustomed fisheries. In the Matter of the Determination of the Rights to the Use of Surface Waters of the Yakima River Drainage Basin, No. 77-2-01484-5, Final Order Re: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places, at 3–4 (Yakima County Super. Ct. Mar. 1, 1995); In the Matter of the Determination of the Rights to the Use of Surface Waters of the Yakima River Drainage Basin, No. 77-2-01484-5, Memorandum Opinion: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places (Yakima Super. Ct., Sept. 1, 1994). *See also* Joint Board of Control of the Flathead, Mission and Jocko Irrigation Dists. v. United States, 832 F.2d 1127, 1132 (9th Cir. 1987) ("The action of the BIA in establishing stream flow and pool levels necessary to protect tribal fisheries is not unreviewable. In making its determination, however, the BIA is acting as trustee for the Tribes. Because any aboriginal fishing rights secured by treaty are prior to all irrigation rights, neither the BIA nor the Tribes are subject to a duty of fair and equal distribution of reserved fishery waters. Only after fishery waters are protected does the BIA, acting as Officer-in-Charge of the irrigation project, have a duty to distribute fairly and equitably the *remaining* waters among irrigators of equal priority."); United States v. Anderson, 591 F. Supp. 1, 5 (E.D. Wash. 1982), *aff'd in part & rev'd in part,* 736 F.2d 1358 (9th Cir. 1984) (water reserved to maintain favorable temperature conditions to support fishery); Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032 (9th Cir. 1985) (court acted appropriately in ordering release of water to protect habitat for treaty fishery); State *ex rel.* Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 712 P.2d 754, 764-66 (Mont. 1985) (tribal reserved rights may include water for fisheries as well as agriculture and other purposes);

In the latest chapter of the Gila River Adjudication, the Arizona Supreme Court "decline[d] to approve the use of PIA as the exclusive quantification measure for determining water rights on Indian lands."[176] The Court rejected the notion that the United States created Indian reservations for agricultural purposes alone[177] and concluded that "the purpose of a federal Indian reservation is to serve as a 'permanent home and abiding place' to the Native American people living there."[178] This seems consistent with the Supreme Court's holding in *Arizona I*.[179] The Arizona Supreme Court went on to note the inequitable manner in which reservations might be treated depending upon their geographic location—tribes in alluvial plains would receive unduly large awards, while those in mountainous regions would receive little water.[180] According to the court, such potential inequities counsel in favor of a more flexible analysis, which takes modern circumstances into account and permits courts in some cases to award less water than is demonstrated under the PIA measure.[181] The court settled on this

---

Confederated Salish & Kootenai Tribes v. Clinch, 992 P.2d 244 (1999) (enjoining issuance of permits to non-Indians until tribal water rights are quantified); *In re* Adjudication of the Existing Rights to the Use of All the Water, 55 P.3d 396, 405 (Mont. 2002) (same).

A state district court in Idaho rejected Indian reserved rights for instream flows. *In re* SRBA, Case No. 39576, Consolidated Subcase No. 03-10022 (Idaho Dist. Ct., Nov. 10, 1999); *see* also United States v. Idaho, 51 P.3d 1110 (Idaho 2002) (rejecting attempt to set aside district court decision on conflict of interest grounds). For analysis of the trial court's decision, see Michael C. Blumm et al., *Judicial Termination of Treaty Water Rights: The Snake River Case*, 36 IDAHO L. REV. 449 (2000). Although Congress mooted the controversy by approving the Snake River Water Rights Settlement Act, Pub. L. 108-447, 108 Stat. 2809, 3431, the United States had taken a position firmly supportive of tribal claims. In its Brief to the Idaho Supreme Court on appeal, the Justice Department relied on the foregoing authorities for the proposition that, "these federal and state court decisions lead ineluctably to the conclusion that, at a minimum, water rights for fishery purposes were reserved on all streams located within the exterior boundaries of the 1855 [Nez Perce] Reservation and outside of that boundary, for all other streams where there is evidence of Nez Perce 'usual and accustomed' fishing places." *In Re* SRBA, Case No. 39576, Subcase No. 10022, Brief of Appellant United States, at 28 (Nov. 22, 2003).

176. *In re* the General Adjudication of All Rights to Use Water in the Gila River System & Source, 35 P.3d 68, 79 (Ariz. 2001) [hereinafter *Gila V*] (one of five Gila adjudication cases). *See* Cosens, *supra* note 160, at 858–59.

177. *Gila V*, 35 P.3d at 76.

178. *Id.*

179. Arizona v. California, 460 U.S. 605, 616 (1983) ("We held that the creation of the Reservations by the federal government implied an allotment of water necessary to 'make the reservation livable.'"). *See also* Montana v. United States, 450 U.S. 544, 566 n.15 (1981) ("this Court has held that Indian tribes retain rights to river waters necessary to make their reservations livable.").

180. *Gila V*, 35 P.3d at 78.

181. *Id.* at 78–79. After stating that the standard might yield too little for some tribes, the court stated that the PIA standard forces tribes to "pretend to be farmers" when farming is

approach in part by holding that the *Winters* doctrine is governed by the concept of "minimal need,"[182] which was announced in a non-Indian federal rights case.[183] The approach, which has never been applied by the U.S. Supreme Court to Indian reserved rights, dictates that the courts find a reserved right to "only that amount of water necessary to fulfill the purpose of the reservation, no more."[184] According to the Arizona Supreme Court, tribes need not fear that the approach will prejudice their interests, since the lower courts "must [award an amount of water that will] satisfy both present and future needs of the reservation as a livable homeland."[185] The Arizona Supreme Court did not entirely preclude the use of PIA,[186] and instead held that many additional factors should be considered, including: past use; tribal history; uses that promote tribal culture; present and future population; and proposed master land use plans.[187] The Court cautioned that "the foregoing list of factors is not exclusive. The lower court must be given the latitude to consider other information it deems relevant to determining tribal water rights."[188] The court was frank in recognizing that its standard is vague and likely to result in a "difficult, time consuming process."[189] Indeed, it echoes in some ways the states' argument that was rejected in *Arizona v.*

---

in fact on the decline. *Id.* This ignores the fact that, if tribes do not use the water because a project can not be built, the water remains for others to use. *See* Report of Special Master Tuttle at 90–91 n.5 (Feb. 22, 1982), Arizona v. California, 460 U.S. 605 (1983). If the water is used for other purposes, the economic benefits inuring to the tribe fulfill the purpose in creating the reservation consistent with the purpose in setting aside reservations as homelands.

182. *Gila V*, 35 P.3d at 77.

183. Cappaert v. United States, 426 U.S. 128, 141 (1976).

184. *Gila V*, 35 P.3d at 77, *citing Cappaert*, 426 U.S. at 141. Like the primary-secondary purpose test, the minimal need concept has never been applied to Indian reservations.

185. *Id.* at 77. In the course of its holding, the Court rejected the primary-secondary purposes test that has been applied in the non-Indian federal reserved rights cases. *Id.* at 76. *See supra* note 174.

186. *See id.* at 80. "However, future irrigation projects are subject to a PIA-type analysis: irrigation must be both practically and economically feasible." *Id.*

187. *See id.* at 79–80. In response to arguments by the State that the inquiry should be conducted in way that is sensitive to junior non-Indian uses, the court stated,

> The court's function is to determine the amount of water necessary to effectuate this purpose, tailored to the reservation's minimal need. We believe that such a minimalist approach demonstrates appropriate sensitivity and consideration of existing users' water rights, and at the same time provides a realistic basis for measuring tribal entitlements.

Id. at 81. *But cf.* Colville Confederated Tribes v. Walton, 752 F.2d 397, 405 (9th Cir. 1985) (Where "reserved rights are properly implied, they arise without regard to equities which might favor competing water users."). *See also* Mergen & Liu, *supra* note 159, at 695.

188. *Gila V*, 35 P.3d at 81.

189. *Id.*

California.[190] Furthermore, by rejecting use of the well-defined and understood PIA methodology for quantifying Indian water rights on reservations with an agricultural purpose, the court appears to defy the Supreme Court's express holding in *Arizona v. California*.[191] Most important is the fact that in the era of negotiated Indian water settlements, PIA is the one component that can be objectively evaluated and thus serves as a cornerstone for the settlement framework. Where the PIA is limited, parties may move on to consider other purposes subsumed in the homeland in order to arrive at a settlement that in fact satisfies tribal needs. It does not help matters to sanction an ad hoc reduction in right based on the standard that courts and parties have utilized for the past 35 years.[192] The *Gila River* homeland approach is sound in cases where the PIA standard yields too little water to make the reservation livable.[193] In such cases courts should award sufficient water for other uses that make the reservation a viable homeland.[194] Thus, instead of citing inequities to justify giving *less* to the tribes with ample irrigable acreage, the *Gila River* court should have instructed Arizona trial courts to broadly construe the homeland purpose as including PIA and give more where necessary to establish a viable homeland for the tribe.[195] This would normally include water for domestic, commercial, municipal, and industrial purposes.[196]

---

190. *See supra* text accompanying notes 132–134.

191. 373 U.S. 546 (1963). The court confronted this accusation head on and quoted language from Special Master Tuttle's Report in *Arizona v. California*, 460 U.S. 605 (1983) [*Arizona v. California II*], indicating that PIA is not necessarily the universal standard and that the Supreme Court had never indicated any differently. *Gila V*, 35 P.3d at 78. To the contrary, the Court seems to have approved PIA as a standard measure for reservations with agriculture as their primary purpose. *See supra* note 134. Further, a review of the full footnote cited by the court indicates support for the PIA standard and express rejection of a moderate standard of living theory: "Moreover, the irrigable acres standard was adopted to represent the present and *future* needs of the Indians. And if the Indians do not consume the water, it remains in the river for others to use." Report of the Special Master, at 90–91 n.5 (Feb. 22, 1982), Arizona v. California, 460 U.S. 605 (1983).

192. *See supra* text accompanying notes 155–158. Professor Cosens seems to agree that the PIA standard should not be abandoned. Cosens, *supra* note 160, at 872. If anything, abandonment of the PIA standard would seem to encourage further litigation in hopes that a court will apply this admittedly vague standard in one party or another's favor.

193. New Mexico *ex rel.* Reynolds v. Lewis, Nos. 20294 and 22600, Final Judgment at 9 (Chaves County Dist. Ct. June 11, 1989). The court awarded water for a variety of homeland purposes. *See supra* note 163.

194. COHEN, *supra* note 1, § 19.03[5][b], at 1187.

195. United States v. Washington, 375 F. Supp. 2d 1050 (W.D. Wash. 2005). The court first determined that the reserved water rights doctrine extends to ground water. *Id.* at 1058, 1068 n.8. The Montana Supreme Court and the Arizona Supreme Court have also held that the federal reserved water rights doctrine applies to ground water. Confederated Salish & Kootenai Tribes v. Stults, 59 P.3d 1093, 1099 (Mont. 2002). *In re* the General

V. THE UNITED STATES' TRUST RESPONSIBILITY—PROGRAMS, LITIGATION AND SETTLEMENTS

The federal government's zeal to develop non-Indian irrigation interests left tribal needs for irrigation, protection of fisheries and wildlife habitat, and domestic consumption to languish.[197] The Bureau of Reclamation and its non-Indian constituents have always commanded the lion's share of resources within the Department of the Interior—both in terms of dollars for projects and of attorney staff to advise and defend reclamation programs.[198] Shortly after the resounding victory for Indian water rights in *Winters*, the Indian Service sought additional legal assistance to assert and protect Indian reserved water.[199] The water rights of tribes, however, were largely ignored.[200] By 1913, the BIA complained of the favored status held by the Reclamation Service, which "had been generously staffed to assert and protect water rights for Reclamation projects."[201] Since establishment of the Bureau of Reclamation in 1902, the federal government has enshrined the diversion of Indian water for non-Indian use as federal policy, and simply left the Indian tribes out of the development mix.[202]

Adjudication of All Rights to Use Water in the Gila River System & Source, 989 P.2d 739 (Ariz. 1999) [hereinafter *Gila III*], *cert. denied, sub nom.*, Phelps Dodge Corp. v. United States, 120 S. Ct. 2705 (2000). Earlier, the Wyoming Supreme Court had agreed that it made sense to apply the doctrine to ground water, but declined to do so on the ground that no other court had done so. *In re* the General Adjudication of All Rights to Use Water in the Big Horn River System & All Other Sources, 753 P.2d 76 (Wyo. 1988), *aff'd by equally divided court sub nom.*, Wyoming v. United States, 492 U.S. 406 (1989).

196. A federal district court recently rejected the Gila River "homeland" approach in evaluating tribal claims to ground water on a portion of the Lummi Reservation. The court determined that water should be quantified for agricultural purposes as determined by PIA and for domestic uses. It relied on the narrow primary-secondary purpose rule applied in non-Indian reserved rights cases and thus seems to conflict with the Ninth Circuit's command to broadly construe the purposes of Indian reservations. *See supra* text accompanying notes 170–175.

197. *See* COHEN, *supra* note 1, § 19.06, at 1221; Chambers & Echohawk, *supra* note 113, at 448 ("[T]he clear disparity between Indian and non-Indian actual water use which greatly favors non-Indian use is one cause of widespread poverty."). *See also Snake River Water Rights Act of 2004*: Hearing on S. 2605 Before the S. Comm. on Indian Affairs, 108th Cong. 61–62, 67 (2004) (Prepared Statement of Anthony D. Johnson, Chairman, Nez Perce Tribal Exec. Comm., at 8–9, 14); Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. 108-34 §§ 2, 5, 117 Stat. 782, 785–88.

198. *See supra* note 4 and accompanying text.

199. SHURTS, *supra* note 68, at 195.

200. *Id.* at 195–98.

201. *Id.*

202. One court of appeals noted this in 1956 when it evaluated an agreement entered into by the Secretary of the Interior purporting to greatly reduce the amount of water available to the Yakama Indian Nation.

In addition to its failure to develop water for Indian agricultural uses, the federal government did virtually nothing to ensure that water remained instream to satisfy the needs of fish and wildlife preserved in treaties and agreements.[203] This all was despite the fact that, in its dealings with Indians, the United States "has charged itself with moral obligations of the highest responsibility and trust."[204] The extent to which the federal government meets this trust responsibility depends in part on funding from Congress and on any given Administration's priorities, but tribes have judicial recourse as well.

The United States is potentially liable to tribes for money damages based on harm inflicted by federal mismanagement of tribal assets.[205] In addition, tribes may bring actions for injunctive relief to force federal agencies to protect tribal assets prospectively.[206] Courts have recognized claims for damages based on harm to tribal water rights when the United States failed to protect extant Indian uses from

---

> With an opportunity to study the history of the *Winters* rule, as it has stood now for nearly 50 years, we can readily perceive that the Secretary of the Interior, in acting as he did, improvidently bargained away extremely valuable rights belonging to the Indians. Perhaps the feature of the whole matter most worthy of criticism is the apparent failure of the Secretary, before approving such an arrangement, to obtain legal advice either from the Solicitor or from the Department of Justice, as to the validity or the advisability of the proposed agreement. Viewing this contract as an improvident disposal of three-fourths of that which justly belonged to the Indians, it cannot be said to be out of character with the sort of thing which Congress and the Department of the Interior has been doing throughout the sad history of the Government's dealings with the Indians and the Indian tribes. That history largely supports the statement: "From the very beginnings of this nation, the chief issue around which federal Indian policy has revolved has been, not how to assimilate the Indian nations whose lands we usurped, but how best to transfer Indian lands and resources to non-Indians."

United States v. Ahtanum Irrigation Dist., 236 F.2d 321, 337 (9th Cir. 1956) (citing Dorothy Van de Mark, *The Raid on the Reservations*, HARPER'S MAG., Mar. 1956). *See also* WILKINSON, CROSSING THE NEXT MERIDIAN, *supra* note 4, at 248.

203. *See, e.g.*, Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1973).

204. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

205. *See* United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003); Cohen, *supra* note 1, § 5.05[1][b].

206. *See* Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355 (2003). In *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1480 (D.C. Cir. 1995), however, the court rejected the tribes' request that the Justice Department be ordered to file what the United States considered to be "meritless" water right claims in the Snake River Basin Adjudication.

upstream diversions,[207] but there have been few cases for damages based on a general failure to protect Indian water rights.[208] In *Gila River Pima-Maricopa Indian Community v. United States*, the court rejected a claim by a tribe for the failure to develop tribal water resources to the full extent that might be authorized by the Winters Doctrine.[209]

The Bureau of Reclamation's traditional preference for administration of non-Indian projects does not appear to have changed despite potential liability for damages and efforts to reorient its mission during the Clinton Administration. Although Reclamation adopted a formal Indian policy that purports to "actively seek partnerships with Indian tribes" and be protective of tribal resources,[210] the agency reportedly has returned to its historic bias in favor of irrigated agriculture.[211] Today, the most pressure to maintain adequate flows for

---

207. Gila River Pima-Maricopa Indian Cmty. v. United States, 684 F.2d 852, 863 (Ct. Cl. 1982) ("Accordingly, it is concluded that, to comply with the standard of fair and honorable dealings, it was incumbent upon the United States, once upstream diversions began to restrict the Pima and Maricopa agriculture, to take legal action either to attempt to end the diversions or to restore an alternative equivalent supply if diversions were to continue for reasons of public policy in favor of settlements.").

208. In *Pyramid Lake Paiute Tribe v. United States*, 36 Ind. Cl. Comm'n 256 (1975), the court approved an $8,000,000 settlement based on the failure of the United States to ensure the delivery of water necessary for a tribal fishery in Pyramid Lake. The settlement carefully noted that the tribe's rights had not been lost, or taken in a permanent sense. But in *Nevada v. United States*, the Supreme Court ruled that the additional tribal claims were barred by res judicata. The Court noted that "[i]f, in carrying out their role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties." 463 U.S. 110, 144 n.16 (1983). *See* COHEN, *supra* note 1, § 19.06, at 1225 (collecting cases). *Cf.* Dep't of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306, 1309 (Wash. 1993). The Washington Supreme Court ruled that a tribe that had filed a damages action against the United States before the Indian Claims Commission and received damages based on the claim that the federal government's construction of a reclamation project destroyed tribal fishing sites could not claim undiminished water rights. *Id.*

209. The court stated,

> The Indian Claims Commission Act, the aim of which was to grant monetary compensation for past (pre-August 1946) wrongs actually inflicted by the United States, does not call for damages based on theoretical maximum "rights" that the Indians were wholly unable to utilize and to implement at the time, especially where the Government was under no moral or legal obligation to construct new facilities so that the Indians could then use the greater amount of water they now claim.

Gila River Pima-Maricopa Indian Cmty. v. United States, 684 F.2d at 865. The court's assertion that there was no moral obligation to fulfill promises implicit in treaties is questionable.

210. *Indian Policy of the Bureau of Reclamation* (Feb. 25, 1998), http://www.usbr.gov/native/naao/policies/indianpol.pdf.

211. Holly Doremus, *Science Plays Defense: Natural Resource Management in the Bush Administration*, 32 ECOLOGY L.Q. 249, 279 (2005) ("The Bureau views Project farmers as its

fisheries comes from the Endangered Species Act (ESA),[212] rather than from the assertion of tribal water rights, and even those efforts have slackened in recent years. For example, fish populations in Upper Klamath Lake and the Klamath River have been in decline for decades[213] and although the United States asserted water right claims to protect the tribal fishery dependent on upper Klamath Lake in 1975,[214] serious efforts to increase water quantity in the lake did not begin until after the fish were listed under the ESA.[215] In the late 1990s however, the agency also relied on its obligation to protect tribal water rights and fulfill its trust responsibility as it provided more protection for fisheries habitat.[216] The Bush Administration abruptly reversed course and changed the Klamath Project's operation scheme to favor increased deliveries for irrigation interests in 2002, which coincided with the death of 33,000 returning adult salmon.[217] In *Pacific Coast Federation of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*,[218] the court of appeals set aside a ten year operations plan proffered by the Bush Administration for the Klamath Project as inconsistent with the requirements of the ESA. The plan was developed amid charges of political meddling on behalf of irrigation interests.[219] In sum, federal program dollars and operations continue the

---

clients; its first priority is providing them with water. Nationally, the Bureau has steadfastly resisted incorporating wildlife concerns into its operations."). *See also* John D. Leshy, *Natural Resources Policy in the Bush (II) Administration: An Outsider's Somewhat Jaundiced Assessment*, 14 DUKE ENVTL. L. & POL'Y F. 347, 359–60 (2004).

212. 16 U.S.C. §§ 1531–1544. The ESA can sometimes limit a tribe's exercise of its reserved water rights when tribal use is dependent on federal actions that require section 7 consultations under the Act. COHEN, *supra* note 1, § 19.06, at 1221–22. The ESA does not appear to apply directly to treaty reserved rights. *See id.* § 17.04[4], at 1115–16. *Cf.* United States v. Dion, 476 U.S. 734 (1986).

213. *See* Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1209–10 (9th Cir. 2000), *cert. denied*, 531 U.S. 812 (2000).

214. *See* United States v. Adair, 478 F. Supp. 336, 342–343 (D. Or. 1979).

215. In 1992, the United States Fish and Wildlife Service issued a Biological Opinion that required certain minimum elevations for Upper Klamath Lake to avoid jeopardizing these protected species. Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1209 (9th Cir. 2000), *cert. denied*, 531 U.S. 812 (2000).

216. The court of appeals approved the Bureau of Reclamation's protective action:

> Because Reclamation maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the Irrigators. Accordingly, we hold that the district court did not err in concluding that Reclamation has the authority to direct operation of the Dam to comply with Tribal water requirements.

Id. at 1214.

217. Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 426 F.3d 1082, 1089 (9th Cir. 2005).

218. *Id.*

219. As Holly Doremus relates,

historic orientation toward non-Indian needs despite policy statements that purport to respect and advance tribal interests in water.

On the other hand, legal theories advanced by the United States supporting Indian reserved rights have generally been consistent and beneficial to Indian tribes, although serious conflicts of interest may impede zealous representation by the government.[220] The Justice Department (on behalf of the Department of the Interior as trustee) regularly asserts tribal water right claims for broad homeland purposes, in addition to advancing the PIA standard for reservations with an agricultural purpose.[221] The federal government also advocates consistently in favor of reserved rights to instream flows to support on and off-reservation fishing rights.[222] In these latter instances, the legal positions usually have no immediate impact and thus are easier to adhere to, as opposed to implementation of policies that might immediately disrupt water deliveries to irrigators[223] or require substantial expenditures. Additionally, increasing population pressures point to an ever-increasing demand for water in metropolitan areas of

---

> There have also been a series of charges that political appointees have overridden the views of agency biologists as key biological opinions have moved up the chain of command. Michael Kelly, a [National Marine Fisheries Service] biologist, asserted that the agency's 2002 biological opinion on the Klamath Project (which for the most part endorsed the Bureau of Reclamation's ten-year operations plan) was softened by agency managers without consulting the biologists.

Doremus, *supra* note 211, at 289. After the court of appeals remanded the case to the agency for further proceedings, the district court again set aside the agency's supplemental Biological Opinion in which it attempted to justify the earlier decision. Pac. Coast Fed'n of Fishermen's Ass'n v. U.S. Bureau of Reclamation, Order Granting Motion for Injunctive Relief Following Remand, Civ. No. C02-2006 SBA (Mar. 23, 2006) 2006 WL 798920.

220. *See* Juliano, *supra* note 3, at 1329–36. Professor Juliano describes how the United States finds itself advancing tribal interests in water rights cases as it also advances claims on behalf of the Bureau of Reclamation, the Forest Service, and other agencies to the same water. *Id.* at 1331–33.

221. In a recent appellate brief, the federal government argued, "The fundamental purpose in establishing Indian reservations—to provide a permanent homeland capable of supporting a self-sustaining community—could not be achieved if water rights were limited to those that further a single, narrow purpose, or if some of the water rights necessary to support a community had to be acquired in accordance with state law." Brief of the United States in Response to the Skokomish Indian Tribe's Petition for Additional Rehearing By the *En Banc* Panel or Full Court Review of the *En Banc* Opinion Dated March 4, 2005 at 6 (Apr. 20, 2005), Skokomish Indian Tribe v. United States, 401 F.3d 979 (9th Cir. 2005), *opinion superceded*, 410 F.3d 509 (9th Cir. 2005).

222. A review of the litigation reveals that the homeland theories and claims for instream flows have remained consistent over time. *See supra* text accompanying notes 170–175.

223. *See supra* notes 211–214. Notable exceptions are found in the Kittitas and Flathead Lake litigation. *See supra* note 175.

the West.[224] This increase in water demand necessarily sharpens the potential for conflict among current users and heightens the scrutiny to which unquantified Indian reserved rights may be subjected. Because modern water rights disputes are most often litigated in state courts, there are fears that courts might manipulate legal standards to reduce tribal shares to water and protect non-Indian uses.[225]

The uncertainty in the law and the complexity of Indian water rights litigation has prompted many tribes to opt for settlement negotiations to quantify their rights.[226] The federal government has a general policy favoring the negotiation and settlement of Indian water rights.[227] Unfortunately, the criteria and procedures for settlement place substantial emphasis on protecting the federal treasury,[228] and less on

---

224. W. WATER POL'Y REV. ADVISORY COMM'N, *supra* note 10, at xiii. In 1990, there were 179 million acre feet of water withdrawn for various uses compared to 135 million acre feet in 1960. *Id.* at 2-23. Agricultural withdrawals constituted 78% of the uses and domestic uses were 8% of the uses in 1990, compared to 86% and 5% respectively in 1960. Industrial uses held steady at 5% during the period. *Id.*

225. *See* Richard B. Collins, *The Future Course of the* Winters *Doctrine*, 56 U. COLO. L. REV. 481, 484–85 (1985). *See also* NAT'L WATER COMM'N, *supra* note 5, at 479.

> Because of potential conflict between Indian and non-Indian water users and to avoid the suspicion of bias that might attend adjudication by elected State officials, the Commission recommends that Indian water rights be adjudicated in Federal court, the traditional forum for this kind of litigation. An effort should be made to simplify the litigation when numerous water users are affected, by allowing the State to represent them *parens patriae*.

Id.

226. Congress has approved 20 Indian water right settlements since 1978. *See* COHEN, *supra* note 1, § 19.05[2], at 1212. In addition to the 18 settlements cited in COHEN, Congress in 2004 approved settlements for the Nez Perce Tribe, Snake River Water Rights Settlement Act of 2004, Pub. L. 108-447, 108 Stat. 2809, 3431, and the Gila River Indian Community, Arizona Water Settlements Act, Pub. L. 108-451, 118 Stat. 3478 (2004). As Professor Frickey has noted, treating the litigation arena as "establishing the framework for negotiation between sovereigns, rather than merely for litigation in federal courts, holds the promise both of greater participation by tribes in the formulation of the federal law that purports to govern them and of the evolution of a more normatively attractive and coherent approach." Frickey, *supra* note 13, at 1757.

227. Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (Mar. 12, 1990).

228. The criteria and procedures provide:

> Federal contributions to a settlement should not exceed the sum of the following two elements: a. First, calculable legal exposure—litigation cost and judgment obligations if the case is lost; Federal and non-Federal exposure should be calculated on a present value basis taking into account the size of the claim, value of the water, timing of the award, likelihood of loss. b. Second, additional costs related to Federal trust or programmatic responsibilities (assuming the U.S. obligation as trustee can be compared

recognition of a moral obligation to settle disputes the United States had a substantial hand in creating. [229] The government's position in water settlements, while ostensibly guided by the Criteria and Procedures,[230] has been inconsistent and subject to frequent congressional overrides.[231] Of course, the ability to overcome a threat of a presidential veto depends on the strength of a given state's congressional delegation, or on the ability to attach a settlement to a veto-proof appropriations bill.

Indian water rights settlements are often said to hold the promise for the actual delivery of water to reservations and Indian people, although there is scant evidence that this is true.[232] On the other hand, the tribes with settlements have legal entitlements to water that are of great value now and in the future, and non-Indians obtain the certainty that is claimed as necessary for future planning. The use of water marketing provisions in settlements facilitates economically efficient allocation of water and can provide substantial economic benefits to Indian tribes.[233]

CONCLUSION

The success of the settlement process depends primarily on the willingness of the federal government to assist and encourage negotiations, and more importantly, to provide the lion's share of funding to implement any agreements. When in the negotiated settlement context, the federal government should not rigidly limit the

---

to existing precedence).—Federal contributions relating to programmatic responsibilities should be justified as to why such contributions cannot be funded through the normal budget process.

55 Fed. Reg. at 9223.

229. The federal government's failure to conclude any Indian water rights settlements from 1993 to 1996 based on budgetary constraints was severely criticized within Indian country and by state representatives. *See* Barbara A. Cosens, *The 1997 Water Rights Settlement Between the State of Montana and the Chippewa Cree Tribe of the Rocky Boy's Reservation: The Role of Community and of the Trustee*, 16 UCLA J. ENVTL. L. & POL'Y 255, 257 (1998) ("The failure of the federal government to effectively participate in and support settlement discussions calls into question its ability to fulfill its role as trustee to the many Indian tribes still struggling to settle their water rights.").

230. Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (Mar. 12, 1990).

231. MCCOOL, *supra* note 5, at 119 ("The favored strategy was just to ignore them [criteria and procedures] and take negotiated agreements straight to Congress, with a conspicuous lack of [Office of Management and Budget] review.").

232. *Id.* at 107–08 (stating that, while 2.8 million acre feet of water per year were quantified in 15 Indian water rights settlements, there was a net increase in actual deliveries of only 72,000 acre feet of water as a result of settlements).

233. See COHEN, *supra* note 1, § 19.03[7][c], at 1192–94.

federal contribution by the assessment of "calculable legal exposure" as defined in the criteria and procedures for settlements.[234] Instead, the federal position in settlement should take into account the inequitable treatment that developing tribal economies received historically in the water context. And while legal exposure is relevant, the scope of such exposure can be easily manipulated depending on the assumptions made in a given case. Instead, the federal government should engage in a transparent analysis of the tribal claims to water, tribal needs, potential federal liability, and the other potential benefits of settlement to the Indian and non-Indian community. There will be some cases where many other issues are dealt with as part of a comprehensive settlement of water rights litigation and related matters, such as ESA issues.[235] The Administration should look to the large body of settlements (there are now 20) to help chart a course for new settlement proposals. Funding of settlements should not reduce the BIA's budget.

Most importantly, the President should firmly and officially endorse the policy of settling Indian water right claims through legislation when tribes request assistance in negotiations. This should include a directive that funds for settlement are an Administration priority and the Office of Management and Budget should not be the arbiter of Administration support. Finally, the United States should support pre-litigation efforts to arrive at solutions and not wait for a litigation-induced crisis to trigger federal financial and staff support for settlement discussions.

234. *See supra* note 226.

235. The Snake River Water Rights Settlement Act is the prime example of such a comprehensive settlement. *See supra* note 225.