



NATURAL RESOURCES JOURNAL

Volume 58
Issue 1 *Winter*

Winter 2018

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Recommended Citation

Stephen H. Greetham, *Water Planning, Tribal Voices, and Creative Approaches: Seeking New Paths Through Tribal-State Water Conflict by Collaboration on State Water Planning Efforts*, 58 Nat. Resources J. 1 (2018).

Available at: <https://digitalrepository.unm.edu/nrj/vol58/iss1/3>

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Stephen H. Greetham^{*}

**WATER PLANNING, TRIBAL VOICES, AND
CREATIVE APPROACHES: SEEKING NEW PATHS
THROUGH TRIBAL-STATE WATER CONFLICT
BY COLLABORATION ON STATE WATER
PLANNING EFFORTS**

ABSTRACT

More than a century after the Supreme Court issued its foundational Indian water law cases, only a handful of American Indian tribes have secured decrees or settlements of legally enforceable water rights. Efforts to resolve tribal water claims are typically hampered by legal and factual complexities as well as the equitable and political legacy of the United States' western expansion. Meanwhile, those difficulties notwithstanding, planners are refining their methodologies and rising to new challenges our water resource management systems now face (e.g., climate variability, aging infrastructure, changing use-value priorities, etc.). Signaling a departure from exclusive reliance on formal dispute resolution mechanisms for facilitating tribal-state engagement on water resource issues, states have begun to engage tribal governments in collaborative water planning efforts. While planning cannot serve as a substitute for the enforceable legal finality of a decree or congressionally approved settlement, tribal-state collaboration in appropriate context and structure may present new opportunities for making overdue progress. Drawing on law, history, political science, Native American studies, and principals of dispute resolution and management, this article situates and explores the experiences of California, New Mexico, and Oklahoma in their outreach to tribes in state-led water planning efforts.

I. INTRODUCTION

Early twentieth century water planning facilitated development of massive infrastructure and made widespread western settlement and economic development

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possible.¹ While they do not create law, these plans and the projects they produced gave shape to the physical, economic, and policy context in which the law has long been applied. Largely coinciding with federal assimilationist and terminationist policies² though, the government developed its plans without tribal input and with little concern for the adverse impact its projects would have on tribal lands, resources, and collective legal rights. This boundary limitation imposed on first generation water plans—the exclusion of tribal voices and failure to integrate identifiable tribal interests—has thus contributed to generations of complex and confounding water resource conflicts, which regularly sharpen tribal-state conflict lines.

Today, rising to a new era of challenges, water planners are refining their art and bending themselves to the task of developing new strategies, institutions, and funding priorities to address this century's resource management challenges.³ Like the earlier plans, today's will not decide legal rights; nonetheless, they will establish frameworks and relationships that will shape how we move forward with our inherited conflicts. I have previously suggested that adapting water planning boundary conditions to better integrate tribal voices—an approach that would seem more in keeping with modern policies that support tribal self-determination and government-to-government engagement⁴—may provide opportunities for productive intergovernmental collaboration.⁵ This article further explores the concept.

1. *E.g.*, John R. Mather, WATER RESOURCES: DISTRIBUTION, USE, AND MANAGEMENT 294, 296-301 (1984); W. Eugene Hollon, THE GREAT AMERICAN DESERT, THEN AND NOW 160,161-74 (1966).

2. *E.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 1.04-1.06, at 71-93 (Nell Jessup Newtoned., 2012) (hereinafter, "COHEN'S").

3. *See*, Water Resources Planning Act, Pub. L. 89-80, § 2, 79 Stat. 244 (1965) (declaring national policy of encouraging "the conservation, development, and utilization of water and related land resources . . . on a comprehensive and coordinated basis"); National Water Commission Act, Pub. L. 90-515, § 3(a), 82 Stat. 868 (1968) (directing newly established commission to evaluate "national water resource problems" and, in doing so, "consider economic and social consequences of water resource development"); Cal. Water Code § 10004(a) (West 2001) (directing plan "for the orderly and coordinated control, protection, conservation, development, and utilization of the water resources of the state"); NMSA 1978, § 72-14-3.1 (2003) (directing "comprehensive state water plan" to serve as "strategic management tool" for enumerated objectives); Okla. Stat.tit. 82 § 1086.1 (1992) (directing plan "for the management, protection, conservation, structural and nonstructural development and utilization of water resources," with particular emphasis on "excess and surplus waters," and enumerating specific considerations); *See also*, James P. Morris, *Who Controls the Waters? Incorporating Environmental and Social Values in Water Resource Planning*, 6 Hastings W.-N.W. J. ENVTL. L. & POL'Y 117, 118-19, 120-29 (2000) (discussing history and evolution of modern water planning); *Cf.*, Kathleen A. Miller, *Grappling with Uncertainty: Water Planning and Policy in a Changing Climate*, 5 ENVTL. & ENERGY L. & POL'Y J. 395, 395-96, 406-07 (2010) (discussing methods for adapting water planning to the uncertainties presented by climate change).

4. *E.g.*, COHEN'S, *supra* note 2, § 1.07 at 93-108.

5. *See*, Stephen H. Greetham, *Water Planning: An Opportunity for Managing Uncertainties at the Tribal-State Interface?*, 64 OKLA. L. REV. 593, 594, 604-13 (2012). *Accord*, Curtis Berkey, Tribal Participation in California Water Planning 1-5 (November 4, 2009) (unpublished manuscript), http://www.berkeywilliams.com/docs/Briefing_Paper_2009_Tribal_Water_Summit.pdf.

Of course, fostering collaboration among heterogeneous interests is a challenge,⁶ particularly when polarizing legal disputes remain outstanding. All the same, while natural resource fights do not intuitively foster partnerships, cooperative engagement in this area does occur, even across cultural, legal, and political lines⁷, and such occurrences—whether they succeed or fail prompt useful questions starting with: What can we learn from those experiences? What do they teach about the hurdles inherent to the tribal-state dynamic? What do they teach about how competing sovereignty and proprietary concerns might be handled (or at least not harmed) by supplemental approaches potentially capable of securing additional social goods? And more to the point: Are there not other, perhaps supplemental, mechanisms we can rely on in our efforts to reach workable resolutions of longstanding conflict?

Discussions of tribal water tend to focus on conflict and injustice. As political scientist Burton wryly notes:

There is a vast literature bemoaning the immoral treatment of indigenous Americans, in part because there is no shortage of examples of such treatment. Less common is some consideration of how we might go about righting old wrongs (restoring tribal water supplies) without committing new ones (taking water from non-Indians who thought they had acquired good title to it under state law).⁸

The point of this article, however, is not to add to the literature “bemoaning” the treatment of American Indian tribes. It is instead intended to lay out a sober overview of relevant dynamics for purposes of examining a potential mechanism for increasing the likelihood of improving tribal-state efforts in a manner that affirms American Indian rights and sovereignty without undue disruption to the complex of equities and otherwise lawful rights vested during the past centuries of tribal dispossession. Efforts to achieve fair and workable resolutions of reserved tribal rights must continue, and in those efforts, there is no substitute for the enforceable finality only legal proceedings can provide; all the same, water planning may offer useful tools for improving our approaches to tribal-state water conflict in those instances where enforceable finality has not yet been achieved. For such potential to be realized, planners must break from the boundary conditions of prior generations and actively seek the integration of tribal voices into the collaborative fact finding and assessment, issue spotting, and strategic policy formation processes that make up modern water planning.

With this potential in mind, this article evaluates the context and experience of tribal-state engagement in water planning, focusing specifically on

6. Edella Schlager and William Blomquist, Resolving Common Pool Resource Dilemmas and Heterogeneities Among Resource Users 1 (June 10-14, 1998) (unpublished conference paper), <http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1009/schlager.pdf?sequence=1&isAllowed=y>.

7. E.g., Zoltán Grossman, *Unlikely Alliances: Treaty Conflicts and Environmental Cooperation between Native American and Rural White Communities*, AM. IND. CULTURE & RESEARCH J. 29.4 at 21-43 (2005). Professor Grossman’s article has been expanded to his recent book: *Unlikely Alliances: Native Nations and White Communities Join to Defend Rural Lands* (2017).

8. Lloyd Burton, AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF LAW x (1991).

state outreach to, and integration of, tribal government participation in state water planning efforts. As foundation for the discussion, Part II situates recurrent and archetypal tribal-state water conflict interests—interests that go beyond the water resources themselves—within the relevant legal and historical setting and offers a brief assessment of how traditional adversarial modes of conflict resolution, i.e., litigation and formal negotiation, have fared in reconciling those interests. Part III examines water planning as an evolving tool for approaching complex common pool resource challenges and reviews specific state efforts (by California, New Mexico, and Oklahoma) to integrate tribes into their planning processes, and evaluates those efforts to discern broader lessons before offering broader observations. Part IV offers a conclusion, lessons learned, and questions for us to answer moving forward.

II. A FRAMEWORK FOR UNDERSTANDING THE CHALLENGES: CONTEXT, INTERESTS, AND HOW WE HAVE FARED SO FAR

A. The Origin, Context, and Contours of Western Water Conflict

From the Louisiana Purchase⁹ to the Gadsden Purchase,¹⁰ the United States took a mere fifty years to stretch from the Mississippi to the Pacific.¹¹ It took only another fifty-eight years to establish state governments throughout the region. On the one hand, the United States' settlement of the American West offers a breathtaking example of territorial expansion and administrative nation-building; on the other, however, it offers the violent story of colonial and military displacement of North American indigenous populations—a displacement followed by the ongoing legalistic expansion of a plenary and paternalistic control of tribal peoples and resources.¹² Today, more than a century later, we continue to work to resolve the conflicts, inequities, and policy implications set in motion during this period.

As the United States expanded westward, the norms of constitutional federalism evolved generally to privilege state primacy in local water allocations.¹³ Toward the end of the United States' period of westward expansion, however, in *United States v. Rio Grande Dam and Irrigation Company*, the United States Supreme Court reasserted the superiority of federal law,¹⁴ holding that Congress's

9. Louisiana Purchase Treaty, Fr.-U.S., Apr. 30, 1803, 2 Stat. 245.

10. Gadsden Treaty, Mex.-U.S., Jun. 8, 1854, 10 Stat. 1031.

11. Proclamation, 37 Stat. 1728 (Feb. 14, 1912) (proclaiming statehood for Arizona, the last of the continental states to enter the Union).

12. *E.g.*, COHEN'S, *supra* note 2, §§ 5.01-5.03, at 383-405 (2005); *See also*, Lone Wolf v. Hitchcock, 187 U.S. 553, 221 (1903) (concluding federal plenary authority empowers the United States to unilaterally abrogate treaties with American Indian tribes in the disposition of tribal land resources); *United States v. Kagama*, 118 U.S. 375, 380, 384-85 (1886) (concluding federal plenary authority vests Congress with requisite authority to enact statutes for the regulation of affairs internal to tribal communities without regard to constitutional basis or consideration of lack of tribal political franchise in federal systems).

13. *California v. United States*, 438 U.S. 645, 653, 656-63 (1978) (discussing statutory history of federal water development as basis for deference to state law).

14. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703-06 (1899).

practice of deferring to state law water allocation systems did not, of itself, signal the United States' abandonment of its constitutional prerogatives with respect to broader federal interests, thus providing the fundamental conflict line in western water battles—competing assertions of state and federal rights and authority.¹⁵

Within the decade, the Court decided *United States v. Winans*¹⁶ and *Winters v. United States*,¹⁷ a pair of rulings that frame the tribal reserved rights doctrine—a rule of the federal common law of Indian affairs that holds, first, a tribal nation reserves to itself those rights not ceded by treaty or direct operation of federal law¹⁸ and, second, the United States reserves from public use water sufficient to accomplish its purpose when it sets aside land for the use and benefit of an American Indian tribe.¹⁹ Given the affirmation of paramount federal law, tribal reserved rights have long been held to be outside the presumed ambit of substantive state primacy,²⁰ providing the next and most relevant conflict line—the bounds of tribal versus state right and authority.

Throughout the Twentieth Century, the legal and factual situation grew more complex. For reasons remote from (and typically contrary to) tribal interests, the federal government engaged in massive reclamation projects that fostered an explosion in water development and dramatically altered the physical nature and operation of the region's watercourses.²¹ Operating in conjunction with local water law systems and the economics and politics that drove them, these projects contributed to a significant over-allocation and eventual over-utilization of water resources as overseen by an expanding and increasingly conflicted federal-state water bureaucracy,²² typically to the detriment of tribes whose reserved rights had yet to be perfected.²³ These dynamics gave rise to two lasting characteristics of our water laws: first, the vesting of diverse, overlapping, and conflicting sovereign, proprietary, and equitable interests in a limited resource; and second, the evolution of a complex body of federal statutes and regulations²⁴ designed to address

15. *E.g.*, Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority Under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241, 242-67 (2006).

16. *United States v. Winans*, 198 U.S. 371 (1905).

17. *Winters v. United States*, 207 U.S. 564 (1908).

18. *E.g.*, COHEN'S, *supra* n.2, § 2.02[2] (describing Supreme Court conceptualization of "an Indian treaty as a grant of rights from the tribe to the United States, with the tribe reserving for itself all interests not clearly ceded," which rule is a fundamental element of the reserved rights doctrine).

19. *E.g.*, *id.* § 19.02 (describing implied reservation of water rights recognized in *Winters* in relation to rights recognized in *Winans*).

20. *See Arizona v. San Carlos Apache*, 463 U.S. 545, 571 (1983); *See also*, *New Mexico v. Aamodt, et al.*, 537 F.2d 1102, 1111 (1976).

21. *E.g.*, Marc Reisner, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* 145-213 (1986); *See also*, Hollon, *supra* n.1, at 160-80.

22. *See*, Donald J. Pisani, *WATER, LAND, AND LAW IN THE WEST: THE LIMITS OF PUBLIC POLICY* 1-49 (1996).

23. *See*, U.S. National Water Commission, *WATER POLICIES FOR THE FUTURE* 476 (1973) (observing "in the water-short West, billions of dollars have been invested, much of it by the Federal Government, in water resource projects benefiting non-Indians but using water in which the Indians have a priority of right if they choose to develop water projects of their own in the future"), <https://www.gpo.gov/fdsys/pkg/CZIC-hd1694-a57-1973/html/CZIC-hd1694-a57-1973.htm>.

24. *See generally*, Endangered Species Act, 16 U.S.C. §§ 1531-1544; Clean Water Act, 33 U.S.C. §§ 1251-1388; National Environmental Policy Act, 42 U.S.C. §§ 4321- 4370m-12.

environmental and public participation considerations not present when the original infrastructure and water use allocation systems were developed and implemented. These characteristics provide our next set of conflicting interests, neither of which neatly conform to a “one versus another” construct—first, non-tribal property right claimants who are general beneficiaries, both legally and politically, of state water law allocation systems but are also frequently vested in the operation of federal water projects; and, second, non-government public interest groups engaged in the implementation of major federal environmental statutes or public lands law. In addition to implicating tribal, state, and federal governmental interests, these complex aggregations of non-governmental interest introduce to the mix non-tribal use-rights arising under state law and non-property use-value interests represented by advocacy organizations.²⁵

Meanwhile, as the facts and associated interests grew more complex, only modest progress was made in converting tribal reserved right claims to meaningful value. In the century since the Court issued its *Winans* and *Winters* decisions, two challenges have predominated: First, with respect to the particulars of water law, neither ruling offered much in the form of guidance as to *how* to disentangle tribal from state sovereignty interests or tribal property rights from those claimed under state law.²⁶ Second, efforts to develop fair and workable claims resolution have so far produced only limited success. Those ongoing efforts at disentanglement, definition, and resolution turn on a consistent practical question: What is the legally actionable definition of each tribe’s reserved right as applied within a fact pattern that typically has been shaped by state law normative water right systems and competing non-tribal legal, equity, and policy interests?²⁷ Without a concrete answer to that question, everything else remains provisional and uncertain, at least for tribes and those whose rights may be subject to a federal law-based tribal claim.

It is through this thicket of colonial legacy, constitutional law and federalism, national growth, tribal sovereignty, private property, economic interest, and environmental law and policy that each tribal-state water conflict, particularly in the West,²⁸ must find its way. For those planning the trip, pack a lunch, for that is not an easy path to walk.

25. The terms “use-right” and “use-value” are intended to highlight the distinction between: (1) a right based on possession of a proprietary interest, the exercise of which is typically for purposes of a private good; and (2) a social utility or non-proprietary public good served by a certain mode of water use, such as leaving a flow *in situ* to support ecological, aesthetic, recreational, or other indirect economic values.

26. See, Greetham, *supra* note 5, at 594-99 (offering an overview of the significance and limitations of *Winans* and *Winters* in disentangling the specific substance of tribal water rights from state law normative riparian or appropriative water allocation systems). Cf. Pisani, *supra* note 22, at 170 (noting the Bureau of Reclamation’s early inter-agency insistence on quantification of tribal claims in accord with state law appropriative rules rather than reserved right principles).

27. See, Greetham, *supra* note 5, at 599 n.17 (discussing significance of distinction between defining versus quantifying tribal reserved rights). Cf., Daniel McCool, *Native Waters: Contemporary Indian Water Settlements In The Second Treaty Era* 32 (2002) (Tribal governments are increasingly turning from courtroom battles to practical efforts to translate their paper rights into tangible benefits for the reservation.).

28. While reserved rights are typically associated with western water and tribal reservation land contexts, it merits noting that legal scholars have long contested that limitation, See, Hope M. Babcock, *Reserved Indian Water Rights in Riparian Jurisdictions: Water, Water Everywhere, Perhaps Some*

B. Situated Perspectives

Conflicts over common pool resources, such as water, can be uniquely complex. Each water system presents its own hydrologic and ecologic context and characteristics, but as political scientists Edela Schlager and William Blomquist note, heterogeneity among resource user interests also significantly contributes to common pool conflict complexity. These variations “present real challenges to gaining a common understanding of their shared problems, to communication, to devising fair rules of access and use, and to monitoring and enforcement of those rules.”²⁹ In turn, this diversity informs perspectives on the disputed resource itself, introducing another level of complexity, i.e., each individual actor’s sense of the problem to be solved.³⁰ While the particular setting and sets of interests, perspectives, and senses of the problem must be carefully assessed on their own terms and in the context of a particular conflict,³¹ the broad historical, legal, and policy setting of western water conflicts allows us, at least for present purposes, to outline an archetypal set of interests, the contours of which help us to understand the shape and flavor of what parties bring to the table and what they seek from engagement.

1. American Indian Tribes

The peoples indigenous to North America are diverse in their histories, cultures, and the landscapes that comprise their homelands. Regardless of that diversity, a significant commonality is tribal status as political and cultural collectives that, similar to other collectives, seek recognition of and respect for their distinct identity and right to exist as such. Federal Indian law and policy scholar Charles Wilkinson discusses this as the goal of achieving “a measured separatism”—one that differs from the goals of other cultural or ethnic groups engaged in civil rights struggles in that it seeks not only a normative equality of *individual* rights but also a *group* right to “homelands . . . islands of tribalism largely free from interference” from non-tribal systems, including state governments.³² Notwithstanding the diminished and checker-boarded tribal jurisdictions that have resulted from various and conflicting federal policies, the

Drops for Us, 91 CORNELL L. REV. 1203 (2006); Judith V. Royster, *Winters in the East: Tribal Reserved Rights to Water in Riparian States*, 25 WM. & MARY ENVTL. L. & POL’Y REV. 169 (2000-2001); Taiawagi Helton, *Indian Reserved Rights in the Dual-System State of Oklahoma*, 33 TULSA L.J. 979 (1998). More importantly, negotiating parties appear likewise not to have seen themselves as so limited. *E.g.*, Water Infrastructure Improvement for the Nation Act, Pub. L. 114-322, § 3608, 33 Stat 2 (Dec. 16, 2016) (approving, among others, the Choctaw Nation of Oklahoma and the Chickasaw Nation Water Settlement); Seminole Indian Land Claims Settlement Act, Pub. L. 100-228, § 7, 101 Stat. 1560 (Dec. 31, 1987) (approving Seminole Nation water rights compact); Kickapoo Tribe Water Rights Settlement Agreement (settlement pending federal approval) (on file with author).

29. Schlager and Blomquist, *supra* note 6, at 1.

30. William M. Adams, et al., *Managing Tragedies: Understanding Conflict Over Common Pool Resources*, 302 SCIENCE 1915, 1915-16 (2003).

31. Schlager & Blomquist, *supra* note 6, at 3 (commending use of Elinor Ostrom’s institutional analysis and development framework).

32. Charles Wilkinson, AMERICAN INDIANS, TIME, AND THE LAW, at 14 (1987). *Accord* Robert A. Williams, Jr., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA xxxv-xxxvi (2005).

core tribal goal remains: To exist and thrive as unique political, ethnic, and cultural collectives—to continue.³³

Flipping the lens around, federal and state policy makers and advocates have frequently treated tribal “separatism” and continuance as something to be tolerated and managed until broader assimilationist goals can be achieved, a dynamic that has been present from the outset of the federal common law of American Indian affairs. In *Worcester v. Georgia*,³⁴ example, Chief Justice Marshall laid out a robust framework for the protection of tribal sovereignty, famously holding “[t]he 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”³⁵ Importantly, though, what motivated the Court’s opinion was not a respect for an inherent and self-evident *tribal* right to sovereignty. (Indeed, the Cherokee Nation was not even a party to the lawsuit.³⁶) Instead, the Court was preoccupied with affirming an overriding *federal* interest in monopolizing relations with tribal nations free from *state* interference.³⁷ Justice McLean’s concurring opinion underscores that this federal-state conflict was the Justices’ real concern:

The exercise of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary. . . . At best, they can enjoy a very limited independence within the boundaries of a state, and such a residence must always subject them to encroachments from the settlements around them; and their existence within a state, as a separate and independent community, may seriously embarrass or obstruct the operation of the state laws. If, therefore, it would be inconsistent with the political welfare of the states, and the social advance of their citizens, that an independent and permanent power should exist within their limits, this power must give way to the greater power which surrounds it, or seek its exercise beyond the sphere of state authority.³⁸

33. Amanda J. Cobb, *Understanding Tribal Sovereignty: Definitions, Conceptualizations, and Interpretations*, AM. STUDIES 46:3/4 115, 124 (2005) (discussing Kathy Seton’s explication of indigenous peoplehood to emphasize “[t]heir struggles for self-determination are struggles to retain and/or regain cultural solidarity which unite them as a distinct people”); Stephen Cornell, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE 7 (1988) (discussing the paramount tribal goal of “survival: the maintenance of particular sets of social relations, more or less distinct cultural orders, and some measure of political autonomy in the face of invasion, conquest, and loss of power”).

34. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

35. *Id.* at 520.

36. *Cf. Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 19-20(1831) (rejecting tribe’s effort to invoke Court’s original jurisdiction in action challenging same state laws).

37. *See* 31 U.S. (6 Pet.) at 561 (“[T]he acts of Georgia are repugnant to the Constitution, laws and treaties of the United States. They interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union.” (Emphasis added.)); *see also* *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) (restraining legal effect of tribal alienation of lands in favor of centralized federal control).

38. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 593-94 (McLean, J., concurring).

As a matter of doctrine, the Chief Justice's views on federal primacy in federal-tribal affairs remains the rule, though the meaning of which is still regularly contested.³⁹ On the other hand, the "measured separatism" the law has so far protected, has often wrestled with and perpetuated a colonial "otherness" problem for tribes in relation to the American constitutional system⁴⁰—a problem illustrated by Justice McLean's argument and one that is too often compounded by the common law's difficulty in shaking off the rhetorics and frameworks of racism with which this area of federal law was founded.⁴¹

This problematic and unsettled dynamic was made worse by the federal bureaucracy's botched attempts to address the human toll of western expansion. For example, between 1890 and 1930—prior to which period the United States had forcibly contained or relocated most of the West's tribal population to reservations and during which period had then allotted much of those reservation lands to individual ownership, both tribal and non-tribal—the government constructed a patchwork of tribal irrigation projects. By 1928, the United States had spent approximately \$36 million on 150 separate projects that served nearly 700,000 acres.⁴² While these projects were justified by tribal needs arising from federal policies that sought to impose agricultural economies on tribal peoples forced to live within restricted land bases, 68 percent of the acreage benefitted by these irrigation projects was farmed by non-Indians—illustrating the disproportionate non-tribal benefit derived from ostensibly tribal projects.⁴³ Western water law and policy historian Donald Pisani offers this discussion of the conversion of tribal projects to non-tribal benefit during this period:

The Indian Irrigation Service enjoyed modest success in the 1890s, but that ended after Congress passed the Reclamation Act in 1902. Reclamation Service officials quickly recognized that the Indian reservations contained a great deal of land that could be purchased or leased by white farmers and that the proceeds from surplus land sales could be used to pay for reclaiming land owned by whites as well as Indians. In 1907, the Reclamation Service took over the construction of the largest irrigation projects on Indian reservations or former reservations—with the

39. *Cf.* *White Mountain Apache v. Bracker*, 448 U.S. 136, 143-45 (1980) (establishing balancing test for evaluation of respective federal, tribal, and state interests relating to state effort to regulate non-Indian activity within reservation).

40. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 383-84, 390-406 (1993) (analyzing the power-law tension inherent to the common law of federal Indian affairs and the difficulty the law has had in mediating the subject matter's colonial foundation within a normative constitutional framework); *see generally* Frank Pommersheim, *Is There a Little (Or Not So Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271, 271 (2003).

41. Williams, *supra* note 32; David E. Wilkins, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* (1997); *cf.* Stephen H. Greetham, *Tribes in "Unexpected Places": The NLRA, Tribal Economic Actors, and Common Law Expectations of Tribal Authenticity*, 38.4 AM. IND. Q. 427, 438-49 (2014) (analyzing challenges the common law's understanding of "tribe" presents in applying concepts of tribal sovereignty in the context of modern tribal economic actors).

42. Peter W. Sly, *RESERVED WATER RIGHTS SETTLEMENT MANUAL* 14 (1988).

43. *Id.* at 15.

complicity, if not full support, of the Indian Office. Officials in the Bureau of Indian Affairs hoped that white farmers would serve as models to would-be Indian irrigators. Therefore, they encouraged whites to take up land on the former reservations.⁴⁴

As Pisani concludes, “[b]y the 1920s, the Indian irrigation projects served far more whites than Indians—often at the expense of the Indians.”⁴⁵

Particularly when compared with the contemporaneous socio-political and physical circumstance of tribal peoples⁴⁶ and the plenary control asserted by the federal government that came to its zenith during this time,⁴⁷ the failure of these and similar federal programs to serve tribal peoples is unconscionable. But this was not the end of the missed opportunities: By 1975, after reallocating administration of non-tribal projects to the Bureau of Reclamation and retaining Bureau of Indian Affairs oversight of the tribal projects, the government had made \$201 million in capital expenditures on tribal projects, though the average area under irrigation had dropped to 648,000 acres.⁴⁸ Meanwhile the federal government spent billions to develop waters subject to tribal claim for predominantly non-tribal expansion and economic benefit.⁴⁹ This entire period of development amounted largely to an exercise of inefficient federal paternalism, incompetently implemented and inadequately realized, which had the effect of empowering state and other non-tribal interests at the expense of tribal right and benefit.

The largest and perhaps most (in)famous example of these projects is the Navajo Indian Irrigation Project (NIIP), a project authorized by Congress in 1962,⁵⁰ which has never been fully funded.⁵¹ While the United States originally calculated the Navajo Nation reserved right for the NIIP to be 787,000 acre-feet per year, non-tribal political opposition to a tribal project of that size stymied progress and led to the Navajo Nation’s being pressured to accept an ostensibly guaranteed annual entitlement of 508,000 acre-feet, which the Department of the Interior later scaled back to 370,000 acre-feet, citing improved water delivery efficiencies.⁵² Meanwhile, as the Navajo’s water allocation was slashed to less than half of the government’s original calculation, Congress tied the appropriation of monies for the construction of NIIP to the San Juan-Chama Project, which was developed for the benefit of New Mexico—though “[e]ight years after authorization, NIIP was only seventeen percent completed” while “New Mexico’s San Juan-Chama project was about two-

44. Pisani, *supra* note 22, at 161.

45. *Id.* at 161-62.

46. See generally Institute for Gov’t Research, THE PROBLEM OF INDIAN ADMINISTRATION (1928) (documenting impact of prior federal policies), <http://www.narf.org/nill/resources/meriam.html>.

47. E.g., COHEN’S, *supra* note 2, §1.05 at 79-80; Williams, *supra* note 32, at 71-83, 85 n.35; Wilkins, *supra* note 41, at 105-17; see also Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66 (1903).

48. Sly, *supra* note 42, at 16-17.

49. See *supra* text accompanying notes 21-22.

50. An act to authorize the Secretary of the Interior to construct, operate, and maintain the Navajo Indian irrigation project and the initial stage of the San Juan-Chama project as participating projects of the Colorado River storage project, and for other purposes, Act of Jun. 13, 1962 Pub. L. 87-483, 76 Stat. 96 (codified at 43 U.S.C. §§ 615ii).

51. Sly, *supra* note 42, at 17-18.

52. Burton, *supra* note 8, at 30-31.

thirds built.”⁵³ Today, the Navajo Nation Council continues to work to secure the funding and federal commitment to complete NIIP,⁵⁴ while San Juan-Chama has been in full operation for years.

Finally, as the common law continued to fumble with its handling of tribal sovereignty, as the federal government continued to mismanage tribal assets, and as the state’s regulatory hand grew stronger, the slow and steady trend of the western water bureaucracy has been “to treat tribes like mere individual owners of water rights and less like sovereigns with the authority and power to govern those water rights within their own territories.”⁵⁵ As Richard Monette frames the matter:

Indian tribes should not own water rights. Individuals own water rights; *sovereigns govern water rights* . . . Should tribes be more like individuals, who merely own water rights under the property scheme of some other sovereign? Or should tribes be more like sovereigns, with the authority and power to own water and to govern water rights within their respective territories and jurisdictions, including the power to vest individuals with ownership?⁵⁶

Tribes, of course, have proprietary interests in water resources, but the failure of the law and bureaucracy to adequately integrate *both* tribal sovereignty *and* proprietary interests exacerbates the difficulty for tribal leaders seeking to obtain that “measured separatism” with respect to their tribes’ reserved right claims.

As a whole, this history of disregard, hostility, and mismanagement promotes a tribal skepticism, if not overt cynicism, when it comes to law, water resources, and promises of justice.⁵⁷ While the particulars vary, each tribal government and community has some local version of this story, which tends to bolster a sense of distrust, both among tribal leaders and the members of the respective polity to which they owe a duty of responsibility and stewardship. It merits emphasis that much of this history of failure, including the Indian Irrigation Projects, is within the living memory of many tribal members and citizens—and many more who were raised by those individuals. Furthermore, given the tendency of the current Supreme Court to manifest sympathy for state interests over federal

53. *Id.* at 31.

54. See Media Release, Office of the Speaker of the 23rd Navajo Nation Council, Council moves forward with efforts to complete the Navajo Indian Irrigation Project (Feb. 29, 2016) (on file with author).

55. Richard Monette, *One Hundred Years after Winters: The Immovable Object of Tribes’ Reserved Water Meets the Irresistible Force of States’ Reserved Rights under the Equal Footing Doctrine*, in *THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS: THE WINTERS CENTENNIAL* 89 (Barbara Cosens et al., eds., 2012).

56. *Id.* (emphasis added).

57. *Cf.* Pisani, *supra* note 22, at 160 (discussing nature of American Indian skepticism and opposition to federal Indian Irrigation Projects); Burton, *supra* note 8, at 60 (“It is little wonder that while tribal leaders are not wildly enthusiastic about negotiation, many of them are reluctant to reject that alternative unequivocally.”). See also Berkey, *supra* note 5, at 2 (“Historically, Indian Tribes have kept the State at a distance with regard to legal and political matters, no doubt due to the hostile relationship between the State and the Tribes in the years following statehood and the numerous court battles to protect tribal water and fishing rights.”).

authority or tribal interests, tribal wariness of the legal system finds basis in current events, not only history.⁵⁸

Regardless of any skepticism, tribal leaders still must do what *all* community leaders must do: They must navigate the broader legal and political systems to address their communities' material challenges with respect to securing reliable water supplies for human consumption, economic growth, ecological health, and, in many instances, particularized cultural and/or religious needs.⁵⁹ While all polities must address similar needs, tribal government must (and do) do so in contexts in which their governments may lack recognized legal control over the watersheds on which they depend⁶⁰ or face opposition when the law does give them control⁶¹ (or even access to the possibility of a degree of control)⁶² and where poverty rates are generally high, rates of economic development comparatively low, and sources of government revenue constrained.⁶³ As western and tribal water law scholar David Getches observed, “[t]he futures of tribes have long been trapped behind unclaimed, unusable water rights,”⁶⁴ the truth of which speaks to the ultimate material interest driving tribal efforts to resolve claims: As a general matter, tribes want the value, utility, and benefit of legally enforceable water rights so they can protect their homelands and provide for their own future. But they want more than that, as well.

American Indian tribes have been able to capitalize on the late-1960s shift in federal policy and have expanded institutional capacities in government, law, and economic development.⁶⁵ Taking advantage of “treatment in the same manner

58. Cf. Burton, *supra* note 8, at 34, 36-37, 61-62.

59. E.g., Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 242-47 (1996) (discussing unique complex of challenges relating to implementation of tribal environmental programming).

60. See, e.g., Complaint for Declaratory and Injunctive Relief, Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, Civ. No. 16-1534 (D.D.C., Jul. 27, 2016).

61. See, e.g., *Montana v. U.S. EPA*, 137 F.3d 1135 (9th Cir. 1998) (addressing challenge to EPA's delegation of Clean Water Act regulatory authority to tribal environmental program); *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996) (addressing challenge to EPA's integration of tribal water quality standards in permitting of upstream off-reservation discharges).

62. See, e.g., Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109-59, § 10,211, 119 Stat. 1144 (Aug. 10, 2005) (imposing unique procedural requirements on tribes in Oklahoma seeking “tribes as states” status); Travis Snell, *Tribal officials angry over transportation bill*, CHEROKEE PHOENIX, May 3, 2006, <http://www.cherokeephoenix.org/Article/index/1417>; Editorial, *Filling the Bill: Inhofe's sage rider targets tribes*, OKLAHOMAN, Aug. 11, 2005 <http://newsok.com/article/2907126>.

63. Harvard Project on American Indian Economic Development, THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 112-22 (2008).

64. David Getches, *Foreward*, to NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST xiv (Bonnie Colby et al., 2005).

65. Harvard Project, *supra* note 65, at 115 (observing tribes have “leverage[d] policies of self-determination into self-selected investments and focus on developing the legal, regulatory, and physical infrastructure that rewards productivity, holds decision makers accountable, and holds down the risks of political instability for individuals and businesses”); Matthew L.M. Fletcher, *Retiring the “Deadliest Enemies” Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 74 (2007).

as states” provisions in certain major environmental statutes,⁶⁶ many tribes may also now operate environmental programs and have promulgated standards governing activities within or affecting their jurisdictional territories.⁶⁷ While the legacy of failed federal policies—e.g., poverty, unemployment, and other economic and associated social challenges—remains problematic throughout Indian country, tribal economic and governance capacities have grown, as has a collective tribal ability to impact matters affecting tribal communities.⁶⁸ And with respect to that central tribal-state conflict line, federal Indian law scholar Matthew L.M. Fletcher argues that “American Indian law is transforming”:

The political relationship between the United States and Indian tribes remains, but a new and more dynamic relationship between states and Indian tribes is growing. States and Indian tribes are beginning to smooth over the rough edges of federal Indian law— jurisdictional confusion, historical animosity between states and Indian tribes, competition between sovereigns for tax revenue, economic development opportunities, and regulatory authority— through cooperative agreements. In effect, a new political relationship is springing up all over the nation between states, local units of government, and Indian tribes. . . . Many states now recognize tribes as de facto political sovereigns, often in the form of a statement of policy whereby the state agrees to engage Indian tribes in a government-to-government relationship mirroring federal policy. The tribal-federal political relationship remains, but more and more tribal-state political relationships form every year⁶⁹

Sovereignty, as among governments, is a constant negotiation. Its exercise and health requires engagement and relationship, not the mere drawing of lines or the defining of legal rights. Monette implies this point when discussing tribes as sovereigns, not merely proprietors, and David Wilkins and Heidi Kiiwetinepinesilk Stark state the point more directly when arguing that tribal survival has long “necessitated the practice of aboriginal sovereigns negotiating political compacts, treaties, and alliances with European nations and later the United States.”⁷⁰ All of this, Wilkins and Kiiwetinepinesilk Stark argue, is part of a broader “governmental interdependency” that is inherent to the modern exercise of *all* sovereignties, requiring the constant negotiation, development, and maintenance of relationships

66. Safe Drinking Water Act, 42 U.S.C. § 300j-11(2012); Clean Water Act, 42 U.S.C. § 1377(e) (2012); Clean Air Act, 42 U.S.C. § 7601(d) (2012); Stephen Greetham, *Native American Sovereignty and the Clean Water Act: The Historic Judicial Treatment of Tribal Sovereign Powers and Recent Statutory Reforms*, 3 N.U. FORUM 1 (1998); Daniel I.S.J. Rey-Bear, *The Flathead Water Quality Standards Dispute: Legal Basis for Tribal Regulatory Authority over Non-Indian Reservation Lands*, 20 AM. IND. L. REV. 151 (1995-1996).

67. See *supra* note 61 and 66.

68. Harvard Project, *supra* note 63, at 117-21.

69. Fletcher, *supra* note 65, at 74; see also Harvard Project, *supra* note 63, at 72-77.

70. David E. Wilkins & Heidi Kiiwetinepinesilk Stark, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* 34 (2011).

between and among sovereigns.⁷¹ Scholars have disputed the wisdom and utility of tribal engagement with non-tribal political systems;⁷² as political scientist Daniel McCool puts the question, can a “strategy of political compromise, via an alien system of values, truly protect the long-term best interests of Indian tribes?”⁷³ However, given that water is typically a trans-jurisdictional matter, engagement—in one form or another—is largely unavoidable, and ultimately the success of any engagement will be shaped by the health of the relationship of the engaged parties.⁷⁴

While not uniform throughout Indian country, the growth in tribal government institutions and economic development has created expanding opportunities for mutually beneficial intergovernmental alliance. The opportunity for conflict will always inhere to the tribal-state dynamic, but as former Arizona Governor Bruce Babbitt said on the subject:

This is not a problem, it’s an opportunity What we have is an intergovernmental environment in which, if we could just quit thinking of Indian tribes and nations as problems and start thinking of them as peoples, communities, and governmental units, we can get on which business and make it happen.⁷⁵

The act of claiming and securing tangible, material value in the provision of reliable access to necessary waters is, of course, a paramount tribal goal, but tribes generally seek not only the water; they also seek intergovernmental relationships that are respectful of their status as recognized political collectives and which integrate them, as such, into the broader “governmental interdependency” of sovereignty. They seek a mode of integration that affords “a measured separation” within, not barred from, the evolving American legal, political, and cultural dynamic.⁷⁶ In short, in addition to water rights, tribes are generally looking for partners who approach them in the same spirit commended by former Governor Babbitt.

71. *Id.* at 38. (citing Valerie Lambert, CHOCTAW NATION: A STORY OF AMERICAN INDIAN RESURGENCE 211 (2007)).

72. Compare Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107 (1999), (arguing the imposition of United States citizenship on indigenous peoples was a unilateral act of colonization and advocating repeal of the Indian Citizenship Act and indigenous resistance and general withdrawal from non-indigenous political processes) with John P. LaVelle, *Strengthening Tribal Sovereignty Through Indian Participation in American Politics: A Reply to Professor Porter*, 10 KAN. J.L. & PUB. POL’Y 533 (2001), (responding and arguing in rebuttal to Porter’s article). See also Carol Goldberg and Duane Champagne, *Ramona Redeemed? The Rise of Tribal Political Power in California*, WICAZO SA R. 17.1 at 44 (2002).

73. McCool, *supra* note 27, at 9.

74. See, e.g., Adams, *supra* note 30, at 1916.

75. Colby, *supra* note 64, at 33.

76. See *supra* text accompanying notes 32-33; see also Cobb, *supra* note 33, at 119-20 (discussing inherency of sovereignty but its “political effect” as dependent on relational recognition).

2. State Governments

While American Indian tribes wrestle with the challenge of colonial “otherness,” states occupy a privileged position within the federal system. Though, among the fundamental tensions inherent in the United States’ Constitution is the exact metes and bounds of state versus federal power, states—particularly western states—have consistently asserted their rights against perceived federal overreach.⁷⁷ With respect to the control and local allocation of water, states assert those rights from a reasonably solid foundation.

The legal control and local allocation of water was largely an afterthought in the federal government’s implementation of western expansion. With the passage of the Homestead Act of 1862,⁷⁸ Congress opened the vast western public domain to lawful private settlement, and the resulting flood of migration increased local needs for works to provide water for domestic, industrial, and agricultural use throughout the predominantly arid region. As most of the land remained in federal title, much of those works were constructed on federal lands.⁷⁹ Soon thereafter Congress enacted the Mining Act of 1866, signaling its deference with respect to private rights to the continued use of water in accord with “local customs, laws, and the decisions of the courts.”⁸⁰ As the California Supreme Court tells the Story:

For a long period the general government stood silently by and allowed its citizens to occupy a great part of its public domain in California, and to locate and hold mining claims, water rights, etc., according to such rules as could be made applicable to the peculiar situation; and, when there were contests between hostile claimants, the courts were compelled to decide them without reference to the ownership of the government, as it was not urged or presented. In this way, from 1849 to 1866, a system had grown up under which the rights of locators on the public domain, as between themselves, were determined, which left out of view the paramount title of the government.⁸¹

77. See *In re U.S. Dep’t of Def.*, U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of U.S., 817 F.3d 261 (6th Cir. 2016), *cert granted sub nom.* Nat’l Assoc. of Mfrs. v. Dep’t of Def., 137 S.Ct 811, 196 L. Ed. 2D 595 (2017); see also Memorandum from U.S. EPA and U.S. Army Corps of Engineers on Administration of Clean Water Programs in Light of the Stay of the Clean Water Rule, Improving Transparency and Strengthening Coordination (Nov. 16, 2015), https://archive.epa.gov/epa/sites/production/files/2015-11/documents/2015-11-16_signed_cwr_post-stay_coordination_memo.pdf (This conflict line has flared most recently in relation to the Army Corps of Engineers’ and Environmental Protection Agency’s promulgation of Clean Water Act jurisdictional rules, which are now heading to the Supreme Court).

78. Homestead Act of 1862, Pub. L. 37-64, 12 Stat. 392, Ch. 75.

79. E.g., *California*, 438 U.S. 645 at 656 (1978).

80. Mining Act of 1866, 39 Cong. Ch. 262, § 9, 14 Stat. 253, 43 U.S.C. § 661.

81. *Cave v. Tyler*, 133 Cal. 566, 567, 65 P. 1089, 1090 (1901). *Accord* A. Dan. Tarlock, et al., *WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY* 106 (2009) (“In settlement of the West, Congress’s silence about water rights on the public lands had been at once confusing and convenient. The states did as they pleased.”).

Next, Congress enacted the Desert Lands Act of 1877,⁸² the central act of congressional deference in this area of the law and which the Supreme Court has interpreted as effecting a severance of non-navigable waters within the enumerated western states and a general reservation of those waters “for the use of the public under the laws of the states and territories.”⁸³ Finally Congress enacted the Reclamation Act of 1902⁸⁴ to authorize the construction of massive works to supplement local supply infrastructure for expanding non-tribal settlement, agriculture, and industry.⁸⁵ The Court has since interpreted the Reclamation Act as generally subordinating federal operation of projects built under its authority to state water allocation rules and administration.⁸⁶

In the words of Justice Rehnquist, this statutory history manifests “the consistent thread of purposeful and continued deference to state water law by Congress”⁸⁷ though, as already noted, not without exception.⁸⁸ Paramount federal sovereignty interests have not been waived by this tradition of deference,⁸⁹ nor have the nature and extent of reserved tribal water rights been subordinated to state substantive law.⁹⁰

With respect to state substantive water law, those laws generally perform three functions: They establish the rule system by which persons obtain new water rights, they provide adjudicative processes for the determination of existing water rights, and they administer the ongoing use, transfer, and distribution of established water rights.⁹¹ The existence of inchoate federal reserved rights can challenge state-led efforts in system-wide water management and complicate administrative efforts to define and administer property rights.⁹² This has particularly, though not exclusively, been a concern in normatively appropriative systems.⁹³

82. Desert Lands Act of 1877, Ch. 107, § 1, 19 Stat. 377, 43 U.S.C. 321.

83. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935); *see also California*, 438 U.S. 645 at 657.

84. Reclamation Act of 1902, Ch. 1093, 32 Stat. 388, 43 U.S.C. 416.

85. *California v. United States*, 438 U.S. 645 at 663.

86. *Id.* at 667-70.

87. *Id.* at 653.

88. *See U.S. v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899). *Cf. Tarlock*, *supra* note 81, at 107 (“Many years after *Winters* the Supreme Court said that, simply passing three post-Civil War statutes that scarcely mentioned water, Congress had deferred to the states to fashion their own water law systems.”)

89. *See U.S. v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703-07 (1899).

90. *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 570-571 (1983).

91. Conference of Western Attorneys General, *AMERICAN INDIAN LAW DESKBOOK 587* (Mazurek, Joseph et al. eds., 2014).

92. *See Oklahoma v. Tyson*, 258 F.R.D. 472, 479 (N.D. Okla. 2009) (dismissing state damages claim based on procedural implications arising from unresolved tribal water rights claims). *See also* Matthew L.M. Fletcher, *Tribal Disruption and Federalism*, 76 MONTANA L. REV. 97, 97 (2015). The rights of tribes and tribal populations can also be challenged. *See id.* at 99. (describing generally and in contemporary context the relationship and relative power of tribes and tribal populations with respect to state electoral and political systems, as contrasted with the tribal-federal trust relationship).

93. Royster *supra* note 28 at 169 (“With one partial exception, Indian reserved rights to water have been litigated only for reservations located in states following the prior appropriation system of state water law rights.”).

Starting early in the Twentieth Century, many western state legislatures adopted water codes that provided for comprehensive water rights adjudications.⁹⁴ Limitations on state substantive jurisdiction and the federal government's sovereign immunity, however, placed reserved rights outside the reach of state law adjudication proceedings; indeed, the Justice Department consistently used the reserved rights doctrine for defensive purposes only, i.e., to enjoin non-tribal diversions or state proceedings it viewed as contrary to federal interests,⁹⁵ which thwarted state authority to conduct comprehensive water right adjudications.⁹⁶ In 1952, Congress opened the door for such state authority by enacting the McCarran Amendment,⁹⁷ which serves to waive federal immunities in state-led stream adjudications. Since its enactment, the Supreme Court has construed it as opening the door for state court determinations of federal reserved right claims,⁹⁸ and subsequent litigation suggests a general rule that state courts are not only *available* for these actions but may be the *preferred* forum—even where tribal water rights are at issue.⁹⁹

Tribes have continued to challenge the states' procedural hold on the litigation of tribal water rights,¹⁰⁰ but state privilege has burrowed deep roots.¹⁰¹ In short, states have spent considerable institutional, financial, and political capital on securing the legal authority to control the relevant litigated processes.

This procedural advantage notwithstanding, states do not run the table. The Supreme Court has consistently and unambiguously reaffirmed that federal law, not state, controls the substance of tribal reserved rights.¹⁰² While this rule may be of debatable immediate value to federal and tribal interests, given McCarran's empowering of state courts to take the first pass on the questions presented,¹⁰³ federal law's substantive primacy continues to increase transactional

94. *E.g.*, *Colorado River Water Conservation Dist. v. U. S.*, 424 U.S. 800, 804 (1976).

95. *E.g.*, *Winters v. U. S.*, 207 U.S. 564, 565, (1908) (the United States seeking, and obtaining, relief in the form of enjoining non-tribal water use, rather than a definition of the tribal water right itself).

96. COHEN'S, *supra* note 2, at 19.05[1] ("Historically, the states lacked subject matter jurisdiction over Indian water rights.")

97. *See* 43 U.S.C. § 666(a) (2012).

98. *U.S. v. Dist. Ct. In and For Eagle County, Colo.*, 401 U.S. 520, 524 (1971).

99. *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 570 (1983) (rejecting secondary assault on Colorado River abstention); *U.S. for and on Behalf of Acoma and Laguna Indian Pueblos v. Bluewater-Toltec Irrigation Dist. of New Mexico*, 806 F.2d. 986, 987 (10th Cir. 1986) (per curiam) (affirming denial of removal effort).

100. *E.g.*, *Confederated Salish and Kootenai Tribes v. Clinch*, 992 P.2d 244, 250 (Mont. 1999) (holding state jurisdiction over water resources limited unless determination made regarding quantity of water "legally available," which could not be determined without quantification of tribal reserved rights). *See also e.g.*, *Oklahoma Water Res. Bd. v. United States, et al.*, Civ. No. 12-275 (Mar. 12, 2012) (motion to remove state stream adjudication to federal court).

101. *San Carlos Apache Tribe of Arizona*, 463 U.S. at 570 (rejecting secondary assault on Colorado River abstention); *Bluewater-Toltec Irrigation Dist. of New Mexico*, 806 F.2d. 986, 987 (10th Cir. 1986) (per curiam) (affirming denial of removal effort).

102. *See Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 571, 580 (1983).

103. *See, e.g.*, 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, 599, 618 (1995) (analyzing state court handling of the substantive law of federal reserved rights).

complexity, risk, and cost—factors which bear directly on state government pursuit of clean and clear resolutions. In short, no matter the litigated and legislated successes of state governments, formal resolution of reserved rights—of water rights, in general—remains hard, expensive, and polarizing work.¹⁰⁴ States have, accordingly, supported increased federal investment in achieving negotiated resolutions—acting in the belief that formal negotiations will provide a surer path to workable resolution.¹⁰⁵

Finally, surrounding the tribal-state relationship are the myriad of water resource regulatory and policy responsibilities the state owes to its state-law constituents. As Peter Sly puts it, “the state is like a ‘traffic cop’” with a “primary interest” in the supervision and “administ[rati]on of state- created water rights in a comprehensive and simplified process, to minimize surprises and uncertainties for water users.”¹⁰⁶ Given the predominance and diversity of the exercise of those “state-created water rights” and the privileged status federal law has afforded state regulation of them, the state’s role as “traffic cop” can be fairly viewed as less a desire to thwart tribal rights and sovereignty and more simply as a public duty—one that strongly informs, if not drives, its interests in these matters.

In sum, states continue to seek not only resolution of reserved rights but workable resolutions that support regulatory stability. If it is acceptable to repurpose Justice McLean’s sour argument in *Worcester*, it may be fair to say states seek a resolution to reserved rights on terms that do not “seriously embarrass or obstruct the operation of state laws.”¹⁰⁷ It is one thing to say that reserved rights lie outside the reach of state authority; it is another (and far more complicated) thing to arrive at legally actionable definitions of those reserved rights in a manner that does justice to the claim while integrating them to a broader property rights system without undue prejudice or harm to other lawful and equitable interests vested under state law. The first statement presents the conflict; the second offers a form of fair resolution. The consequence of our shared history is complex and challenging, but states—like all sovereigns—are not inclined to abandon local interests or claimed governmental rights based solely on appeals to that history. Instead, fundamental to the approach of state regulators and political leaders in these matters is a path to reconciliation that does minimal violence to current legal, property, and power systems.

3. *The Other Parties*

The tribal-state relationship, of course, does not exist in isolation. Multiple other actors have relevant affected interests, and each has its own relationship, common cause, and conflict with tribal and/or state sovereigns—most prominently, the United States, non-tribal use-right claimants, and use-value advocacy organizations.

104. See, e.g., Rhett Larson & Kelly Kennedy, *Bankrupt Rivers*, 49 U.C. DAVIS L. REV. 1335, 1358-59 (2016) (discussing high cost and transactional uncertainty of stream adjudications).

105. E.g., Western States Water Council, Resolution (Position No. 376) In Support of Indian Water Rights Settlements (Oct. 10, 2014) (on file with author).

106. See generally Sly, *supra* note 42, at 47, 44-54.

107. 31 U.S. (6 Pet.) at 594.

Of the other parties involved, the United States is the most complex. As prime mover of the nation's western expansion, it implemented a series of policies designed to remove tribal populations to small corners of their pre-expansion aboriginal homelands.¹⁰⁸ These homelands were then made ready for non-tribal settlement through the construction of massive reclamation and other water infrastructure projects.¹⁰⁹ As legacy of this history, the United States today owes a myriad of public responsibilities, in addition to its role as fiduciary of the federal-tribal trust.¹¹⁰ Historian Patricia Nelson Limerick describes the government's arguably untenable position as follows:

By 1980, Interior's jurisdiction was a crazy mosaic. Overseeing the Fish and Wildlife Service, the National Park Service, the Bureau of Mines, the Geological Survey, the Bureau of Indian Affairs, the Bureau of Land Management, and the Bureau of Reclamation, the secretary of the interior wore more hats than a head could support. The interests of mining, for instance, were often in conflict with the interests of wildlife, of Indian people, and of national parks. Beyond the likelihood of conflicting interests among bureaus, the range of each bureau could make the head spin.¹¹¹

The Supreme Court has offered little guidance in sorting out management of this mess.¹¹² Instead offering its own complications by affirming the primacy of state and local water allocation laws.¹¹³

As a result of this network of sovereign and proprietary rights, statutory and common law duties, and concurrent status as sovereign, developer, and trustee, there are few water issues in which the United States does not have a vested interest.¹¹⁴ As sovereign, it must act as steward of national interests, which includes enactment and implementation of water and natural resource protection systems

108. *E.g.*, COHEN'S, *supra* note 2, at 4 (discussing sweep of tribal land losses); *See also* COHEN'S, *supra* note 2, at 23-30, 38-41, 79-84 (discussing arc of federal policies implementing the diminishment of tribal lands and resources); Harvard Project on American Indian Economic Development, *supra* note 62, at 95-98.

109. *See supra* notes 1, 21-23 and accompanying text.

110. *E.g.*, Colby, *supra* note 64 at 14-18; Cohen, *supra* note 2, at 412-416.

111. Patricia Nelson Limerick, THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST 307 (2011). *Accord* Mather, *supra* note 1, at 305 ("Clearly, many [federal programs dealing with water resources development and management] overlap and conflict. It is certain that even the agencies involved do not know of all possible conflicting or supporting programs in other agencies or, even possibly, the full ramifications of the programs they have been authorized to establish or enforce within their own agencies.").

112. *See Nevada v. U.S.*, 463 U.S. 110, 128 (1983) ("The Government does not 'compromise' its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obliged it by statute to do."); *E.g.*, *id.* at 135 (providing an example for the same point).

113. *See California v. U.S.*, 438 U.S. 645, 656 (1978).

114. *See, e.g.*, Mather, *supra* note 1, at 302 ("Current federal water laws and programs are quite complex. More than forty federal agencies have some water programs or statutory responsibilities and the programs keep changing.").

such as the Clean Water Act¹¹⁵ and the Endangered Species Act.¹¹⁶ Using its financial and scientific resources, the government also acts in its sovereign capacity by funding technical studies intended to better inform water resource management and environmental protection efforts.¹¹⁷ As proprietor, the government acts to protect its rights appurtenant to federal reserved lands and water infrastructure¹¹⁸ and, likewise, to fulfill its contractual obligations to derivative property right holders who enjoy the use of those federal assets.¹¹⁹ Finally, as trustee, it has an obligation to represent the interests of tribal sovereigns who hold reserved rights to water resources as well as jurisdictional authorities relating to the use and enjoyment of those resources.¹²⁰ The government's balance of these varied and conflicting interests is driven less by the law and more by executive and legislative branch politics and policy, with the courts simply playing referee pursuant to statutory, common law, or constitutional standards.¹²¹ In short, government tends to be on no one party's side in any water dispute but, instead, manages what it views as its interests in accord with predominating law, policies, and politics.

While the federal government could be understood as a single entity with a myriad of interests, non-tribal property right claimants are a myriad of entities with a singular—though individually held—interest, i.e., a property right in the use of water, a right which is generally governed by and within a state law water allocation system. Such use-rights are held by towns and cities, irrigators and ranchers, energy producers and power plants, large industry, and individual homeowners.¹²² Given the nature of state versus federal politics, these claimants generally have a strong interest in protecting the state's regulatory and management role.¹²³ Echoing the federal-state conflict line, this tendency can put tribal and non-tribal claimants at odds.

115. See 33 U.S.C. § 1251(a) (2012).

116. See 16 U.S.C. § 1531 (2012).

117. See, e.g., U.S. BUREAU OF RECLAMATION, RECLAMATION COLLABORATES WITH COLORADO RIVER BASIN TEN TRIBES PARTNERSHIP IN TRIBALLY FOCUSED WATER STUDY (2013); U.S. BUREAU OF RECLAMATION, COLORADO RIVER BASIN TEN TRIBES PARTNERSHIP TRIBAL WATER STUDY (2016).

118. See, e.g., *United States v. New Mexico*, 438 U.S. 696 (1978) (construing scope of federal reserved rights appurtenant to forest service lands); *Cappaert v. United States*, 426 U.S. 128 (1976) (seeking injunction against groundwater diverters for purposes of protecting federal reserved water right and associated interests).

119. See *supra* note 107 (enforcing federal reclamation contract obligations); see also, e.g., *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 261 (D.D.C. 1972) (reversing agency decision regarding promulgation of flow regulation affecting Newlands Reclamation Project for failure to properly balance federal obligations regarding prior adjudication decrees, federal fiduciary obligations to tribes, and the contract rights of irrigators using reclamation project waters).

120. *Id.*; see also *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims*, Fed. Reg. (Mar. 12, 1990), https://www.usbr.gov/native/policy/12mar1990_fedreg_indianwaterrights.pdf (“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.”)

121. See *supra* note 118.

122. Colby *et al.*, *supra* note 64, at 32.

123. See, e.g., Colby *et al.*, *supra* note 64, at 32; cf. Sly, *supra* note 42, at 49-53 (discussing state as *parens patriae*).

Finally, use-value advocates also have a significant role in these matters. Environmental groups and recreational users are not frequent participants in tribal water disputes, but they are regular participants in water fights more generally, typically relying on federal statutory systems that secure public participation rights to advocate positions framed as serving the public's interest, such as environmental protection and government and corporate accountability.¹²⁴

4. *The Interests Aggregated*

Much of the complexity summarized above arises out of, on the one hand, the unique relationship between tribal sovereigns and the federal government and, on the other hand, the unique competition between tribal and state sovereigns. Viewing it as a whole, its contours drape a generalized structure built on *sovereignty* and *proprietary* considerations: Sovereignty concerns (primarily represented by tribal, state, and federal government parties) that focus on questions of control, authority, autonomy, and certainty; and proprietary concerns (primarily represented by use-right claimants, both tribal and non-tribal, and use-value advocates such as environmental or other policy organizations) that focus on maximal realization of an individualized material value (i.e., amount of water reliably obtained for a desired use-right or use-value, such as for municipal, agricultural, recreation, fish and wildlife, or other purposes).

From tribes (seeking a “measured separatism” and dynamic intergovernmental relations) to states (seeking to protect a privileged legal position with respect to the implementation of administrative regulatory systems necessary for ecological and economic health) to the United States (acting on its crazy quilt of interests and obligations) and all the use-right and use-value interests entangled among them, each party brings legitimate concerns to the table. These interests are each informed and shaped by history, culture, law, and context, and each, in turn, shapes the nature of the conflict to be addressed—a conflict that typically goes far beyond the water resource itself and, instead, ought to be viewed as part of ongoing efforts to reconcile America's colonial past with its constitutional present.¹²⁵

In short, this is about more than water.¹²⁶

C. Traditional Tactics and Paths to Resolution

Parties typically seek resolution among this rowdy set of interests by reliance on traditional adversarial means, i.e., litigation or the nominally more cooperative approach of formal negotiations. Regardless of approach, the law requires resolution of reserved rights claims to include finality and enforceability of right.¹²⁷ Exclusive focus on enforceable finality, however, tends to deepen conflict

124. Colby *et al.*, *supra* note 64, at 32–33.

125. *See supra* note 40.

126. McCool, *supra* note 27, at 7–9 (discussing water settlements as marking a “second treaty era.”)

127. *E.g.*, Nevada v. U.S., 463 U.S. 110, 129 n.10 (1983) (“The policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water.”); *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims*, *supra* note 119, at 9223 (“Settlements should be completed in a way that all outstanding water claims are resolved and finality is achieved.”)

by miring the parties in pie-cutting zero-sum games, thus restricting combatants to distributive competition rather than facilitating integrative cooperation. Each approach, in its own way, has proven itself to be less than ideal.

For much of the Twentieth Century, litigation has been the primary tool for addressing reserved rights to water,¹²⁸ but such reliance has proven expensive, polarizing, and not certain to provide clear or transportable results—in a word, unsatisfactory. The adjudication of the rights of the Eastern Shoshone and Northern Arapahoe tribes often serves as an illustration of the limited efficacy of litigation: After thirty-seven years, including seven trips to the Wyoming Supreme Court, the tribes are still unable to fully utilize their substantial decreed water right without continued conflict and uncertainty.¹²⁹ Meanwhile, lingering uncertainty due to adversarial relations continues to inhibit economic growth and forestall ecological restoration efforts.¹³⁰ Another illustration of litigation's limitations can be found in northern New Mexico, where it took approximately twenty-seven years to produce a useable legal standard for determining Pueblo water rights,¹³¹ after which a separate district court concluded it was not bound by the product of those efforts leaving the parties free to litigate the questions anew.¹³² Indeed, underscoring a level of frustration with his state's experience, former New Mexico State Engineer John D'Antonio estimated it would take "another 600 years to complete the adjudication of water rights" within its jurisdiction if it continued at its current pace.¹³³

With these experiences in mind, it is not hard to understand why parties started taking a step back and moved from the courtroom to the conference table.¹³⁴ In 1979, for example, Montana established its Reserved Water Rights Compact Commission to represent the state in efforts to negotiate settlements of outstanding reserved right claims.¹³⁵ Around that same time, the Conference of Western Attorneys General reached out to the Native American Rights Fund to, likewise, explore the development of standard practice and procedural norms for securing enforceable settlements, which resulted in the 1988 publication of the RESERVED

128. See, e.g., Burton, *supra* note 8, at 48-58 (indicating only fourteen of fifty tribal water conflicts involved formal negotiation efforts and, of those, ten included litigation as well). Efforts to resolve claims through negotiation were not meaningfully pursued until after promulgation of the criteria and procedures for federal participation in tribal water settlements. See generally *supra* note 119.

129. E.g., McCool, *supra* note 27; Anne MacKinnon, *Eyeing the Future on the Wind River*, 15 WYO. L. REV. 517 (2015); Jason Robison, *Wyoming's Big Horn General Stream Adjudication*, 15 WYO. L. REV. 244 (2015).

130. MacKinnon, *supra* note 128, at 518, 520.

131. New Mexico filed the Aamodt adjudication in 1966, and the parties thereafter completed trial litigation over questions relating to a methodology for quantifying Pueblo water rights by 1993. See New Mexico ex rel. State Eng'r v. Aamodt, et al., 537 F.2d 1102 (10th Cir. 1976); New Mexico ex rel. State Eng'r v. Aamodt, et al., 618 F. Supp. 993 (D.N.M. 1985); New Mexico ex rel. State Eng'r v. Aamodt, et al., No. CV-6639 (D.N.M., Dec. 29, 1993) (Memorandum Opinion and Order).

132. New Mexico ex rel. State Eng'r v. Abousleman, No. 83-1041 (Dist. Ct. N.M. Oct. 4, 2004).

133. Lora Lucero and A. Dan Tarlock, *Water Supply and Urban Growth in New Mexico: Same Old, Same Old or a New Era?*, 43 NAT. RESOURCES J. 803, 819 (2003).

134. Cf. Greetham, *supra* note 5, at 602 n.27 (discussing tribal motivations for turning to negotiated resolutions).

135. Mont. Code Ann. § 2-15-212 (1979).

WATER RIGHTS SETTLEMENT MANUAL¹³⁶ and years of coordinated tribal-state advocacy at the federal level for deeper federal commitment to resolution of reserved rights claims.¹³⁷

Since the 1980s, the value of the multi-party and congressionally-approved negotiated settlement has been accepted, almost as an article of faith, as the preferred method of formal tribal reserved right dispute resolution, though the record suggests one may want to hold to that faith with something less than righteous enthusiasm.¹³⁸ Since, 1978, when Congress approved the Ak-Chin Indian Water Rights Settlement Act,¹³⁹ the first express settlement of tribal water rights claims, only forty-four of the more than 560 federally recognized American Indian tribes have obtained a formal settlement of their claims,¹⁴⁰ with twelve settlements accomplished during the Obama Administration alone.¹⁴¹ This progress marks a significant collective achievement, but it remains slow work. As the Western Water Policy Review Advisory Committee observed nearly twenty years ago, negotiation has its own limitations:

[N]egotiated settlements are not an easy solution. They rely on the willingness of parties to negotiate. Delays and political maneuvering are often considerable. Settlements generally must be ratified by the Congress and, in most instances, need judicial recognition to be effective. Most importantly, settlements generally rely on large infusions of federal funds to provide additional water for tribes without damaging the rights of other water users. Federal budgetary concerns will probably restrict funding of new water settlements and project-based solutions. Accordingly, future negotiators will have to be even more creative.¹⁴²

The overall pace of settlement seems to justify the Committee's cautionary tone and, more dauntingly, suggests—like New Mexico's former State Engineer once estimated for his state¹⁴³—it may take as much as another half a millennium to resolve the reserved right claims of the more than five hundred

136. Sly, *supra* note 42.

137. WESTERN STATES WATER COUNCIL & NATIVE AMERICAN RIGHTS FUND, THE IMPORTANCE OF INDIAN WATER RIGHTS SETTLEMENT FUNDING (2014).

138. Cf. Daniel McCool, *Intergovernmental Conflict and Indian Water Rights: An Assessment of Negotiated Settlements*, 23 PUBLIUS 85, 92–93 (1993) (noting lack of methodological assessment of effectiveness of negotiated settlements in obtaining identified goals).

139. Ak-Chin Indian Water Rights Settlement Act, Pub. L. No. 95–328, § 1582, 92 Stat. 409 (1978).

140. Charles V. Stern, CONG. RESEARCH SERV., R44148, INDIAN WATER RIGHTS SETTLEMENTS 6-8 (2015) (tabulating settlements approved by Congress as of that publication date); *see also* Pub. L. 114-322, *supra* note 28 (including approval of new water settlements relating to the claims of four tribes, i.e., Blackfeet Tribe, Chickasaw Nation, Choctaw Nation, and Pechanga Band, while completing steps necessary for the fulfillment of the prior settlement of the claims addressed in the San Luis Rey Indian Water Rights Settlement, *see infra* note 192).

141. U.S. Dep't of The Interior, SECRETARY JEWELL, TRIBAL LEADERS MARK ENACTMENT OF FOUR ADDITIONAL WATER RIGHTS SETTLEMENTS FOR INDIAN COUNTRY (2017).

142. Denise Fort *et al.*, WATER IN THE WEST: CHALLENGE FOR THE NEXT CENTURY 3–49 (1998).

143. *See* Lucero & Tarlock, *supra* note 132 and accompanying text.

federally recognized tribes that have not yet converted (or, for many, even yet stated) their claims. That is a sobering prospect.

Thus, more than a century after the Court decided *Winans* and *Winters*, we find ourselves acknowledging tribal sovereignty and proprietary rights as a *general* matter but having produced few specifically-defined and enforceable articulations of those rights. That lack of finality notwithstanding, tribal and non-tribal communities, public water suppliers, resource users, and others continue to wrestle with exigencies driven by shifting use-value priorities, climate variability, and aging infrastructure—exigencies that demand analysis and decision, even if only provisionally. This is a circumstance ripe for creative thinking and reform.

III. A FRAMEWORK FOR WATER PLANNING AS A SUPPLEMENTAL APPROACH: ITS EVOLUTION AND APPLICATION IN THE TRIBAL-STATE CONTEXT

Tribal water right litigation and negotiation efforts are fundamentally organized around that single, practical question: What is the legally actionable definition of each tribe's reserved right as applied within a fact pattern that typically has been shaped by state law normative water right systems and competing non-tribal legal, equity, and policy interests?¹⁴⁴ Answering the question, though, is not the end itself; the question serves to organize efforts intent on reconciling competing interests within a framework with which our legal systems can deal, i.e., rights. Our aspiration in resorting to those mechanisms is to create a level of certainty that will allow our pursuit of material goals, ideally without prejudice to or caused by our neighbor, e.g., development of water supplies, restoration of habitat, support for diverse economic development efforts, etc. Leaving aside the legal system's focus on rights and the ultimate requirement for enforceable finality, water planning efforts are generally driven by the same aspiration.¹⁴⁵ Given the demonstrable limitations of our legal systems for efficiently achieving the goal, water resource planning appears to be a reasonable supplemental approach.

A. Water Planning as an Evolving Resource Management Tool

Water planning has become an increasingly popular tool for assessing water resource policy and management challenges and options.¹⁴⁶ Evolving from an engineering tool originally used to develop disaggregated, single-purpose projects,¹⁴⁷ water planning today requires an interdisciplinary and comprehensive approach to address a growing list of scientific, political, and use-value

144. See Greetham, *supra* note 5 at 599 n.17; McCool, *supra* note 27 and accompanying text.

145. See *supra* note 3.

146. Craig Bell & Jeff Taylor, WATER LAWS AND POLICIES FOR A SUSTAINABLE FUTURE: A WESTERN STATES' PERSPECTIVE 21 (2008), <http://www.westernstateswater.org/wp-content/uploads/2012/10/laws-policies-report-final-with-cover-1.pdf>; see also Vanessa Cassado-Peréz, et al., *All Over the Map: The Diversity of Western Water Plans*, CA. J. OF POL. & POL'Y 7(2) 3 (2015) (noting that water planning now appears to be predominantly performed by state governments).

147. E.g., Morris, *supra* note 3, at 120-121 (discussing Gilbert F. White, STRATEGIES OF AMERICAN WATER MANAGEMENT, 4-5 (1969)).

uncertainties.¹⁴⁸ This evolution in practice and utility demonstrates the plasticity of the tool itself, suggesting its amenability to adaptation for application to a variety of fact and policy challenges.

For all their diversity in application,¹⁴⁹ today's water plans fundamentally involve a uniform set of elements, i.e., a quantitative and qualitative assessment of available water supplies, a characterization of current and projected future demands, an analysis of the adequacy of supplies relative to demands, and an exploration and comparative evaluation of strategic options for closing any shortfall, as judged against identified policy goals or "performance objectives."¹⁵⁰ Engineering professor Jay Lund notes that building on this common foundation, water planning can be adapted to specific needs or approaches, including traditional single-purpose planning, benefit-cost planning, multi-objective planning, and—most importantly for our purposes—conflict resolution planning.¹⁵¹

Lund describes conflict resolution planning as uniquely serving "to reconcile individuals or groups with conflicting objectives for water management to a single plan or plan strategy."¹⁵² He notes these efforts typically occur in a quasi-adversarial context in which "parties have alternatives to participating in a formal planning process," and typically emphasize the value of recruitment, such as requirements that the participants "communicate, understand, and negotiate."¹⁵³ This approach generally invests "considerable emphasis, effort and time . . . to establish broad confidence and communication in both technical and decision-making processes,"¹⁵⁴ again emphasizing the need for recruitment of would-be adversaries to a more collaborative forum. Given the fact-intensive nature of the planning exercise and the increased prioritization of public engagement, the tool may even be *superior* to traditional adversarial modes for certain purposes.

As Schlager and Blomquist argue, adversarial and collaborative modes of engagement are "psychologically incompatible," with the former rewarding "strategic, and even opportunistic, communication and withholding of information—and a good deal of distrust against potential misinformation"—while the latter "requir[es] creativity, effective communication, and mutual trust."¹⁵⁵ Given these distinctions between adversarial and collaborative modes, "[i]nformation asymmetries can contribute to creating an atmosphere of distrust and deception, discouraging individuals from working together to find outcomes superior to what they currently achieve."¹⁵⁶ In the tribal-state water conflict

148. *Id.* at 122; see also Miller, *supra* note 3, at 395-396.

149. Cassado-Peréz, *supra* note 145, at 6-14.

150. Jay R. Lund, APPROACHES TO PLANNING WATER RESOURCES 2-3 (Mar. 30, 2006) (unpublished paper), http://www.waterboards.ca.gov/centralvalley/water_issues/salinity/library_reports_programs/lund_water_resource_planning.pdf; accord Greetham, *supra* note 5, at 606-607.

151. Lund, *supra* note 149, at 3, 5-6.

152. *Id.* at 5.

153. *Id.*

154. *Id.*

155. Schlager & Blomquist, *supra* note 6, at 6-7 (quoting Fritz Scharpf, GAMES REAL ACTORS PLAY (1997)).

156. *Id.* at 7.

context, political scientist Lloyd Burton similarly observes that the combatants do not always appear focused on resolution as much as competitive position:

[F]or one or more parties in a dispute, settlement may not be a primary goal. Indeed, keeping the dispute unsettled, active, off balance, and costly to all concerned may in some situations be the preferred strategy. Also, in the disputing process each party plans and executes strategy to get the dispute into the friendliest forum under the most favorable conditions possible at the lowest costs to themselves and the greatest cost to their opponents. In short, each party tries to manage the dispute (regarding forum, transaction costs, movement toward or away from settlement, at so on) to its own advantage.¹⁵⁷

Indeed, given the sweeping nature of the issues and history of distrust, relegation of tribal and state actors to adversarial forums may compound the typical challenges arising from competition. Certainly Schlager's, Blomquist's, and Burton's observations echo concerns voiced by the Western Water Policy Review Advisory Committee twenty years ago.¹⁵⁸

Conversely, properly structured opportunities for cooperative fact-finding and information distribution and analysis outside of or insulated from adversarial contexts, i.e., properly structured planning exercises, can facilitate breaking down the distrust and gamesmanship inimical to building consensus and collaboration.¹⁵⁹ Admittedly, water planning has no legal force and can provide no enforceable finality,¹⁶⁰ which can serve as a legitimate basis for criticism.¹⁶¹ Critics have also pointed to the general lack of uniform water planning methodologies as well as structural challenges to reliable information gathering and implementation.¹⁶² These critiques and observations are valid, but they also serve primarily to underscore the fact that water planning remains an evolving tool, which may be part of its value—allowing a flexibility to permit locally appropriate exercises in joint fact finding, issue spotting, and policy debate.¹⁶³ Indeed, given the burden and pace of achieving enforceable finality through formal legal mechanisms, the opportunity for interim or supplemental progress through enhanced intergovernmental engagement has manifold attractions.

And it is not an entirely new idea. In its 1978 National Indian Water Policy, the United States Department of the Interior recommended ensuring tribal

157. Burton, *supra* note 8, at 36.

158. See Fort, *supra* note 141 and accompanying text.

159. E.g., Lawrence Susskind, Alejandro E. Camacho & Todd Schenk, *Collaborative Planning and Adaptive Management in Glen Canyon: A Cautionary Tale*, 35 COLUM. J. ENVTL. L. 1, 29-54 (2010) (discussing the U.S. Department of the Interior's failure to adhere to specific "best practices" with respect to, for example, joint fact-finding and group decision making in its effort to implement a collaborative adaptive management program among diverse water resource interests and stakeholders).

160. Cassado-Peréz, *supra* note 145, at 18.

161. Lucero & Tarlock, *supra* note 132, at 823.

162. Cassado-Peréz, *supra* note 145, at 18; see also Bell & Taylor, *supra* at note 144, at 22-24 (discussing criticisms made of water planning in New Mexico and California as well as watershed planning, in general).

163. Susskind, *supra* note 158, at 2-3; Lund, *supra* note 149, at 5-6.

participation in water resource planning development and making federal technical resources available for such purposes.¹⁶⁴ While this policy was never fully implemented, federal technical resources are available to tribes for purposes of water development planning,¹⁶⁵ which tribes have used to deepen capacities for water resources assessments and to develop and implement supply and restoration projects.¹⁶⁶ However, the skepticism that tends to affect tribal regard for legal processes¹⁶⁷ can tend also to adversely impact tribal willingness to engage in intergovernmental planning efforts; as tribal planner Sharon Hausam puts it, “[a]fter centuries of being excluded, ignored, or misunderstood in decision-making processes, it is reasonable to doubt that regional planning might be an improvement.”¹⁶⁸ Hausam’s comments help to re-ground discussion of engagement efforts in the same history that contributes to the complexities affecting tribal-state water conflict generally.¹⁶⁹

B. State Water Planning and Tribal Engagement: Experiences in California, New Mexico, and Oklahoma

As water management challenges have continued and compounded, states increasingly have turned to water planning to build support for initiatives and to better inform management decisions.¹⁷⁰ However, the question remains, how well have they fared in engaging tribes in state water planning efforts? The next section examines the experience in three states that seem so far to have made the most effort in this regard: California, New Mexico, and Oklahoma.

Collectively, these three states have 171 federally recognized American Indian tribes within their borders—nearly a third of all federally recognized tribal governments throughout the United States.¹⁷¹ Among them, however each differs

164. Thomas W. Fredericks, *Developing a National Indian Water Rights Policy*, in BEST PRACTICES FOR PROTECTING NATURAL RESOURCES ON TRIBAL LANDS 1, 19-20 (Aspatore, 2016).

165. See, e.g., U.S. Bureau of Indian Affairs, *Branch of Water Resources*, <https://www.bia.gov/WhoWeAre/BIA/OTS/NaturalResources/Water/index.htm> (last visited Jan. 18, 2017); U.S. Geological Survey, *USGS and Tribes Work Together to Gain Water Knowledge*, https://water.usgs.gov/coop/tribes_2014.pdf (last visited Jan. 18, 2017); U.S. Geological Survey, *PNW Tribal Water Resources Assessment*, <https://wa.water.usgs.gov/projects/pnwtribal/> (last visited Jan. 18, 2017); U.S. Bureau of Reclamation, *Native American Affairs*, <https://www.usbr.gov/native/> (last visited Jan. 18, 2017).

166. See, e.g., Office of the Tribal Water Engineer Eastern Shoshone & Northern Arapahoe Tribes, *Drought Mitigation Plan*, <http://wrir.wygisc.org/content/drought-mitigation-plan> (last visited Jan. 18, 2017); Spokane Tribe, *Water and Fish Program*, <http://www.spokanetribe.com/dnr-water> (last visited Jan. 18, 2017); CPN Public Information Office, *CPN Water Plan an Example for Oklahoma Tribes*, CITIZEN POTAWATOMI NATION, Feb. 26, 2013 (on file with author).

167. See Pisani, *supra* note 57 and accompanying text; Berkey, *supra* note 57 and accompanying text; Burton, *supra* note 58 and accompanying text.

168. Sharon Hausam, MAYBE, MAYBE NOT: NATIVE AMERICAN PARTICIPATION IN REGIONAL PLANNING, IN RECLAIMING INDIGENOUS PLANNING 162, 169 (Ted Jojola, et al. eds., 2013).

169. See, e.g., *supra* notes 32-76 and accompanying text.

170. See, e.g., Meghan Leemon, *Western Water Planning Processes: Lessons for Colorado*, 17 U. DENV. WATER L. REV. 368, 368 (2014) (noting that “[i]n the west, Arizona, Colorado, and Washington are the only states without comprehensive water plans”); see also Bell & Taylor, *supra* at note 145, at 22.

171. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 5019 (Jan. 29, 2016); See also NATIONAL CONFERENCE OF STATE

from the other with respect to tribal populations and land bases. For example, less than one percent of California's land base is formally recognized as tribal land,¹⁷² much of which is isolated or otherwise extensively checker-boarded; while a greater percentage of lands within Oklahoma are tribally held,¹⁷³ those lands, too, are largely checker-boarded and non-contiguous. In contrast, nearly eleven percent of lands within New Mexico is tribally held,¹⁷⁴ much of it in substantially contiguous parcels.

These variations in size and degree of contiguity contribute to jurisdictional and land ownership diversities that can pose different challenges to water resource management efforts. Each state also varies in its demographics. As indicated in Figure 1, the non-Hispanic white population makes up only a large plurality in California and New Mexico while such population is the significant majority in Oklahoma. Meanwhile, the American Indian population of California is only one percent of the state's total population, less than the national proportion of one and one-fifth percent,¹⁷⁵ while New Mexico and Oklahoma have American Indian populations of approximately nine percent, each.

State	Total population	American Indian only	Non-Hispanic white only	Hispanic only
California	37,254,522	1.0%	40.1%	37.6%
New Mexico	2,059,198	9.4%	40.5%	46.3%
Oklahoma	3,751,351	8.6%	68.7%	8.9%

176

These demographics reflect each states' varied ethnic, cultural, and legal histories, all of which impacts their particular relations with the American Indian tribes within their borders. With this as background, the following discussion examines each of these state's individual efforts to engage tribes in their water plan efforts.

LEGISLATURES, FEDERAL AND STATE RECOGNIZED TRIBES (Oct. 2016), <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx>.

172. U.S. Forest Serv., *Appendix D: Indian Nations* D-3 (1990) <https://www.fs.fed.us/people/tribal/tribexd.pdf>. (Of California's total land base, 520,049 acres are tribal lands, 66,769 are individually allotted tribal lands, and 808 acres are other federal-tribal lands).

173. *See Id.* (illustrating that of Oklahoma's land base, 96,839 acres are held by tribes, 1,000,165 acres are allotted lands, and 2,298 acres are other federal-tribal lands, for an overall share of 2.5%).

174. *See Id.* (illustrating that of New Mexico's land base, 7,252,326 acres are tribal lands, 630,293 are individually allotted lands, and 270,276 are other federal-tribal lands).

175. U.S. CENSUS BUREAU, QUICK FACTS: UNITED STATES, (2010), <https://www.census.gov/quickfacts/table/PST045216/00>.

176. *See* U.S. CENSUS BUREAU, QUICK FACTS: CA, (2010), <http://www.census.gov/quickfacts/table/PST045216/06>; *See also* U.S. CENSUS BUREAU, QUICK FACTS: NM, (2010) <http://www.census.gov/quickfacts/table/PST045216/35>; *See also* U.S. CENSUS BUREAU, QUICK FACTS: OKLA., (2010) <http://www.census.gov/quickfacts/table/PST045216/40>.

I. California

The United States' possession of California began with the signing of the Treaty of Guadalupe Hidalgo in 1848 at the close of the Mexican-American War.¹⁷⁷ As the ink was drying on that treaty, gold was discovered at Sutter's Mill, "prompting a huge influx of Americans seeking their fortunes" and violent conflict between the new migrants, who were backed by the United States military, and the indigenous American Indian peoples who resisted displacement.¹⁷⁸ Of this period of violence and dispossession, California historian Hubert Bancroft said, "[i]t was one of the last human hunts of civilization, and the basest and most brutal of them all."¹⁷⁹ While the federal government made preliminary efforts to secure treaties with the tribes of the region, California's objection to tribal land assignments and reservations scuttled the enterprise.¹⁸⁰ Meanwhile, the California government enacted and implemented laws to effect the disenfranchisement of tribal peoples and expedite the expropriation of tribal resources.¹⁸¹ As a result, tribal populations and holdings were decimated, leaving the vast majority of American Indians "landless" by the dawn of the Twentieth Century.¹⁸² Federal efforts between 1906 and 1934 made some progress in restoring lands and otherwise supporting tribal populations,¹⁸³ but the explosion of California settlement was disastrous for American Indian tribes. Legal scholar Carol Goldberg and sociologist Duane Champagne make the point that, following the gold rush era and "[t]hroughout much of the Twentieth Century, California Indians have been administratively, culturally, economically, and politically disadvantaged, even compared with tribes elsewhere in the United States."¹⁸⁴

During this same period of time, the United States responded to local agricultural producers' call for the development of massive water infrastructure—resulting in the Central Valley Project, a quintessential Bureau of Reclamation project.¹⁸⁵ As historian Donald Worster argues, the Central Valley Project was not only instrumental in engineering water resources in support of epically scaled California agricultural development, it also served to mature the Bureau of Reclamation into "the technical master of water in the richest agricultural region on

177. Treaty of Guadalupe Hidalgo, Mex.-U.S., art. 5, Feb. 2, 1848, 9 Stat. 922.

178. Veronica E. Velarde Tiller, TILLER'S GUIDE TO INDIAN COUNTRY: ECONOMIC PROFILES OF AMERICAN INDIAN RESERVATIONS 359-60 (2005). Accord COHEN'S, *supra* note 2, § 1.03[5], at 58 ("The discovery of gold in California transformed the non-Indian migration westward into a stampede.")

179. Hubert Howe Bancroft, HISTORY OF CALIFORNIA: VOL. VII, 1860-1890 474 (1890).

180. COHEN'S, *supra* note 2, § 1.03[5], at 58-59.

181. See An Act for the Government and Protection of Indians, 1850 Cal. Stat. 408-10 (1850);); Kimberly Johnston-Dodds, *Early California Laws and Policies Related to California Indians*, Cal. Res. Bureau, CRB-02-014, at 5 (2002), <https://www.library.ca.gov/crb/02/14/02-014.pdf>, ("The 1850 Act and subsequent amendments facilitated removing California Indians from their traditional lands, separating at least a generation of children and adults from their families, languages, and cultures (1850 to 1865), and indenturing Indian children and adults to Whites.")

182. Tiller, *supra* note 177, at 360; Accord COHEN'S, *supra* note 2, § 1.03[5] at 59.

183. *Id.*

184. Goldberg and Champagne, *supra* note 72, at 44.

185. *C.f.*, Reisner, *supra* note 21, at 9-10.

earth . . . the indispensable partner of western industrial farming.”¹⁸⁶ In other words, through building some of the West’s most storied water infrastructure, California proved to be the incubator of the federal government’s primary western water developer.

Today, California has within its borders 109 federally recognized American Indian tribes and several other federally unrecognized tribal communities.¹⁸⁷ Few of these tribes have significant contiguous land holdings, and poverty and limited access to infrastructure continue to pose challenges for the health and stability of many tribal communities.¹⁸⁸ At the same, some tribes located near urban centers have been able to capitalize on gaming,¹⁸⁹ which has had significant positive local and statewide economic impact.¹⁹⁰ Perhaps more importantly, success in economic development has provided means for strengthening tribal institutions and potentially enhancing the exercise of tribal sovereignty in an intergovernmental context.¹⁹¹

California has a comprehensive water law system, which includes provisions for the conduct of stream adjudications,¹⁹² and has secured water rights settlements with several American Indian tribes, i.e., the La Jolla, Ricon, San Pasquale, Pauma, and Pala Bands of Mission Indians,¹⁹³ the Pechanga Band,¹⁹⁴ and the Soboba Band of Luiseno Indians.¹⁹⁵ Through its Water Resources Control Board, the state also develops a comprehensive statewide water plan¹⁹⁶ and provides financial, technical resources, and facilitation services support to regional water planning efforts.¹⁹⁷ And in recent years, the state has made significant tribal outreach efforts.¹⁹⁸

186. See Donald Worster, *RIVERS OF EMPIRE: WATER, ARIDITY, AND THE GROWTH OF THE AMERICAN WEST* 256 (1985).

187. See *supra* note 170.

188. E.g., Advisory Council on California Indian Policy, *THE ACCIP ECONOMIC DEVELOPMENT REPORT: ECONOMIC DEVELOPMENT ISSUES OF CONCERN TO INDIANS IN CALIFORNIA I* (1997).

189. *Id.*; see also Mark Fogarty, “California Controls 25 Percent of All Indian Gaming Revenues,” Indian Country Media Network (Mar. 25, 2016) (on file with author). Indeed, modern tribal gaming can be said to have originated among California tribes. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (preempting state effort to shut down tribal gaming operation conducted on tribal lands).

190. California Tribal Gaming Impact Study, *AN UPDATED ANALYSIS OF TRIBAL GAMING ECONOMIC AND SOCIAL IMPACTS, WITH EXPANDED STUDY OF RSTF AND CHARITABLE EFFECTS*, (Beacon Economics, LLC ed. 2014), <https://cniga.com/wp-content/uploads/2017/02/EIS-Final-2014.pdf>.

191. Goldberg & Champagne, *supra* note 72, at 57-59 (“The California tribes’ political battle over gaming also created an economic base that makes it easier to implement their sovereignty, establishing sovereign realities “on the ground” that change options for both state and federal governments.”).

192. See Cal. Water Code §§ 2000-2900 (1943); See, e.g., Decree, *In re Determination of Rights to the Waters of the Scott River Sys.*, No. 30,662 (Cal. App. Dep’t Sup. Ct. Jan. 16, 1980).

193. San Luis Rey Indian Water Rights Settlement Act, Pub. L. No. 100-675, 102 Stat. 4000 (1998); see also San Luis Rey Settlement Agreement Implementation, Pub. L. No. 114-322, § 3605 (2016); *Supra* note 28.

194. See Water Infrastructure Improvements for the Nation Act, *supra* note 28, §§ 3401-02.

195. Soboba Band of Luiseno Indians Settlement Act, Pub. L. 110-297, 122 Stat. 2975 (2008).

196. CAL. WATER CODE §§ 10000-10013 (West 2017).

197. See *id.* § 10013; Cal. Dep’t of Water Res., *Integrated Regional Water Management*, <http://www.water.ca.gov/irwm/> (last visited Sept. 24, 2017); Tom J. Lutterman, P.G., & Scott D. Woodland, P.E.,

Early in the state's outreach efforts, California water law practitioner Curtis Berkey made the case that Indian tribes "acknowledge that California's water planning process may present an opportunity for collaboration in devising water management plans that protect tribal resources and foster cooperation between Tribes and their neighbors," but are "too often seen as merely part of the general public, rather than sovereign entities with enforceable water rights under federal law."¹⁹⁹ He pointed to the Coachella Valley Water District's local water plan, for example, and explained it "contains no evidence that Indian Tribes were consulted in its formulation," notwithstanding the district's inclusion of four Indian reservations comprised of nearly 50,000 acres.²⁰⁰ As he suggested, this omission appears conscious, since the plan admitted it made "no distinctions among 'Indian trust assets and other lands within District boundaries.'"²⁰¹ Berkey contrasted this approach with that of the North Coast Regional Water Quality Control Board, which was "making efforts to include Indian Tribes within that region in development of a water quality restoration plan for the Klamath River Basin, and has held at least one hearing on an Indian reservation affected by the plan."²⁰² Berkey's focus on the Coachella District's omission may have been prescient; four years after he made his case, the district was sued by the Agua Caliente Band of Cahuilla Indians, which has successfully asserted reserved rights to the groundwaters of the Coachella Valley.²⁰³

Berkey suggested several factors that may contribute to the "near invisibility of Indian Tribes in state and regional water planning,"²⁰⁴ including the legal and political complexities of the issues, the history of distrust and hostility among the parties, and the absence of state statute obligating state agency consideration of tribal rights and interests.²⁰⁵ However, California's efforts in recent years indicate it is taking serious steps toward ameliorating some of those concerns.²⁰⁶

For example, in 2009, California formed a Tribal Communications Committee "to advise the California Department of Water Resources on how to

Regional Services: Technical Services Facilitation Services Regional Coordination, Cal. Dep't of Water Res. (n.d.), http://water.ca.gov/irwm/archives/docs/partnership/Module%20A_IRWM%20Regional%20Services.pdf (last visited Sept. 24, 2017). California also requires the development of Urban Water Management Planning Act. *Id.* §§ 10610, -10610.4.

198. *E.g.*, Cal. Dep't of Water Res., *California Water Plan Tribal Water Summit*, ca.gov <http://www.water.ca.gov/waterplan/tribal/tws/index.cfm> (last visited Jan. 28, 2017). California water plan documents are generally available at <http://www.water.ca.gov/waterplan>.

199. Berkey, *supra* note 5, at 1, 3.

200. *Id.* at 2.

201. *Id.*

202. *Id.* at 3.

203. Complaint for Declaratory & Injunctive Relief at 1, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., et al.*, Civ. No. 13-883 (C.D. Cal., May 14, 2013); *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., et al.*, 849 F.3d 1262, 1265 (9th Cir. 2017), *petition for cert. filed*, (U.S. filed July 7, 2017) (No. 17-42).

204. Berkey, *supra* note 5, at 3.

205. *Id.* at 2-3.

206. *E.g.*, Cal. Dep't of Water Res., CAL. WATER PLAN 2013 UPDATE Vol. 1, Ch. 4, at 4-20 to 4-22, http://www.water.ca.gov/waterplan/docs/cwpu2013/Final/05_Vol1_Ch04_Strengthening_Gov_Align.pdf.

better contact, and communicate with, the more than 160 Native American Tribes in California.”²⁰⁷ In that first effort, twenty-seven Tribal representatives participated in the formulation of a written tribal communication plan.²⁰⁸ That same year, the first Tribal Water Summit was held under the water plan’s auspices to provide a forum for relevant discussion and to facilitate coordination of tribal input. (It was in this forum that Berkey presented his paper.)²⁰⁹ The summit produced a detailed set of Recommended Actions for Addressing California Native American Tribal Water Issues,²¹⁰ and thereafter, California took a series of responsive actions designed to increase government-to-government tribal-state engagement, including:

- the formation of a Tribal Advisory Committee, apparently supported by direct outreach to tribal leaders;²¹¹
- the establishment of a California Water Plan’s Tribal Advisory Committee and establishment of the group’s charter;²¹²
- Governor Brown’s issuance of Executive Order B-10-11, which provided that “it is the policy of this Administration that every state agency and department subject to my executive control shall encourage communication and consultation with California Indian Tribes” and “permit elected officials and other representatives of tribal governments to provide meaningful input into the development of legislation, regulations, rules, and policies on matters that may affect tribal communities;”²¹³ and
- pursuant to the governor’s executive order, the creation of the Governor’s Tribal Advisor Office, which reports directly to the state’s chief executive with respect to oversight and implementation of “effective government-to-government consultation between the Governor’s Administration and California Tribes on policies that affect California tribal communities.”²¹⁴

As of 2013, the California Water Plan Tribal Advisory Committee included representation from forty state and federally recognized tribes (15%), plus

207. *Cal. Water Plan Tribal Water Summit*, *supra* note 197. *See id.* (including within its count of tribes state as well as federally recognized tribes); *see also id.* at 4-20 (discussing plan’s definition of “Native American Tribe”).

208. *See* Tribal Comm’n Comm. (TCC), Tribal Communication Plan (Working Draft) 27 (Summer 2008), www.vision.ca.gov/docs/Tribal_Comms_Plan.pdf.

209. *See* Cal. Dep’t of Water Res., Cal. Water Plan Tribal Water Summit (2009), http://www.water.ca.gov/waterplan/docs/tws/CTWS_ProceedingsFull_v2df_02-08-10.pdf.

210. Cal. Tribal Water Summit Planning Team, Recommended Actions for Addressing Cal. Native Am. Tribal Water Issues (Feb. 8, 2010), http://www.water.ca.gov/waterplan/docs/tws/CTWS_SummitNextStepsSorted_v7df_02-08-10.pdf.

211. Letter from Calif. Dep’t of Water Resources Director Mark Cowin to “Dear Sir or Madam” (Nov. 15, 2010), http://www.water.ca.gov/waterplan/docs/tribal_engagement/inviteletter_tribalorganization.pdf.

212. Cal. Water Plan Tribal Advisory Comm. Group Charter (Aug. 6, 2011), http://www.water.ca.gov/waterplan/docs/tac/Final_TribalACCharter.pdf.

213. Calif. Exec. Ord. No. B-10-11 (Sept. 19, 2011), <https://www.gov.ca.gov/news.php?id=17223>.

214. *Governor’s Tribal Advisor Office*, ca.gov, <http://tribalgovtaffairs.ca.gov/>.

two additional tribal organizations,²¹⁵ and in April of that year, the second Tribal Water Summit was held, organized primarily by tribal representatives.²¹⁶ The Proceedings from these summits suggest a significant level of substantive tribal engagement.²¹⁷

The 2013 update to the California Water Plan emphasized three fundamental policy goals: commitment to integrated water management, strengthening of government agency alignment, and investment in innovation and infrastructure.²¹⁸ Notably, the state policy goal of engagement and collaboration with tribal governments is woven throughout the plan's call for strengthening of government agency alignment, generally.²¹⁹ Meanwhile the California Water Plan Tribal Advisory Committee is preparing for the 2018 plan update.²²⁰

2. *New Mexico*

Like California, the United States' possession of New Mexico began at the end of the Mexican-American War and the Treaty of Guadalupe Hidalgo.²²¹ While the United States' acquisition and establishment of the New Mexico Territory triggered its citizens' increased migration to the region, it was not nearly the stampede occasioned by the California gold rush.²²² During this period, the United States surveyed and confirmed American Indian tribal land title previously vested under Spanish and Mexican law,²²³ offering basic protection for some tribal property interests and some stability in the early development of the region. However, the sovereign status of the individual tribal collectives and their relation to the federal common law of Indian affairs was not established until statehood,²²⁴ which led to interim confusion regarding certain land transactions.²²⁵ Still, such tribal status and land bases were confirmed within twenty years of statehood, and the federal law's protection of the rights and powers incident thereto has likewise

215. See CALIF. DEP'T OF WATER RES., CALIF. WATER PLAN UPDATE 2013: TRIBAL ADVISORY COMMITTEE MEMBER LIST (2013); see also CALIF. DEP'T OF WATER RES., CALIF. WATER PLAN UPDATE 2013 TRIBAL ADVISORY COMMITTEE: ACCOMPLISHMENTS 2011-PRESENT (2014).

216. See CALIF. DEP'T OF WATER RES., CALIFORNIA WATER PLAN TRIBAL WATER SUMMIT PROCEEDINGS 7-8 (2013).

217. See *Id.*

218. See CALIF. DEP'T OF WATER RES., CALIFORNIA WATER PLAN UPDATE 2013 INTEGRATED WATER MANAGEMENT: PRESENTATION TO CALIF. WATER COMM'N, 11 (2013).

219. *E.g., Id.* at 10; see also CALIF. DEP'T OF WATER RES., CALIF. WATER PLAN 2013 UPDATE: STRENGTHENING GOVERNMENT ALIGNMENT, *supra* note 205.

220. See, *e.g.*, CALIF. DEP'T OF WATER RES., CALIFORNIA WATER PLAN UPDATE 2018: TRIBAL ADVISORY COMMITTEE ORIENTATION WEBINAR (Oct. 19, 2016).

221. See Treaty of Guadalupe Hidalgo, *supra* note 176.

222. See generally, *supra* note 177-78 and accompanying text.

223. See *e.g.*, Act of July 22, 1854, ch.103, 10 Stat. 308 (1854) (appointing surveyor for evaluation of pre-treaty land claims); Act of December 22, 1858, chap. 5, 11 Stat. 374 (1858) (recognizing multiple Pueblo land grants); Act of February 9, 1869, ch. 26, 15 Stat. 438 (1869) (recognizing additional grant); Act of March 3, 1931, ch. 438, 46 Stat. 1509 (1931) (same).

224. See *U.S. v. Joseph*, 94 U.S. 614, 616-19 (1876); *U.S. v. Sandoval*, 231 U.S. 28, 36-49 (1913).

225. See *e.g.*, Pueblo Lands Act of 1924, ch. 331, 43 Stat. 636 (Jun. 7, 1924); Pueblo Compensation Act of 1933, ch. 45, 48 Stat. 108 (May 31, 1933).

long been affirmed.²²⁶ Today, while challenges remain, the tribes in New Mexico have reclaimed their collective position as a significant part of the region's economy, particularly with respect to tribal gaming;²²⁷ meanwhile the State of New Mexico has evolved over the decades has developed a culturally diverse, fiscally conservative, and generally socially tolerant political atmosphere.²²⁸

New Mexico, situated in the high plains desert of the American southwest, has a long history of water rights litigation and negotiation. Three of its oldest stream adjudications—the *Lewis* adjudication initiated in the 1956,²²⁹ the *Aamodt* adjudication initiated in 1966,²³⁰ and the *Abeyta* adjudication initiated in 1969²³¹—are generations old and have each produced decrees of tribal water rights; in fact, of the twenty-three American Indian tribes with lands in New Mexico,²³² eight have obtained final and enforceable declarations of their water rights through either litigation²³³ or negotiated settlement.²³⁴ As already noted, the unique complexities of Pueblo water rights have so far hindered the development of a uniform standard for defining those rights,²³⁵ but New Mexico has nonetheless established a fairly successful, if slow,²³⁶ tradition of handling tribal water rights matters within traditional adversarial processes. It has also long worked to engage tribal governments in regular water planning efforts.²³⁷

New Mexico's Office of the State Engineer (OSE) and its Interstate Stream Commission (Commission) produced New Mexico's first statewide water plan in 2003²³⁸ and, since then, have produced updates every five years.²³⁹ The

226. See *New Mexico v. Aamodt*, 537 F.2d 1102, 1111 (10th Cir. 1976).

227. See Thaddieus W. Conner and William A. Taggart, *The Impact of Gaming on the Indian Nations in New Mexico*, 90 Soc. Sci. Q. 50 (2009).

228. See Marilyn C. O'Leary, *Water Planning in New Mexico: Enigma, Paradox or Pattern?*, 24 J. LAND RESOURCES & ENV'T'L L. 343, 346-47 (2004).

229. *State ex rel. State Engineer v. Lewis*, 1973-NMSC-035, 508 P.2d 577.

230. *N.M. ex rel. Reynolds v. Aamodt*, 618 F. Supp. 993 (D.N.M. 1985).

231. Procedural and Scheduling Order for Review of Proposed Settlement Agreement and Partial Final Judgement Rights of Taos Pueblo at 8, *N.M. ex rel State Engineer v. Abeyta*, 6:69-CV-07896-MV (D.N.M. 2013).

232. Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 81 Fed. Reg. 5019-23 (Jan. 29, 2016).

233. *State ex rel. Martinez v. Lewis*, 1993-NMCA-063, 116 N.M. 194, 861 P.2d 235 (1993) (decreeing water rights for the Mescalero Apache Tribe).

234. Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064 (providing for the settlement of water rights claimed, respectively, by the Navajo Nation and the Pueblos of Nambé, Pojoaque, San Ildefonso, Taos, and Tesuque); Jicarilla Tribe Water Rights Settlement Act, Pub. L. No. 102-441, 106 Stat. 2237 (providing for the settlement of water rights claimed by the Jicarilla Apache Tribe).

235. See *supra* notes 130-31 and accompanying text.

236. Lucero & Tarlock, *supra* note. 132.

237. NMSA 1978 §§ 72-14-3.1(J) (2003); 72-14-44(B) (1987).

238. Interstate Stream Commission, NEW MEXICO STATE WATER PLAN: WORKING TOGETHER TOWARDS OUR WATER FUTURE (Dec. 23, 2003), <http://www.ose.state.nm.us/Planning/SWP/PDF/2003StateWaterPlan.pdf>, (hereinafter, "NM 2003 Plan.").

239. Interstate Stream Commission, WORKING TOWARD SOLUTIONS: INTEGRATING OUR WATER AND OUR ECONOMY, STATE WATER PLAN 2013 REVIEW (2013) [hereinafter NM 2013 Plan Review]; Interstate Stream Commission, REVIEW AND PROPOSED UPDATE N.M. STATE WATER PLAN (June 2008)

state developed the narrative substance of its first plan through extensive public input, including twenty-nine public meetings in which approximately 1,500 individuals participated,²⁴⁰ the plan offered the following declaration:

The [Commission and OSE] shall consult directly with the governments of Indian nations, tribes and pueblos to formulate a statement of policy and process to guide: (1) coordination or integration of the water plans of Indian nations, tribes and pueblos located wholly or partially within New Mexico with the state water plan; and (2) final adjudication or settlement of all water rights claims by Indian nations, tribes and pueblos located wholly or partially within New Mexico.²⁴¹

This declaration is now included in New Mexico's water law statutes.²⁴²

Contemporaneous with this declaration, New Mexico took steps to formalize mechanisms for intergovernmental tribal-state engagement and collaboration. The first step, in 2003, was Governor Bill Richardson's uniting of leaders from tribes throughout the state to sign a joint Statement of Policy and Process to, among other things, "establish and promote a relationship of cooperation, coordination, open communication and good will, and work in good faith to amicably and fairly resolve issues and differences."²⁴³ Two years later, Governor Richardson issued Executive Order 2005-004, relating to the Statewide Adoption of Tribal Consultation Plans.²⁴⁴ Finally in 2009, New Mexico enacted its State-Tribal Collaboration Act, which directed the establishment of tribal liaison positions in each agency of state government, the training of state employees in cultural competencies, and the development of state-tribal communication and collaboration policies and capacities.²⁴⁵ In short, during this relatively short period of time, New Mexico took several specific and concrete actions to develop and refine its ability to engage directly and in a government-to-government capacity with American Indian tribes located within its borders.

Meanwhile, in its 2013 Plan Review, the Commission and OSE provided a substantive update on the progress of tribal-state engagement, reporting that long-

[hereinafter NM 2008 Review]. New Mexico water plan documents are generally available at <http://www.ose.state.nm.us/Planning/>.

240. O'Leary, *supra* note 227, at 345.

241. NM 2003 Plan, *supra* note 237, Sec. E at 73. The statement expands on this policy declaration to include statements that the state water planning process "will not limit Pueblo or Tribal water claims," that the state will engage in good faith on a "government-to-government" basis, and that the state recognizes the unique cultural importance of water to American Indian communities and the paramount importance of tribal sovereignty. *Id.*

242. NMSA 1978, § 72-14-3.1(E) (2003).

243. STATEMENT OF POLICY AND PROCESS (Jan. 17, 2003), https://www.env.nm.gov/OOTS/Tribal_Liaison/statement_pp.pdf.

244. STATEWIDE ADOPTION OF TRIBAL CONSULTATION PLANS (Feb. 1, 2005), <http://archives.elpalacio.org/cdm/ref/collection/p267801coll5/id/2634>; *see generally*, Richard Nichols and George Colyer, PILOT TRIBAL CONSULTATION EFFORTS BY THE STATE OF NEW MEXICO: STUDY OF THE IMPLEMENTATION OF EXECUTIVE ORDER 2005-004, (Jun. 2009), <https://www.cms.gov/Outreach-and-Education/American-Indian-Alaska-Native/AIAN/Downloads/Pilot-Tribal-Consultation-Efforts-by-the-State-of-New-Mexico.pdf>.

245. NMSA 1978, §§ 11-18-1 to -5 (2009).

standing efforts to achieve negotiated water right settlements with the Navajo Nation and the Pueblos of Nambe, Taos, Tesuque, Pojoaque, and San Ildefonso had been successful since the 2003 plan's release.²⁴⁶ The agencies also reported that the New Mexico Legislature had recently enacted the Indian Water Rights Settlement Fund and appropriated \$35 million toward the three tribal water settlements.²⁴⁷ Finally, though less remarkably, the agencies reported that they had "met with the Tribes, Pueblos and Nations in public meetings over the course of the past ten years to address water planning goals. All the parties involved have a strong commitment to create a mutually agreeable statement of policy and process to guide coordination and integration of the water plan."²⁴⁸

In addition to its statewide plan, New Mexico conducts regional water planning, which provides tribe-specific engagement data.²⁴⁹ The Commission generally provides central oversight and guidance, while "self-defined water planning regions" perform data collection and water planning strategy prioritization.²⁵⁰ The regional process emphasizes the value of public engagement but provides that "the extent and nature of public involvement in the regional water planning process is the prerogative of each region"²⁵¹

As to tribal engagement, the Commission's regional planning handbook offers:

Indian tribes and pueblos are a key stakeholder group in New Mexico. The [Commission] has a tribal liaison and conducts periodic tribal summits on water resource issues. The state and the regions will encourage tribal participation in the regional and state water plan updates. However, the state respects tribal sovereignty and will abide by tribal decisions regarding the extent of their participation in the process.²⁵²

Of New Mexico's sixteen planning regions, seven (44%) included significant tribal lands and waters, and a review of the 2016 regional plan updates²⁵³ indicates

246. NM 2013 Plan Review, *supra* note 237, at 26-27.

247. *Id.* at 28.

248. *Id.*; *see generally* Nichols & Colyer, *supra* note 243.

249. NMSA 1978, § 72-14-43 and -44 (2007).

250. John R. Brown, "Whisky's Fer Drinkin'; Water's Fer Fightin'!" *Is it? Resolving a Collective Action Dilemma in New Mexico*, 43 NAT. RESOURCES J. 185, 194-95 (2003). New Mexico's planning regions are based on a blended consideration of the natural and the political, i.e., "[a] water planning region . . . is an area within the state that contains sufficient hydrological and political interests in common to make water planning feasible." NMSA 1978, § 72-14-44(D) (1987).

251. New Mexico Interstate Stream Commission, UPDATED REGIONAL WATER PLANNING HANDBOOK: GUIDELINES TO PREPARING UPDATES TO NEW MEXICO REGIONAL WATER PLANS 5 (Dec. 13, 2015).

252. *Id.* at 7.

253. *See generally*, Regional Water Planning, http://www.ose.state.nm.us/Planning/regional_planning.php.

consistent efforts to integrate tribal voices and issues—an effort regional planners appear focused on continuing to evaluate and potentially improve.²⁵⁴

For example, as tabulated in Figure 2, six (86%) of the seven water planning regions included representation from tribal governments on their steering committees, and the seventh indicated that tribal leaders had been invited but did not report participation. Of the twenty-three tribes in New Mexico, ten (43%) participated through appointees to regional planning steering committees, with four (17%) participating in multiple regions.²⁵⁵ Thirteen (57%) appear not to have participated in any regional planning body.²⁵⁶

Planning Region	No. of Tribes Within Region	No. of Tribes on Steering	Tribal Participation Rate
Region 2 (San Juan)	3	1	33%
Region 3 (Jemez y Sangre)	8	3	38%
Region 6 (Northwest New Mexico)	4	4	100%
Region 7 (Taos)	2	0	0%
Region 10 (Lower Pecos)	1	1	100%
Region 12 (Middle Rio Grande)	12	2	17%
Region 14 (Rio Chama)	2	2	100%

As to the relationship between participation in water planning and traditional adversarial processes, there seems little relationship. For example, seven (70%) of the ten tribes that participated in regional water planning are also party to ongoing stream adjudications,²⁵⁷ of the five non-participating tribes that are already party to ongoing stream adjudications, three (60%) are party to the same case,²⁵⁸ which may suggest the possibility of a cause specific to that proceeding, and one

254. N.M. Reg'l Water Plan. Governance Study Grp., Tribal Participation: Draft (2015), <http://www.waterassembly.org/Archives/Water%20Assembly%20Documents/GSG06b-Tribal%20Participation.pdf>. (evaluating and proposing reforms to state's outreach efforts).

255. See 2016 Regional Planning Reports, *supra* note 252, Navajo Nation participated in Regions 2 and 6, appearing not to have participated in Region 12; Jicarilla Nation participated in Region 14, appearing not to have participated in Regions 2 and 12; Santa Clara Pueblo participated in Regions 3 and 14, appearing not to have participated in Region 12; Laguna Pueblo participated in Regions 6 and 12; Pojoaque and Tesuque Pueblos participated in Region 3; Acoma and Zuni Pueblos participated in Region 6; Mescalero Apache Nation participated in Region 10; and Sandia Pueblo participated in Region 12.

256. See *id.* Ute Mountain Ute Tribe, Ohkay Owingeh, Cochiti Pueblo, Kewa, Nambe Pueblo, San Ildefonso Pueblo, Taos Pueblo, Picuris Pueblo, Isleta Pueblo, Jemez Pueblo, San Felipe Pueblo, Santa Ana Pueblo, and Zia Pueblo.

257. See *id.* Acoma Pueblo, Jicarilla Nation, Laguna Pueblo, Mescalero Apache Tribe, Navajo Nation, Santa Clara Pueblo, and Zuni Tribe, though two of these tribes (Jicarilla and Mescalero) have already obtained a decree of rights.

258. See *id.* Jemez Pueblo, Santa Ana Pueblo, and Zia Pueblo, each of whom is a claimant in the Jemez adjudication, New Mexico, *ex rel.* State Engineer v. Abousleman, et al., 83cv01041 (D.N.M. July 5, 2012).

(20%) has very limited land holdings in New Mexico,²⁵⁹ with the majority of its lands lying within Colorado's borders, which suggests tribal priorities may lie north of the state line. Furthermore, while it may be a safe assumption that participation in an active adjudication would dissuade a tribe from engagement in collaborative water planning, three (23%) of the non-participating tribes are party to completed water right settlements that resolved their water right claims,²⁶⁰ a status that should reduce perception and concern of legal risk associated with intergovernmental cooperative engagement. Admitting that this is a small sample size, these numbers do not suggest any clear correlation between participation in regional water planning and participation in active litigation or formal negotiations; whether to participate or not in planning efforts seems a decision made without necessary regard to prior or contemporaneous participation in litigation or negotiation efforts.

Finally, each of the 2016 regional planning reports include discussions of applicable tribal water codes and water quality standards applicable to water use within their boundaries—discussing, for example, the Jicarilla Nation's water code as well as its water and wastewater utility codes and water quality standards promulgated by seven tribes.

3. Oklahoma

The United States acquired the lands that now comprise Oklahoma as part of the Louisiana Purchase,²⁶¹ a portion of which was set aside from the public domain for purposes of implementing President Andrew Jackson's Indian removal policies.²⁶² During the pre-statehood period, tens of thousands of American Indians were forcibly removed from their aboriginal homelands, effectuating the near complete ethnic cleansing of the United States east of the Mississippi as tribes were relocated to treaty lands in what was loosely denominated Indian Territory.²⁶³ Those tribes were not long alone in their new homelands, however.

Following the American Civil War, American expansion came to Indian Territory.²⁶⁴ Expedited by post-war enthusiasm for western development and new treaties that allowed the railroads access to tribal lands,²⁶⁵ American Indians were

259. *See id.* Ute Mountain Ute Tribe, which is primarily located within the borders of Colorado.

260. *See id.* Nambé Pueblo, San Ildefonso Pueblo, and Taos Pueblo.

261. *E.g.*, *Louisiana Purchase*, <http://www.historynet.com/louisiana-purchase> (last visited Sept. 8, 2017).

262. COHEN'S, *supra* note 2, § 1.03[4][a], at 31.

263. *Id.* at 44-51 (discussing legal history of President Jackson's removal policy, concluding "by 1850, the majority of Indian tribes had been removed from the eastern states."); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 622-27 (1970) (discussing removal treaties, Indian Territory, and formation of the State of Oklahoma). *See generally*, e.g., Amanda L. Paige, et al., CHICKASAW REMOVAL 23-70 (2010); *see also*, L. Susan Work, THE SEMINOLE NATION OF OKLAHOMA: A LEGAL HISTORY 3-4 (2010).

264. *See* David A. Nichols, LINCOLN AND THE INDIANS: CIVIL WAR POLICY AND POLITICS 204-06 (U. of Mo. Press 1978) (discussing post-war initiation of federal efforts to set up centralized territorial government in Indian Territory).

265. *Id.* at 163-64; *see also* COHEN'S, *supra* note 2, § 1.03[8]; BLUE CLARK, INDIAN TRIBES OF OKLAHOMA: A GUIDE 13 (U. of Okla. Press: Norman 2009); Daniel F. Littlefield, *The Chickasaw*

soon overwhelmed by non-Indian migrants. Within the first decade of the new century, Congress again imposed and coerced the dismantlement of tribal treaty homelands to make way for Oklahoma's entry as the forty-sixth state,²⁶⁶ a process that included massive government-sponsored land runs that facilitated an overwhelming inflow of non-tribal settlement.²⁶⁷ The establishment of the State of Oklahoma seems to have been contemporaneously presumed to have effectuated the erasure of the tribal communities and systems on which it was superimposed,²⁶⁸ and as a result of the policies attendant to that goal, tribal peoples were reduced to a remarkable level of poverty and disenfranchisement under new state law systems. As Oklahoma historian Angie Debo observed in 1951 with respect to the Five Tribes of eastern Oklahoma, "they were protected theoretically by laws and courts, which they did not understand and could not use; actually the whole legal system of Eastern Oklahoma was warped to strip them of their property"²⁶⁹ as result, "[t]hese Indians, who less than fifty years ago owned half of what is now the state of Oklahoma, live in appalling poverty."²⁷⁰

But the later decades of the Twentieth Century saw a remarkable resurgence of tribal governance in Oklahoma.²⁷¹ Beginning with the American Civil Rights movement, grassroots tribal leaders emerged to reorganize efforts to take back control of tribal assets and rebuild tribal institutions.²⁷² Among other successes, these efforts led to the enactment of the Principal Chiefs Act,²⁷³ which ended federal law limitations on tribal selection of leaders of Oklahoma tribes, and to litigation that culminated in the revitalization of pre-statehood tribal constitutions—sources of organic tribal national sovereignty that survived Oklahoma statehood.²⁷⁴ Today, thirty-eight federally recognized American Indian tribes are located within Oklahoma's borders,²⁷⁵ many of whom have helped establish a regionally robust gaming economy, resulting in tribal governments serving collectively as a major economic engine in modern Oklahoma, particularly its rural areas.²⁷⁶

Freedmen: A People Without A Country, in CONTRIBUTIONS IN AFRO-AMERICAN AND AFRICAN STUDIES No. 54, at 40-45 (Greenwood Press 1980).

266. Proclamation No. 780 (Nov.16, 1907).

267. *E.g.*, W. David Baird and Danney Goble, OKLAHOMA: A HISTORY 141-48 (U. of Okla. Press: Norman 2008).

268. *See, e.g., Last Indian Legislation, Chickasaw Legislature Has Held Last Session*, DAILY ARDMOREITE Sept. 16, 1907, at 1 (describing dismantlement of tribal government on eve of Oklahoma statehood).

269. Angie Debo, THE INDIAN RTS. ASS'N., THE FIVE CIVILIZED TRIBES OF OKLAHOMA: REPORT ON SOCIAL AND ECONOMIC CONDITIONS I (1951).

270. *Id.* at 4.

271. *E.g.*, Clark, *supra* note 264, at 16-17.

272. *E.g.*, Phillip Carroll Morgan, CHICKASAW RENAISSANCE 96-109 (Chicksaw Press 2010).

273. An Act to authorize each of the Five Civilized Tribes of Oklahoma to popularly select their principal officer, and for other purposes, Pub. L. 91-495, 84 Stat. 1091.

274. *See Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).

275. Steven C. Agee, Okla. City U. Econ. Res. & Pol'y Inst., THE STATEWIDE IMPACTS OF OKLAHOMA TRIBES 3 (2012).

276. *Id.* at 3; Catherine Sweeney, *Tribes provide counties, towns with money for roads, internet access*, THE JOURNAL RECORD, Jan. 25, 2017, at 1.; *Report: Oklahoma tribes paid state \$1.123 billion*

Meanwhile, Oklahoma's mechanisms for tribal-state relations regarding water are uncertain. As a general matter, the state governor, whose staff includes a statutorily designated Native American Liaison,²⁷⁷ is authorized "to negotiate and enter into cooperative agreements on behalf of the state with federally recognized Indian tribes" within the state to address issues of mutual interest.²⁷⁸ While the state has secured numerous tribal-state compacts through this and associated mechanisms, the governor's authority is explicitly curtailed with respect to any agreement "involving the surface water and/or groundwater resources of this state or which in whole or in part appertains surface and/or groundwater ownership."²⁷⁹ The state has developed no water compact through this mechanism, and it has otherwise had very little experience of water rights litigation, in general; what litigation it has had has been locally idiosyncratic²⁸⁰ or otherwise lost in the complexities of the state's unique water law system, giving rise to significant uncertainties.²⁸¹

Oklahoma enacted its first water planning statute in 1963, which called for the development of "statewide and local plans to assure the best and most effective use and control of water to meet both the current and long-range needs of the people of Oklahoma."²⁸² Relying on data from state and federal agencies, the Oklahoma Water Resources Board (Board) produced the first phase of a statewide water plan in 1975,²⁸³ which included the following policy declaration:

The overall objective of the Plan is the maximum utilization of the State's water resources for all citizens. Because State law notes that all stream water originating in or flowing through the State, within limits of interstate compacts, is the property of the State of Oklahoma, tribes must file for water rights. Equal care is taken to ensure that these water rights are protected. Stream and ground water rights currently held by various tribes were given full consideration in the formulation of the plan to ensure this protection, and water needs for present and long-range tribal development have also been considered.²⁸⁴

since 2006, THE OKLAHOMAN, Jan. 24, 2017, <http://newsok.com/article/5535467> (noting \$7.2 billion operations and construction impact, "of which 60 percent was in rural areas").

277. OKLA. STAT. tit. 74 § 7401207 (2014).

278. OKLA. STAT. tit. 74, § 74-1221 (B)-(C)(1) (2014).

279. OKLA. STAT. tit. 74, § 1221(C)(3) (2012); OKLA. STAT. tit. 74 § 1221(A) (2012).

280. *E.g.*, Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface in the Pre-1963 Period*, 22 OKLA. L. REV. 1 (1969); Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface Under the 1963 Amendments*, 23 OKLA. L. REV. 19 (1970).

281. *See, e.g.*, Gary Allison, *Oklahoma Water Rights: What Good Are They?*, 64 OKLA. L. REV. 469 (2012) (criticizing Oklahoma water law instability based on uncertainties relating to riparian rights, the failure to address hydrologic interconnections, and the embrace of groundwater mining principles).

282. OKLA. STAT. tit. 82, § 1085.2 (2012).

283. OKLA. Water Res. Bd., PHASE I: OKLAHOMA COMPREHENSIVE WATER PLAN (1975) [hereinafter Okla. 1975 Plan]. Oklahoma water plan documents are generally available at <http://www.owrb.ok.gov/supply/ocwp/ocwp.php>.

284. *Id.* at Summary 7-8.

Again not appearing to provide for public participation, the Board produced its first full water plan in 1980, in which it stated the following:

In regard to Indian water rights, the State of Oklahoma recognizes the Winters Doctrine . . . , which doctrine maintains that water rights may be attached to Indian reservations created by lawful means, i.e., treaties, acts of Congress or executive orders. However, it should be noted that no Indian reservations presently exist in Oklahoma, with those previously existing being substantially dissolved by allotment of lands in severalty during the period of time from 1891 through 1906. The future water needs of Oklahoma's substantial Indian population have been considered within the water requirement projections included in the Oklahoma Comprehensive Water Plan.²⁸⁵

Both of these statements manifest a specific view of and attitude toward tribal water rights—one which directly discourages tribal participation or invocation of federal law rights.

The Board did not update its water plan again until 1995,²⁸⁶ but this time, it significantly engaged public input via two Water Plan Advisory Committees—a Citizens Advisory Committee, which brought a “grass-roots perspective to the planning table,” and a Technical Advisory Sub-Committee, which “allowed state and federal water agencies to contribute their knowledge and experience.”²⁸⁷ There is no indication in the 1995 Update of any outreach to American Indian tribes; though, outside of these processes, other matters may have affected the state's approach.

First, after years of litigation,²⁸⁸ the state and several tribes negotiated and were now implementing significant tax compacts,²⁸⁹ opting for negotiated intergovernmental cooperation rather than conflict. Likewise, the state and several tribes entered into gaming compacts pursuant to the Indian Gaming Regulatory Act,²⁹⁰ producing positive economic impacts that have proven instrumental in rebuilding tribal institutions, programs, and services.

Second, the Chickasaw Nation and Choctaw Nation of Oklahoma asserted their water rights during this period to object to a state effort to sell water

285. Okla. Water Res. Bd., OKLAHOMA COMPREHENSIVE WATER PLAN 11 (1980) [hereinafter Okla. 1980 Plan].

286. Okla. Water Res. Bd., UPDATE OF THE OKLAHOMA COMPREHENSIVE WATER PLAN (1995) [hereinafter Okla. 1995 Update].

287. *Id.* at 6.

288. *E.g.*, Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995); Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993); Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991); Oklahoma Tax Comm'n v. Graham, 489 U.S. 838 (1989).

289. *E.g.*, OKLA. STAT. tit. 68, § 346 (2014) (authorizing the state executive to enter tobacco tax compact with tribal sovereigns); OKLA. STAT. tit. 68, § 500.63 (2013) (same with respect to motor fuel taxes). The full collection of tribal-state compacts in Oklahoma are available at the website of the Oklahoma Secretary of State: <https://www.sos.ok.gov/gov/tribal.aspx>.

290. *See* OKLA. STAT. tit. 3A, §§ 261 (codifying model state-tribal compact offer).

originating from the tribes' historic treaty territory to out-of-state water users.²⁹¹ Those tribal claims triggered a new era in the handling of tribal water rights in Oklahoma, as suggested by the 1995 Plan's statement:

Indian water rights in Oklahoma concern both fundamental sovereignty and water quantity and quality. Indian claims to water rights could have a significant effect on existing state water law as well as the current system of water rights administration and water quality regulation in Oklahoma.²⁹²

Consistent with this new recognition of the subject matter significance, the Board included in the 1995 Update a call for increased outreach, partnership, and the identification of specific projects the state and tribes could pursue jointly in an effort to “develop a level of trust” and seek resolution of “the Indian water rights issue in a non-confrontational manner. . . .”²⁹³ The primary efforts toward this end were spent on addressing Chickasaw and Choctaw opposition to the state's plan to sell water to Texas water users and coming to terms on a possible compact.²⁹⁴ However, those efforts failed to produce a compact and, instead, resulted in the state legislature's restricting the Governor's compacting authority, as already described.²⁹⁵

Prior to the completion of its next 2012 water plan update, three new developments further affected tribal-state relations. First, in a natural resources damages lawsuit Oklahoma filed against poultry farmers in the upper Illinois River watershed, the federal district court issued a July 2009 dismissal of state claims on the grounds that the Cherokee Nation, which was not a party to the action and could not be joined due to its sovereign immunity, had “a real and substantial interest in some as-yet undetermined portion of the waters of the Illinois River.”²⁹⁶ The court dismissed the state's damages claims notwithstanding an agreement its Attorney General had entered with the Cherokee Nation on the subject,²⁹⁷ nor would it later allow the Cherokee Nation to intervene, concluding such motion was untimely.²⁹⁸ In short, the unanswered questions relating to tribal water rights in Oklahoma resulted in the state's inability to pursue a high-profile integrated resource damages claim.²⁹⁹

291. Lambert, *supra* note 71, at 209-10.

292. Okla. Water Res. Bd., *supra* note 285, at 119.

293. *Id.*

294. See Okla. H. Con. Res. 1066 (1999) (directing Oklahoma Water Resources Board to work with the Choctaw Nation, the Chickasaw Nation, and local representatives on the development and protection of the Kiamichi River); see also Okla. Water Res. Bd., FINAL REPORT: KIAMICHI RIVER BASIN WATER RESOURCES DEVELOPMENT PLAN (2000), [https://www.owrb.ok.gov/studies/report s/reports_pdf/KiamichiWRDPlan_2000.pdf](https://www.owrb.ok.gov/studies/report%20s/reports_pdf/KiamichiWRDPlan_2000.pdf); Okla. Water Res. Bd., JOINT STATE/TRIBAL WATER COMPACT & WATER MARKETING PROPOSALS (2002).

295. See *supra* note 278 and accompanying text; see also Mark A. Willingham, *The Oklahoma Water Sale Moratorium: How Fear and Misunderstanding Led to an Unconstitutional Law*, 12 U. DENV. WATER L. REV. 357 (2009).

296. Tyson, 258 F.R.D. at 479.

297. *Id.* at 475-76.

298. Oklahoma *ex. rel.* Edmondson v. Tyson Food, Inc., et al., 619 F.3d 1223, 1226 (10th Cir. 2010).

299. Greetham, *supra* note 5, at 599-601.

Next, in May 2010, a state policy group coordinated with the Board to hold a multi-day, state-wide public input session on water and water resource matters as an adjunct to the state's water planning efforts. This session produced a final report, which included the following consensus policy recommendation:

State/Tribal Issues. State and tribal issues must be resolved through meaningful government-to-government negotiations, preservation and building up on history of “good neighbor” relations, and implementation of the specific recommendations made on this subject in the 1995 state water plan so that the state and tribes can work cooperatively and more efficiently to resolve water issues. Tribal governments should be involved in the development of the 50 Year Water Plan so as to best address tribal water issues³⁰⁰

This statement, produced through a consensus-based public input process, marked a significant departure from the prior discussed state policy statements concerning tribal relations and water.

Finally, in August 2011, Oklahoma faced its first tribal water litigation when the Chickasaw and Choctaw filed suit to stop a proposed trans-basin water project affecting their historic treaty territories.³⁰¹ In this suit, the tribes argued Oklahoma was preempted from exercising state law authority over the proposed transfer without federal law inquiry into the potential impact such administrative action would have on the tribes' claimed treaty right to a sustainable homeland.³⁰² The tribes alleged that resort to litigation was necessary because the state has not taken seriously their prior efforts to seek cooperative resolution.³⁰³

In response, Oklahoma's former Attorney General Scott Pruitt, who now serves as Administrator of the United States Environmental Protection Agency under President Donald Trump, personally wrote to Oklahoma citizens in several of the affected basins to express the state's position that, one, it was “doubtful” the tribes had any water rights whatsoever and, two, responsive litigation, i.e., a state-filed general stream adjudication, was the only means available “to move forward with any confidence that [the state] will not be plagued with claims of Tribal rights again and again in the future as either moods or tribal leaders change.”³⁰⁴ Through his office, he then represented to the Oklahoma Supreme Court that the tribes'

300. Okla. Acad. Town Hall Nat'l Emp. Dev. Ctr., WATER: FINAL REPORT 9 (2010), https://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/TownHall_FinalReport.pdf.

301. E.g., Felicity Barringer, *Indians Join Fight for an Oklahoma Lake's Flow*, N.Y. Times, Apr. 11, 2011, at A1; Stephen H. Greetham, *Water Policy in the Former Indian Territory: Chickasaw, Choctaw, and Oklahoma at a Crossroads over Sardis Reservoir*, 82 THE WATER REPORT 1 (2010); David Moon, *Oklahoma Water Storage: Tribal Concerns Raised*, 79 THE WATER REPORT (2010).

302. Complaint at 5, Chickasaw Nation and Choctaw Nation of Oklahoma v. Fallin, No. 5:11-CV-927 (W.D. Okla., Aug. 18, 2011).

303. E.g., Okla. Water Res. Bd., SPECIAL MEETING OFFICIAL MINUTES 8 (2010) (recording Choctaw Nation Chief Pyle's request that state delay action on controversial water project); Letter from Governor Bill Anoatubby and Chief Greg Pyle to Governor Mary Fallin (Aug. 18, 2011) (on file with author); Letter from Michael Burrage to Attorney General Scott Pruitt (Aug. 18, 2011) (on file with author).

304. Letter from Oklahoma Attorney General E. Scott Pruitt to “Oklahomans and Others with water rights to protect” at 4-5 (Feb. 10, 2012) (on file with author).

lawsuit put “the very future of [the] State of Oklahoma” at risk, warning that the “State could become an economic dust bowl” if the tribal lawsuit proceeded in federal court.³⁰⁵

In the midst of (and contrast to) this rancor, the Board completed its most recent water plan update³⁰⁶ and, in doing so, for the first time included specific outreach to tribal governments. This outreach began prior to the litigation through the Board’s contracting a member of the University of Oklahoma College of Law faculty to serve as liaison with tribal representatives in a series of informal consultations.³⁰⁷ These consultations, the tribal participants to which were not disclosed, resulted in a report and recommendations that differed starkly from the Attorney General’s contemporaneous legal position.³⁰⁸ Specifically, the report and the 2012 plan update’s policy recommendations regarding tribal water issues emphasized the substantive reality of unaddressed tribal water rights in Oklahoma³⁰⁹ and focused on the state’s lack of process for tribal-state engagement, calling on it to:

- identify what state government entity has the authority to develop a tribal-state water rights negotiation process, to conduct such negotiations, and approve any product of negotiation once completed;
- establish an authorized team to work with tribal representatives on the development of a negotiation process;
- engage with tribes, pursuant to such established process, to complete binding negotiated resolution of claims; and
- develop and implement tribal-state consultation protocols.³¹⁰

Oklahoma has taken no specific legislative or administrative steps based on its 2012 Update’s recommendation, though in August 2016, Oklahoma and the Chickasaw and Choctaw Nations announced a comprehensive settlement of litigation that addressed the proposed trans-basin project and included a framework for tribal-state engagement on future water permitting and planning.³¹¹

305. Application to Assume Original Jurisdiction at 4, Okla. Water Res. Bd. v. United States, No. 110375 (Okla. S. Ct., Feb. 10, 2012).

306. Okla. Water Res. Bd., OKLAHOMA COMPREHENSIVE WATER PLAN: EXECUTIVE REPORT (2012).

307. Okla. Water Res. Bd., OKLAHOMA COMPREHENSIVE WATER PLAN SUPPLEMENTAL REPORT: TRIBAL WATER ISSUES & RECOMMENDATIONS (2011).

308. Update of the Oklahoma Comprehensive Water Plan, Executive Report, *supra* note 305, at 13; Oklahoma Comprehensive Water Plan, Tribal Water Issues and Recommendations, *supra* note 306, at 9.

309. Update of the Oklahoma Comprehensive Water Plan, Executive Report, *supra* note 305, at 35-36 (observing regarding tribal water claims in Oklahoma that “judicial rules of treaty construction—that treaties with Tribes are to be interpreted as the Indians would have understood them, that ambiguities in Indian treaties are to be liberally construed in favor of the Indians—tend to favor the tribal position”).

310. *Id.* at 13 (stating the policy recommendation of “Building Cooperation to Avoid Future Conflict and Remove Uncertainties to Water Use”).

311. Joe Wertz & Logan Layden, INSIDE THE LANDMARK STATE AND TRIBAL AGREEMENT THAT ENDS STANDOFF OVER WATER IN SOUTHEAST OKLAHOMA, NPR.com, (Aug. 12, 2016), <https://stateimpact.npr.org/oklahoma/2016/08/12/inside-the-landmark-state-and-tribal-agreement-that-ends-standoff-over-water-in-southeast-oklahoma/>.

C. Observations on the Experiences in California, New Mexico, and Oklahoma

The experiences of California, New Mexico, and Oklahoma show a range of approaches and results: California and New Mexico have achieved a significant level of tribal engagement, while Oklahoma has not.

With respect to the historical and relational context, none of these states depart markedly from the generalized discussion of Part II.³¹² One might suggest that California and Oklahoma, both of which were founded in contexts that involved substantial tribal dispossessions enacted by law and violence, would problematize their outreach efforts. Indeed, Berkey intimated as much,³¹³ and the apprehension of tribes to participate in Oklahoma's planning process is documented;³¹⁴ on the other side of the table in Oklahoma, its litigation positions continue to adhere to arguments that cast tribal treaty rights as presenting an existential threat to the state itself, suggesting a significant hostility regarding tribal sovereignty.³¹⁵ Notwithstanding both states' having difficult histories, their approaches and experiences differ markedly, however— with California's outreach and engagement obtaining positive tribal response after only a few years' effort, while Oklahoma's fractured approach has failed to engage directly with tribes, despite having identified it as a policy priority twenty years ago.

With respect to legal processes, each state has significant experience litigating and negotiating with tribal governments. In California and New Mexico, this experience includes engagement over water rights, which has been playing out for decades, and has produced numerous tribal water right settlements.³¹⁶ Conversely, though it has had substantial experience in the litigation and negotiation of compacts with American Indian tribes on other complex intergovernmental matters,³¹⁷ Oklahoma has participated in only one tribal water lawsuit and negotiation, which was only recently initiated and completed.³¹⁸ While Oklahoma's relative lack of experience in water resource litigation and negotiation may be relevant, the experience of each state suggests an ability to bridge complex differences with tribal sovereigns and to find cooperative approaches on divisive issues.

312. See *supra* notes 9-76 and accompanying text.

313. Berkey, *supra* note 5, at 2.

314. Tribal distrust of state planners is evident in the 2011 supplemental report to the Oklahoma Comprehensive Water Plan, Tribal Water Issues & Recommendations, *supra* note 306, which records concerns, based on the state's failure to implement prior policy statements regarding tribal outreach "that their interests were being ignored", at 2; likewise, the anonymous tribal participants expressed distrust that their participation "would be construed as support for the end product" even though they "lack[ed] control over that product", at 3; other concerns focused on the state's potential to use any information a tribe may provide against them in future legal proceedings regarding water rights", at 2.

315. See *supra* notes 303-04, and accompanying text. Cf. *Osage Nation v. Okla.*, ex rel. Okla. Tax Comm'n, 597 F. Supp. 2d 1250, 1254 (N.D. Okla. 2009) (ruling against tribal preemption argument and, in so doing, emphasizing the state attorney general's arguments of the "staggering" implications and near-existential threat occasioned by the tribe's jurisdictional argument).

316. See *supra* notes 191-94, 228-33, and accompanying text.

317. See *supra* notes 276-77, 288-89, and accompanying text.

318. See *supra* notes 300-04, 310, and accompanying text.

Finally, in each of these states, American Indian tribal communities have successfully engaged in tribal institution building and economic development initiatives in accord with federal self-determination policies,³¹⁹ which create additional opportunities for mutually beneficial intergovernmental alliances.³²⁰ Rather than suggest challenges, this characteristic would suggest a greater likelihood of success for tribal-state engagement, if the effort were properly framed and supported.

Turning to the details of each state's effort, larger distinctions appear. Specifically, success appears driven by the substance and institutional foundation for outreach efforts. New Mexico's and California's outreach, for example, specifically included a focus on establishing known mechanics and protocols for intergovernmental engagement. Both states established high-level liaisons within their respective chief executive's offices and have launched agency-specific implementation strategies and projects across state government. Furthermore, both states developed the mechanics and protocols for intergovernmental engagement through government-to-government talks with American Indian tribes, building a mutual investment in the success of those efforts.

Additionally, both California and New Mexico have made high-level institutional commitments to their efforts. In New Mexico, the state's efforts are founded on both statutory and executive department authorizations, while state efforts in California have been founded on explicit executive department actions alone. In both instances, implementation has been led by the state's chief executive, and in both states, tribal communities have responded.

In contrast, Oklahoma lacks a functional mechanism or protocol for government-to-government tribal engagement on water issues, and while statute authorizes the state governor to negotiate agreements with tribes on matters of mutual interest, that same statute expressly ties the governor's hands with respect to water resource agreements. Tribal concerns on this point are well documented in the state's 2012 plan update³²¹ and were otherwise publicly cited as reason for the initiation of litigation in 2011.³²²

Additionally, while the state's lead water planning agency has consistently acknowledged interest in and the importance of collaborative engagement with tribal governments,³²³ its prior plan's preemptive denial of the validity of tribal water right claims³²⁴ appears to continue with some force and influence through the positions of other executive department denials of the legitimacy and substance of tribal claims to sovereignty, relying on polarizing rhetoric of tribal "otherness" that cast tribal treaty rights as a marked existential threat to state government.³²⁵ At best, the history of Oklahoma's institutional approach to tribal governments regarding water suggests dysfunction, ambivalence, and uncertainty. By any

319. See *supra* notes 187-90, 226, 275, and accompanying text.

320. See *supra* notes 68-69, and accompanying text.

321. See *supra* note 305.

322. See *supra* note 302 and accompanying text.

323. See *supra* notes 291, 310-11, and accompanying text.

324. See *generally supra* notes 281-83, and accompanying text.

325. See *supra* notes 303-04, 314, and accompanying text.

measure, its track record regarding tribal engagement stands in stark contrast to California's and New Mexico's.

D. Lessons, Questions, and Concluding Thoughts

When one examines water conflict, substantial common interests can appear. While parties differ on *how* they would individually approach a given issue, for example, they may share common ground in the desire for reliable access to and management of water resources, improved community and intergovernmental relations, locally appropriate economic development, and effective planning for a future of shared success.³²⁶ The history of water in the United States (and elsewhere) is easily viewed as a history of conflict, and our reliance on adversarial processes tends to focus differing parties on disaggregating competition while blinding them to potential common ground.

There are, of course, exceptions—modes of conflict and responses that can “serve as an embryo from which cooperation can emerge.”³²⁷ The challenge is to create the environment in which that opportunity can emerge. Notwithstanding their successes so far, it is not clear yet whether California's or New Mexico's efforts will create those sorts of opportunities, but they mark a start in the right direction.

In their work on heterogeneities in common pool resource disputes, Schlager and Blomquist discuss interaction orientations such as individualism, competition, altruism, and hostility, and they identify solidarity—the state in which a benefit to any member of a group is viewed as success for the members of the group—as a necessary “precondition to unrestricted cooperation.”³²⁸ Likewise, in discussing mechanisms that foster the necessary conditions for cooperation, they discuss the value of strategies such as building efforts on common or related sets of interests³²⁹ or party types.³³⁰

In a fascinating article, geographer Zoltán Grossman brings these concepts to life in his exploration of case studies of natural resource conflicts involving tribal and non-tribal communities.³³¹ In each of his cases, “members of Native and rural white communities unexpectedly came together to protect the same natural resources from a perceived outside threat.”³³² In each conflict, a tribal group asserted a treaty based right to the affected resource that was damaged by the subject activity, and triggered “a backlash from some rural whites” and “created a conflict around the use of land or natural resources.”³³³ And in each of his selected cases, Grossman shows, as the conflict's intensity calmed over time, tribal and non-tribal factions “initiated dialogue” and “increased collaboration around the

326. *E.g.*, Colby, *supra* note 64, at 31.

327. Grossman, *supra* note 7, at 35.

328. Schlager & Blomquist, *supra* note 6, at 7-8.

329. *Id.* at 10.

330. *Id.* at 10-11.

331. Grossman, *supra* note 7.

332. *Id.* at 21.

333. *Id.* at 21-22.

protection of their community livelihood and common natural resources.”³³⁴ As he observes, the combatants ultimately “believed that if they continued to contest the place, to fight over resources, there may not be any left to fight over.”³³⁵

Grossman identified key factors that facilitated this shift. Chief among them was a shared sense of place or “‘place membership,’ based on local-scale multiethnic territorial identity” that served as a replacement for a more narrow “state citizenship”; integral to this commonality was the combatants’ ability to build “a sense of a common place or a common bond to the landscape.”³³⁶ Next, he emphasized the importance of developing a “common purpose in legal, political, or economic fields” as well as a shared desire to find resolution rather than mere partisan victory—or, as he put it, “a sense of a common understanding.”³³⁷ Fundamentally, Grossman documents efforts within diverse communities to build upon a shared interest in a common, if not collective, enjoyment of place and appurtenant resources and, thus, to shift from distributive competition to integrative cooperation.

While conflict is our tradition with respect to management of water resources and while the potential for conflict inheres to the tribal-state relationship, conflict is not the only path we can take in our search for progress. The options our formal dispute resolution mechanisms present are limited, i.e., litigation or formal negotiation, and our nearly exclusive reliance on these tools has so far produced only modest progress. However, options for seeking collaborative engagement, conflict avoidance, and mutual problem solving appear far more extensive, and as water planning methodologies grow more sophisticated, opportunities for greater progress through constructive, non-adversarial engagement may open.

Given the challenges we face in reconciling America’s colonial past with its constitutional present, it seems significant that private and public good, both tribal and non-tribal, would be well served by our continuing to “be even more creative”³³⁸ in our exploration of all potential paths. Our failure to do so may result in, as Grossman observes, our contest over place and may leave us with no place to fight over.³³⁹

IV. CONCLUSION

More than 100 years have passed since the Supreme Court announced its framework for tribal reserved rights to water,³⁴⁰ and nearly forty years have passed since finalization of the first negotiated settlement of tribal water rights. In that time, tribes, states, and the federal government have wrestled with how to do justice to tribal claims within the complex physical, legal, and political realities of water use and needs. We have made progress, though not enough, and if we want to

334. *Id.* at 23.

335. *Id.*

336. *Id.* at 35-36.

337. *Id.* at 36.

338. *See supra* note 141 and accompanying text.

339. *See supra* note 334 and accompanying text.

340. *See supra* note 16-19 and accompanying text.

make further progress, to borrow the words of the Western Water Policy Review Advisory Committee, we “will have to be even more creative.”³⁴¹

Stepping aside from our adversarial processes, water planning appears to be a tool well-suited for the further pursuit of collaborative engagement and problem solving, and the experiences in California and New Mexico show that integrated and well supported state engagement efforts within a government-to-government framework can be successful in promoting tribal-state water planning efforts. Planning cannot substitute for the law’s ability to provide enforceable finality, but—creatively structured and skillfully used—it may provide a means for enhanced intergovernmental engagement that could lead to more efficient dispute resolution in the future. It could, perhaps, even facilitate sustainable and just conflict avoidance.

341. *See supra* note 141.