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WATER PLANNING: AN OPPORTUNITY FOR MANAGING UNCERTAINTIES AT THE TRIBAL- STATE INTERFACE?

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I. Introduction

Ten years ago, Donald Rumsfeld offered a semi-poetic¹ reminder of considerations to keep in mind when tackling any complex task:

[A]s we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know.²

I have always viewed this reminder as workable advice, i.e., before setting off on a difficult endeavor, you should take an honest and searching inventory of your facts—figure out what you do and don't know on the subject and develop a sense of what is knowable and unknowable, from a present perspective. To offer my own version of it, our efforts do best when we stick to what we know while continuing to work toward expanding our knowledge and establishing contingencies to deal with the inevitable uncertainties. Approaching complex matters in this way keeps our efforts reality based and, ultimately, enhances their long-term utility.

The Rumsfeld reminder seems particularly useful when approaching a water plan—either in developing a plan or in reading someone else's. This paper discusses the water plan task with particular regard for the legal “knowns” and “unknowns” at the tribal-state interface. Water plans throughout the West have had to address the tribal-state interface, and it is an issue of increasing attention in Oklahoma. Oklahoma's water plan has included discussions of the issue in each of its iterations, providing a useful

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1. See e.g., Hart Seely, *The Poetry of D.H. Rumsfeld*, SLATE (Apr. 2, 2003, 1:03 PM ET), http://www.slate.com/articles/news_and_politics/low_concept/2003/04/the_poetry_of_dh_rumsfeld.html; Bryant Kong & Elender Wall, *The Unknown on THE POETRY OF DONALD RUMSFELD* (Stuffed Penguin 2004), available at http://stuffedpenguin.com/rumsfeld/documents/TheUnknownclip160k_000.mp3.

2. U.S. Dep't of Defense, News Transcript (Feb. 12, 2002), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636>.

set of texts for exploring how the State has addressed the matter. California's water plan also provides a useful example for discussion purposes—i.e., a state water plan that goes so far as to build a structural adjunct to its administrative infrastructure for purposes of facilitating and integrating state-tribal intergovernmental consultation. Meanwhile, the Chickasaw and Choctaw Nations are in the process of developing a tribal-regional water plan that focuses on the resources, needs, and critical policy values of their shared treaty homeland in southeast Oklahoma, which exercise will encounter the tribal-state interface. The relationship of state-tribal water conflict and water planning is a subject too little considered in both the study and practice of water law. It is my hope that this informal discussion makes a relevant and timely contribution to this symposium.

To that end, this paper is written in three parts. First, it offers a broad summary of tribal water rights, focusing on the essential principles of the reserved rights doctrine and outlining the primary means used to establish those principles—i.e., litigation and negotiated settlement. Next, it offers a lawyer's overview of the water planning exercise, a largely science-driven policy task that is meant to help us proactively address water resource management challenges. Third, it explores some of the associated legal "knowns" and "unknowns" that water planners face at the tribal-state interface and concludes with a brief comparative discussion of how the Oklahoma and California water plans have addressed uncertainty in that zone. While it is not clear that water planning processes have yet been successfully used to facilitate avoidance or preemptive resolution of tribal-state water uncertainties, it appears that they are a tool that could be more actively explored for that purpose.

II. Tribal Water Rights

Two systems dominate American water law: riparianism and prior appropriation. Regardless of their distinct structures, each provides for the allocation of water flows and quantities. Each recognizes a governmental role, and both arise from and manifest specific societal values relating to economic development, private property rights, and environmental protection. Each system, as it has developed through case law and evolving statutes, translates localized concepts of abstract use-value hierarchies—such as promoting conservation and shortage-sharing or, alternately, diversion and consumption—into more or less practical rules on which we can base our everyday conduct. But from the long view, it is apparent that these systems are not static; both are constantly subject to some measure of strain as our economies, communities, and understanding of our

environment adapt and evolve. Each system, in its own way, wrestles with a theme central to water law: How do we balance the *certainty* necessary to protect private property with the *flexibility* needed to provide for changing conditions that are outside of our control?

The certainty-flexibility and private-public axes are central to water law, and our water rights systems have generally evolved to highlight the known-knowns of both the riparian and prior appropriation systems. For water planners, this is good news. But American water law is broader than those two legal systems, and one of the richest soils for producing “unknowns” in this area has been *federal Indian* water law, which may not be something that water planners greet with any particular joy. For the past century, though, we have been working to better understand what we know and do not know on the subject.

A. *What We Know About Tribal Water Rights*

Federal Indian water law formally got its start in 1908 when the Supreme Court enjoined non-Indians from interfering with the Milk River as it flowed past the Fort Belknap Indian Reservation, located in what is now the State of Montana.³ A generation prior, the government had reserved lands on the river to the Gros Ventre and Assiniboine tribes not as an act of charity but in exchange for massive tribal land cessions—a transaction that was part of the government’s opening of the West to non-Indian settlement as tribal peoples were forced into more expressly agrarian lifestyles and economies within smaller, bounded land holdings.⁴ One year after Congress approved the Fort Belknap transaction, it welcomed Montana into the Union as a new state, ushering in settlements that placed greater demands on the Milk River upstream from the tribes’ lands.⁵ Concerned for the success of the reservation enterprise, the government brought suit asserting, on behalf of the tribes, a broad right to the Milk River.⁶ In its

3. *Winters v. United States*, 207 U.S. 564, 574-78 (1908).

4. *Id.* at 567-68, 576 (discussing treaty purpose of shifting tribes from nomadic to pastoral lifestyle). *See generally* THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS: THE WINTERS CENTENNIAL 22-24 (Barbara Cosens & Judith V. Royster eds., 2012) (providing summary discussion of historic context of *Winters* litigation, including the federal actions and local pressures that led to the establishment of the Fort Belknap Reservation).

5. *See generally* THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS: THE WINTERS CENTENNIAL, *supra* note 4, at 22-24.

6. *Winters*, 207 U.S. at 565-67. *See generally* THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS: THE WINTERS CENTENNIAL, *supra* note 4, at 26-29 (summarizing the United States’ “three mutually reinforcing theories as to why these water rights are

ruling, the Court built on the parties' arguments and provided the foundation for a *new* theory of water rights: the doctrine of federal reserved rights.⁷

Today, *Winters* stands for the rule that a federal reservation of lands from the public domain will be *presumed* to include waters adequate for accomplishing the purposes of the reservation.⁸ Notwithstanding the *Winters* treaty's silence on the question of water rights, the Court reasoned:

[I]t would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.⁹

In one of its more famous passages, the Court elaborated:

The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, “and grazing roving herds of stock,” or turned to agriculture and the arts of civilization. *Did they give up all this? Did they*

available for the tribes,” i.e., reservation of rights under general principles, reservation of rights as the tribes would have understood them, and riparian rights under state law).

7. *Winters*, 207 U.S. at 575-77. For an authoritative analysis of the Court's *Winters* decision, see generally JOHN SHURTS, INDIAN RESERVED WATER RIGHTS: THE WINTERS DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT 150-57 (2000); see also THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS: THE WINTERS CENTENNIAL, *supra* note 4, at 54-65 (featuring Shurts' summary of his placement of the *Winters* case within the broader water and federal Indian law context).

8. Although *Winters*, for better or worse, has become virtually synonymous with “tribal water rights” in the public's understanding, it was actually a ruling three years earlier that provided the seed from which grew the “reserved rights” doctrine of federal Indian water law. See *United States v. Winans*, 198 U.S. 371 (1905). In *Winans*, the Court held that a Yakima Nation treaty with the United States vested tribal citizens with the continuing right to set up fishing weirs in traditional locations notwithstanding the fact that title to such places had since passed, via allotment and federal conveyance, to non-Indians who were using such locations for fishing practices that were incompatible with what the tribal citizens pursued. *Id.* at 379, 381. Faced with a stark contrast in values—the rights of after-acquiring title holders versus the aboriginal practices of a treaty tribe's citizens—the Court turned to the relevant treaty and held that such a document memorialized a profound transaction and was, importantly, a *grant of rights from the tribe to the federal government*. *Id.* at 381. Thus, by implication, that which the tribe did not expressly grant to the government was *reserved* to the tribe. *Id.* *Winans* and *Winters* reservations are accordingly distinct though, as the case law has evolved, closely related.

9. *Winters*, 207 U.S. at 577.

*reduce the area of their occupation and give up the waters which made it valuable or adequate?*¹⁰

The Court did not ask those questions rhetorically; its questions were key to the issue presented: Were the tribes entitled to flows of the Milk River sufficient to enjoin the subject diversions and impoundments? The Court's unambiguous answer? Yes.

Winters is striking for several reasons, not least of which is that it was decided during a particularly dark period of federal Indian law and policy—a period in which the courts consistently closed their doors to tribal complaints as tribal peoples and cultures were shoved aside to make way for non-tribal expansion into tribal homelands.¹¹ Since its issuance in 1908, *Winters* has grown—both symbolically and practically—as a defensive beachhead from which efforts to protect tribal self-determination, homelands, and resources have been staged. Notwithstanding the broader array of social forces facing tribal continuance at that time, the *Winters* Court affirmed that the federal-tribal intergovernmental transactions on which the American West was founded would *mean* something in the law.

But mean *what*, exactly? Historical context aside, *Winters* is still striking for the number of questions it does *not* answer. For example, what was the nature and extent of the tribes' water right? Nothing was quantified or otherwise defined, nor did the Court seem at all concerned about it. Nor did the Court seem concerned with questions such as *how* one would administer a federal-law reserved right among growing state-law appropriations from the same water source or *who* would referee the actual day-to-day balancing acts that water rights administration would require. While not addressed by the Court, those questions (and many others) have been litigated as *Winters* and its progeny evolved into the body of federal Indian water law that we have today.

10. *Id.* at 576 (emphasis added).

11. The apex of this “dark period” is perhaps *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), wherein the Court concluded that allegations of federal treaty violations that posed an existential threat to tribal peoples raised only political questions that lay outside the judiciary's reach. See generally DAVID E. WILKINS & K. TSINANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 110-13 (2001) (discussing *Lone Wolf* in its jurisprudential and historic context); DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 64-117 (1997) (discussing key cases from this period); CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 23-26 (1987) (same).

That body of federal common law gives us a reasonable outline of what tribal water rights mean on the ground. For example, we can confidently say the following:

Tribal water rights include both sovereign (i.e., regulatory) and proprietary (i.e., ownership) elements;¹²

Tribal water rights are created, defined, and governed by federal law, not state law;¹³

Tribal water rights are of a nature and extent sufficient to fulfill the federal purposes for which they were implicitly established;¹⁴

Tribal water rights generally vest prior to those held under state law water right systems, thus giving them a valuable seniority within appropriative systems,¹⁵ and

12. *E.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §19.04[2] (Nell Jessup Newton et al. eds., LexisNexis 2005) [hereinafter COHEN] (noting that tribal water rights "are property rights held by tribes and their members" but further noting that "Indian tribes, therefore, have full and exclusive regulatory authority over Indian reserved rights to water, including water rights of allottees and lessees"); *cf.* *City of Albuquerque v. Browner*, 97 F.3d 415, 423 n.12 (1996) (characterizing tribal water rights as "an element of tribal sovereignty"). *But cf.* THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS: THE WINTERS CENTENNIAL, *supra* note 4, at 89 (lamenting that "American water law has come 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").

13. *E.g.*, COHEN, *supra* note 12, §19.03[1] ("First and foremost, the cases established that Indian reserved rights to water are determined by federal, not state law. Indian rights and interests in property are defined and protected by federal law, and state jurisdiction over Indian property interests within Indian country is preempted unless authorized by Congress." (Footnotes omitted.)); *see also, e.g.*, *New Mexico ex rel. State Engineer v. Aamodt*, 537 F.2d 1102-11 (10th Cir. 1976) ("Any intent of Congress to relinquish its jurisdiction and control over the lands and water rights of the Pueblos must be express," and there was no showing that the United States had so "relinquished jurisdiction and control over the Pueblos" or "placed their water rights under New Mexico law.").

14. *E.g.*, COHEN, *supra* note 12, §19.03[4] ("Tribal water rights are reserved to carry out the purposes for which particular reservations were established."); Judith Royster, *Winters in the East: Tribal Reserved Rights to Water in Riparian States*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 169, 174 (2000) ("The first fundamental principle of tribal reserved water rights is that when Indian country is established, that act implicitly reserves for the use of the tribe that amount of water which is needed to fulfill the purposes for which the land was set aside."); *cf. also* *United States v. Alaska*, 521 U.S. 1, 40-41 (1997) (focusing analysis of reserved right on the United States' operable intent).

15. *E.g.*, COHEN, *supra* note 12, at §19.03[3] (discussing establishment of reserved right priorities for purposes of implementing tribal water rights within state-law appropriative systems); *cf. also* Royster, *supra* note 14, at 179-82 (discussing "paramount" nature of reserved tribal water rights).

Tribal water rights do not require placement to beneficial use for purposes of perfecting them and cannot be lost through non-use, thus giving them a certain riparian gloss.¹⁶

Perhaps the most important thing we can say regarding what we know about tribal water rights, at least for the purposes of this paper, is that *those rights remain largely undefined in most systems*, and they thus give rise to questions for which we don't yet have answers.¹⁷ Those unanswered questions—the known-unknowns—are most relevant where tribal and state-law water rights come into contact with each other, i.e., at the tribal-state interface, at which point they can affect water resource use and associated management initiatives, something of practical concern to water regulators and users.

Oklahoma recently had an up-close-and-personal encounter with those known-unknowns. In 2005, the Oklahoma Attorney General commenced a federal court action against poultry integrators, alleging that their land application of chicken litter (or fecal waste) within the Illinois River watershed was degrading that river's water quality in violation of federal

16. *E.g.*, Royster, *supra* note 14, at 183 (“[T]ribal reserved rights to water are not forfeited or abandoned by non-use.”); *cf.* COHEN, *supra* note 12, §19.03[3] (noting that tribal rights “are often put to actual use long after appropriation rights are established”).

17. I intentionally use the word “undefined” rather than “unquantified.” Quantification is a function and necessity of appropriative water right systems only. As Professor Judith Royster teaches, the quantification of *tribal* water rights is attributable more to efforts to harmonize administration of tribal water rights within prior appropriation legal systems than to anything inherent to the nature of a tribal water right itself. *See* Royster, *supra* note 14, at 173. Furthermore, even within the traditional *Winters*/appropriation-jurisdiction context, what “quantification” requires has not been static. *Compare* *Arizona v. California*, 373 U.S. 546, 600-01 (1963) (announcing “practically irrigable acreage” standard), *with In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d 68, 79-81 (Ariz. 2001) (announcing “homeland” standard). Indeed, notwithstanding the fact that the non-*Winters* water right claims of the Pueblo tribes of New Mexico have generally and variously been in litigation since 1966, federal law has *yet* to produce a concrete standard for “quantifying” Pueblo water rights. *Compare* *New Mexico ex rel. Reynolds v. Aamodt (Aamodt II)*, 618 F. Supp. 993, 1010 (D.N.M. 1985) (announcing “historically irrigable acreage” standard), *with* *United States v. Abousleman*, Civ. No. 83-1041 at 21-28 (D.N.M. Oct. 4, 2004) (declining to accept the *Aamodt* standard as controlling). It is an open question as to whether the definition of tribal water rights within riparian jurisdictions, for example, would give rise to quantification issues; indeed, as in all matters associated with a federal reserved right, the overarching requirement is to *define* the right in accord with the manifest federal *purpose*, *e.g.*, *United States v. Alaska*, 521 U.S. 1, 40-41 (1997) (focusing analysis of reserved right on the United States’ operable intent)—an analysis that may not require quantification.

law.¹⁸ In addition to injunctive relief, the action sought natural resource damages and other money claims.¹⁹ The defendants argued, however, that the real-party-in-interest with respect to those damages claims was not present and could not be forced to join the proceedings.²⁰ The missing party? The Cherokee Nation of Oklahoma, which, the defendants argued, held relevant rights to the subject water resources pursuant to its removal-era treaties with the federal government.²¹ The court agreed and, pursuant to Rule 19 of the Federal Rules of Civil Procedure, dismissed the damages component of Oklahoma's suit.²²

The *Tyson* case raises two points. First, those unanswered questions are a very real part of our legal landscape and can have a very real impact on water resource management. Regardless of what one thinks of the scientific or legal merit of the *Tyson* suit, the court's indispensable party ruling illustrates that unanswered questions about the respective scopes of tribal and state legal interests in water resources can derail complex efforts to manage and protect those water resources. Second, *Tyson* shows that *this is not a "problem" created by tribes or tribal advocates*; it is instead a concrete part of our shared legal landscape, something left to us by our shared history. The Cherokee Nation did not make the arguments that required the dismissal of Oklahoma's damages claims; *Tyson* and its co-defendants did. In fact, the tribe tried to work *with* Oklahoma toward a *commonly held goal*, Illinois River watershed restoration, but that effort at

18. *Oklahoma v. Tyson Foods, Inc.*, Civ. No. 05-329 (N.D. Okla., Jun. 13, 2005).

19. *See generally* *Oklahoma v. Tyson Foods, Inc.*, Civ. No. 05-329 (N.D. Ok., Jul. 16, 2007) (Second Amended Complaint); *id.* ¶¶ 69-76 (Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) cost recovery claim); *id.* ¶¶ 77-88 (CERCLA natural resource damages claim); *id.* ¶¶ 89-96 (Solid Waste Disposal Act (SWDA) claim, seeking injunction and abatement); *id.* ¶¶ 97-107 (state law nuisance claim, seeking injunctive relief as well as compensation, reimbursement, and exemplary and punitive damages, as well as court costs and reasonable attorney fees); *id.* ¶¶ 108-117 (federal law nuisance claim, seeking injunctive relief as well as compensation, reimbursement, and exemplary and punitive damages); *id.* ¶¶ 118-126 (trespass claim, seeking injunctive relief as well as compensation, reimbursement, and exemplary and punitive damages); *id.* ¶¶ 127-138 (various state statutory claims, seeking injunctive relief as well as civil penalties, court costs, and reasonable attorney fees); *id.* ¶¶ 139-146 (claims for unjust enrichment, restitution, and disgorgement).

20. *See generally* *Oklahoma v. Tyson Foods, Inc.*, Civ. No. 05-329 (N.D. Ok., Oct. 31, 2008) (Defendants' Motion to Dismiss for Failure to Join the Cherokee Nation as an [sic] Required Party or, in the Alternative, Motion for Judgment as a Matter of Law Based on Lack of Standing).

21. *Id.*

22. *Oklahoma v. Tyson Foods, Inc.*, 258 F.R.D. 472, 481-83 (N.D. Okla. 2009).

tribal-state cooperation—on the facts of that case and as presented in that courtroom, at least—was unsuccessful.²³

Tyson highlights the contours of some of our unanswered questions—the Rumsfeldian known-unknowns. Those questions rise from history and circumstance to present us with a specific decision point: Do we ignore them and wait for their uncertainties to ripen into actual conflict? Do we engage and seek to resolve them? Or, do we game them for purposes of some short-term objective? If we choose to address the law’s presently unanswered questions, we generally have two options: litigate or negotiate. Federal Indian water law is no exception.

B. Addressing the Unanswered Questions

The first wave approach to answering post-*Winters* questions was litigation.²⁴ More specifically, it was litigation arising within appropriation doctrine jurisdictions and typically in the form of general stream adjudications on over-appropriated stream systems.²⁵ Those general stream adjudications are the grand-daddies of western water law, complex and

23. As the Attorney General for Cherokee Nation of Oklahoma Diane Hammons framed the issue, “[t]he question is not who owns the water; the question is who owns the pollution,” and both the State and the Nation agreed that the companies owned that problem. Transcript of Oral Argument at 16, lines 20-21, *Oklahoma v. Tyson Foods, Inc.*, Civ. No. 05-329 (N.D. Okla. Sep. 15, 2009). As part of the cooperative effort, the State and Nation entered an agreement under which Oklahoma recognized the Cherokee Nation’s substantial interests in the Illinois River and the Cherokee Nation authorized Oklahoma to act to protect those interests. *See* Agreement Between the State of Oklahoma and the Cherokee Nation of Oklahoma (May 19, 2009) (on file with author). However, the court held that agreement was insufficient for purposes of saving the State’s damages claims. *Tyson Foods, Inc.*, 258 F.R.D. at 475-76 (assessing Oklahoma-Cherokee Nation agreement and concluding that it “is invalid [under state law] and does not resolve or moot the Rule 19 issues raised in defendants’ motion”). Likewise, the court also denied as untimely a Cherokee Nation motion to intervene, *see Tyson Foods, Inc.*, Civ. No. 05-329 (N.D. Okla. Sept. 18, 2009) (Order), *aff’d*, 619 F.3d 1223 (10th Cir. 2010), thus bringing this component of Oklahoma’s case to an end.

24. *See, e.g.*, *Arizona v. California*, 373 U.S. 546 (1962); *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d 68 (Ariz. 2001); *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys. (Big Horn I)*, 753 P.2d 76 (Wyo. 1988). Each of these rulings arose from complex western water rights disputes—the first from an original jurisdiction proceeding before the Supreme Court and the second and third from state court general stream adjudications conducted pursuant to state law and the McCarran Amendment, 43 U.S.C. § 666 (1952).

25. *See, e.g.*, *Royster*, *supra* note 14, at 183-84.

sprawling legal actions that take generations to complete.²⁶ Our experience with the litigation approach has demonstrated a few basic truths—namely, courts can define co-relative rights in a shared resource and can even give us a decree we can use for future water rights administration. At the same time, courts—by design—are of limited use when it comes to resolving intercommunity or political struggles. To oversimplify, litigation helped *answer questions* but failed to *resolve conflicts*.²⁷ Tribal water fights tend to involve cultural differences that turn, at least in part, on starkly differing views of control, history, and identity. Furthermore, tribal water fights often turn on questions of what the future will, or should, look like as it relates to water resources. These issues can divide communities and launch political conflicts that courts and associated administrative processes are not capable of resolving.

The federal government—cognizant of litigation’s limitations—launched a second wave approach to post-*Winters* questions in the 1970s when it began encouraging the negotiated settlement of tribal water rights disputes. More specifically, the United States began to encourage negotiated settlement of active tribal water rights litigation, whenever such resolution was possible. Congress approved the first tribal water settlement in 1978,²⁸ a full seven decades after the *Winters* decision; twelve years later, the Departments of Interior and Justice, working with the White House Office of Management and Budget, established the formal criteria and procedures that govern federal participation in tribal water negotiations.²⁹ To date,

26. Not too long ago, New Mexico State Engineer John D’Antonio indicated it would take upwards of “another 600 years to complete the adjudication of water rights” in that state. Lora Lucero & 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).

27. Professor Dan McCool has noted that repeated tribal court victories aside, political realities have often made it “nearly impossible to stop these upstream water users from diverting rivers and streams that originally flowed through or past Indian reservations. Thus many of the court victories had a hollow ring to them. However, the constant threat of lawsuits kept many non-Indian water users apprehensive. After seventy years of acrimonious litigation, both sides began looking for an alternative to endless court battles.” Daniel McCool, *Indian Water Settlements: Negotiating Tribal Claims to Water*, 107 J. CONTEMP. WATER RESOURCES & EDUC. 28, 28 (1997).

28. Ak-Chin Indian Community Act of 1978, Pub. L. No. 95-328, 92 Stat. 409.

29. Notice, Department of the Interior Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Right Claims, 55 Fed. Reg. 9223 (Mar. 12, 1990). The Obama Administration has generally re-committed to the 1990 criteria and procedures and to “work with Congress to identify and implement clear criteria for going forward with future settlements on issues including cost-sharing and eligible costs.” Letty Belin, The

Congress has approved twenty-nine tribal water right settlements,³⁰ and the Department of the Interior has approximately a dozen negotiation teams in the field working toward future settlements.

In recent years, scholars of law and the social sciences have sought to learn from prior successes and failures by evaluating tribal settlements and the efficacy of the federal process.³¹ The track record is mixed, but ultimately suggests that, at their best, negotiated settlements can obtain *answers* for the parties, as in the litigation context, while also providing for localized problem solving that supports the *respectful resolution of complex intercommunity conflict*.³² Mindful of its pros and cons, Professor Daniel McCool places this second wave approach in historical context; underscoring the negotiated resolution of tribal water rights conflicts in terms of tribal existence, continuance, and self-determination:

Ultimately, the settlements are much more than just water settlements; they are, in a larger sense, sovereignty settlements because they decide issues of control and destiny. They involve water marketing, land acquisition and use, administrative control, and culturally sensitive water uses. And in nearly every settlement, the tribes must relinquish their right to future claims to reserved water rights—forever. Thus, the settlement era is, in effect, a second treaty-making era. The first treaty-making era was concerned with land; this one involves water. If

Administration's Settlement Policy (Aug. 22, 2011), available at <http://www.narf.org/water/2011/presentations/06-belin.pdf>.

30. NATIVE AM. RIGHTS FUND & W. STATES WATER COUNCIL, SETTLEMENTS APPROVED BY CONGRESS (updated Aug. 2011) (on file with author).

31. See e.g., BONNIE COLBY ET AL., NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST (2005); DANIEL MCCOOL, NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA (2006); TRIBAL WATER RIGHTS: ESSAYS IN CONTEMPORARY LAW, POLICY, AND ECONOMICS (John E. Thorson et al. eds., 2006).

32. While I will paraphrase his words, a more experienced hand than myself—Lee Wilson, a New Mexico-based hydrologist—once put it to me that while litigation can get you a decree of your rights, negotiation can get you the “three Rs”: Your *rights*, better *relations* with your neighbors, and the possibility of *resources* for actual water management and development. For a limited but useful empirical analysis of negotiated tribal water settlements, see generally Daniel McCool, *Intergovernmental Conflict and Indian Water Rights: An Assessment of Negotiated Settlements*, 23 PUBLIUS 85 (1993) (evaluating six claimed advantages of negotiation over litigation based on an analysis of contemporaneously completed tribal water right settlements); see also LLOYD BURTON, AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF LAW (1991).

reservations are going to serve as viable homelands, they must have both.³³

Such a comprehensive and explicitly forward looking approach goes far beyond the mere question-answering capacity of litigation and moves us closer to the realm of water planning.

III. Water Planning

Water planning is a science-based policy exercise designed to improve our capabilities to deal with future demands. Like other substantive law subjects that tie to the environment, water law tends to keep close company with science and scientists, and whether the subject is climate change, population growth, or legal uncertainties at the tribal-state interface, water planning can create an opportunity for lawyers, scientists, and policy makers to work together proactively and in a non-adversarial context. Since water planning is typically a *non*-legal tool produced by a single government, it can *neither* authoritatively answer the legal questions *nor* actually resolve the issues we face. It can, however, serve to facilitate our exploration of those questions and provide an opportunity for better understanding what threatens to divide or challenge communities *before* those challenges ripen into actual conflict.³⁴ As such, I tend to think of water plans as the not-too-distant cousins of the litigation and negotiation processes that have defined the first and second wave approach to post-*Winters* questions, though perhaps too seldom considered in that relation.

A. Why Do Governments Create Water Plans?

The governmental role in water law is critical. Governments are not typically proprietors of water rights;³⁵ instead, they generally function as regulators. They are responsible for administering the legal systems in which proprietary interests are exercised—establishing and refereeing property interests within their respective jurisdictions, including such interests in water. Governments also typically provide for the construction, operation, and management of our water delivery infrastructure—the

33. McCool, *supra* note 27, at 31.

34. Plainly, water planning could still be a useful tool for exploring approaches to resolution even *after* an uncertainty has ripened into conflict; however, such exercises would likely be more in the context of a second-wave negotiation rather than a pure water planning exercise.

35. *See e.g.*, Tarrant Reg'l Water Dist. v. Sevenoaks, 545 F.3d 906, 913 (10th Cir. 2008) (citing *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 950-52 (1982)).

reservoirs and pipes that alter our natural environment and facilitate the growth of communities and economies. Unlike other natural resources, our communities and economies cannot exist without water, and our governments—federal, tribal, and state—therefore have a unique interest in, and responsibility for, its security.

In this light, the development of a water plan should be understood as a governmental effort to get ahead of the proverbial curve. Properly done, a water plan provides an opportunity to understand better the resource and prepare for the future. With that in mind, governments engage in water planning to:

- (1) improve our shared understanding of the competing demands placed on the resource as well as the fiscal and legal parameters in which those demands materialize;
- (2) prompt high-level policy discussions of water management issues and priorities; and
- (3) based on that improved understanding and assessment of priorities, establish a policy vision for allocating financial and physical resources while protecting jurisdictional and/or regional interests.

For better or worse, though, water planners receive little recognition for their work, despite its critical nature. Why? Talking about history can be grounds enough for division and conflict, but talking about what we want from the future can be even more so. After all, in talking about the future, *what* future do we have in mind? *Whose view of the future?* Whose view is going to *win*, and whose is going to *lose*? Whether or not the questions are framed as starkly as that, the reality of tensions that inhere to the certainty-flexibility and private-public axes can quickly make planning exercises the lightning rods for competing political agendas,³⁶ which can distract from, and even compromise the integrity of, the planning effort.³⁷

36. Take, for example, Oklahoma's most recent update to its water plan, an effort that has been alternatively criticized as imposing artificial water shortages that will hamstring industry and urban growth while simultaneously drying rural Oklahoma so that it will be easier to "sell" water to Texas. *E.g., compare* Memorandum, Joint Position on the OWRB Oklahoma Comprehensive Water Plan (Feb. 8, 2012), *available at* http://www.okstatechamber.com/additional/legcorrespondence/2012/OKCompWaterPlan2_8_12.pdf, *with* Joe Wertz, *State Water Plan's Cost is Questioned, Science Criticized*, NPR (Nov. 3, 2011, 10:27 AM), <http://stateimpact.npr.org/oklahoma/2011/11/03/state-water-plans-cost-is-questioned-science-criticized/>.

37. *See e.g.,* Arnold Hamilton, *Hands Across the Water—The Wheeling and Dealing of Water Rights Takes a Deft Wrist*, URB. TULSA WKLY. (Feb. 22, 2012), <http://www.urban-tulsa.com/gyrobase/Content?oid=oid%3A46960> ("State leaders did the smart thing, ordering up a comprehensive statewide water plan that was designed to give policy-makers the

Given the pressures that can come to bear on water planning efforts, the question “Why do governments do water plans?” might be read more cynically than I have intended. At the end of the day, though, two facts remain. First, water is simply controversial.³⁸ Perhaps we all have too much at stake for it not to be so. Whether it is water litigation or water negotiation, water issues raise passions, and that may be particularly true when it comes to tribal-state water issues. As former New Mexico Representative (and then-future Governor) Bill Richardson once said from the floor of Congress, “[t]here is no more divisive issue in the West than the dispute between Indians and non-Indians over water.”³⁹ Be that as it may, we still have our second fact—namely, all things considered, a sound water planning process provides governments with perhaps the most flexible and fact-based format for exploring relevant scientific findings and legal principles. In that light, water planning processes could be useful for trying to develop pre-conflict consensus among affected water users.⁴⁰

Litigation has its limits, as does negotiation, and water planning is no different. But these are *all* tools for addressing the complex (and sometimes confounding) issues that water law, policy, and our day-to-day needs present.

B. What Makes Up a Water Plan?

As a practical matter, water plans rest on complex science-based reviews of four general elements:

- (1) an assessment of available water supplies;
- (2) an assessment of water demands, both present and projected future;
- (3) an analysis of whether supplies are adequate to meet demands; and

information necessary to determine what's in the state's best long-term interests. Unfortunately, the \$16 million analysis was a dud, victimized by back-room special interest gamesmanship that overrode science and common purpose.”).

38. The two prior footnotes notwithstanding, it should be emphasized that these competing political agendas and controversies are *not* unique to Oklahoma. *See, e.g.*, Glenn Evans, *State Water Plan Includes Building Controversial Northeast Texas Reservoir*, NEWS-JOURNAL.COM (Dec. 21, 2011, 4:00 AM), http://www.news-journal.com/news/local/state-water-plan-includes-building-controversial-northeast-texas-reservoir/article_731a9348-8317-5c29-b4a7-c70eac5b7b7a.html; Will Goldsmith, *Water Plan 'Architect' Reflects on Controversy*, C-VILLE – CHARLOTTESVILLE NEWS & ARTS (Jan. 9, 2009), http://www.c-ville.com/index.php?cat=141404064435450&ShowArticle_ID=11801201093860282; *Mark A. Stein, Water Plan Controversy: It's Off to an Early Start*, L.A. TIMES (Dec. 21, 1988), http://articles.latimes.com/1988-12-21/news/mn-669_1_water-board.

39. 100 CONG. REC. 9,348 (1988).

40. *See supra* note 34 and accompanying text.

(4) an identification and assessment of options for marrying up those supplies and demands in the real world.

Whether one focuses on questions of fact, technological capability, economic feasibility, political will, or law, each element presents its own maze of known-knowns, known-unknowns, and unknown-unknowns—thus providing an opportunity for taking stock of our Rumsfeldian knowledge inventory and aiming for someplace ahead of the curve.

For example, let's assume the role of a generic planner who is setting out on a new water plan effort. At the outset, she is asked to consider whether climate change projections indicate a future impact on supply and demand projections. After taking an inventory of the science available to her, she would—to grossly oversimplify—have three potential views on the subject: Yes, no, and I don't know. Whatever her view, its expression will necessarily impact the water plan. If her view is "yes," then the next set of questions she must confront will turn on an assessment of *how* such impacts might affect the resource. Will it decrease supplies? Increase them? What about demands? What about timing of supply availability and demand peaks? Conversely, if her view is "no," then the factor is dust-binned, stricken from further consideration. If her view is "I don't know," the next step may be to develop contingencies for dealing with a potential range of future events—both the known and potentially unknown-unknown contingencies. This sort of exercise is conducted *multiple* times with respect to *every* variable relevant to our planner's water plan—including legal variables.

Now, a water plan is *not* a legal exercise, of course. Its primary purpose is to outline the achievable, generally using the language of science and quantifiable fact. Nevertheless, planners are bound as much by the law as they are bound by what they can ascertain of the facts on the ground. For example, if our planner works in a prior appropriation jurisdiction, the planning work would presumably be governed by the legal principles of *that* water law system. After all, it would serve no clear purpose for our planner to make her supply and demand assessments based on the principles of *riparianism*. Similarly, if she works in a jurisdiction that declares its policy is not *sustainable flow management* but, instead, the *maximal utilization* of available water resources, it would follow that her work should be informed and bounded by those policies. *Not* to do so would be to fail to build a tool up to the task for which it is intended.

In all of this, our planner is setting the *boundaries* that will define her work. If she is to engage in a meaningful planning process, she will need to take stock of what she knows, does not know, and cannot now know—as to

both the water resource itself *and* the rules that control our use of it. If she fails to make such preparations, she will quickly get lost in the wilderness of possibilities and the plan itself will fail to have any grounding in the practical day-to-day. Likewise, when we approach a *completed* water plan, we ought to be able to understand the bounds within which the planner worked—whether or not those boundaries are plainly stated. Clarity as to those boundaries will help us understand the uncertainties faced and addressed (or not) and will ultimately make the work more relevant to ongoing efforts to resolve disputes—including, potentially, proactive efforts to avoid conflicts or defuse emerging ones.

IV. Water Planning Uncertainties and the Tribal-State Interface

As previously stated, federal Indian water law is perhaps the richest soil in American water law for producing legal “unknowns.” Just as those “unknowns” continue to present lawyers and policy makers with points of decision (as in the *Tyson* matter), they also present water planners with a series of choices.

For example, consider the exercise of estimating available water supplies. You will recall that our generic planner (who was earlier dealing with climate change science) was employed to conduct a water plan within a prior appropriation jurisdiction. Now assume that she is employed by a state water agency to build her plan and that she is asked to focus first on a determination of available surface water supplies. From a scientific and fact perspective, she will want to determine which stream basins are within the planning parameters, what the data shows with respect to annual and, perhaps, monthly or seasonal stream flows. She may then attempt to characterize the various supplies based on an assessment of available water quality data. Based on this body of fact, she will then be able determine how much water can be expected to be in which stream, possibly even including the time of year during which it is most readily available. She can also make determinations as to the locations of the cleanest water. Nevertheless, even after all of this work, she is only able to tell us what water is *physically* available. Taking her analysis further, she can take an inventory of existing water-use permits and determine the quantity and flow of water that is subject to existing permitted rights. It is here that she is starting to get into *legal* availability.

At the tribal-state interface, assessing *legal* availability can be a much more complicated question than reviewing existing water-use permits. If those waters are subject to identified-yet-undefined tribal rights, no state-law permit system will be adequate for determining what is *legally*

available for future development. On the one hand, our planner works for a state agency and may therefore be charged to focus only on water available presuming the exclusivity of the state's permitting system. That is not an illegitimate charge; in fact, it would be quite understandable given all of the unknowns as to how that identified-but-undefined tribal right might someday be defined.⁴¹ All the same, the decision would impose a *legal* boundary condition relevant to the completed water plan's future utility—rendering her core supply analyses limited and open to question.

Issues like this come up frequently for water planners working at the tribal-state interface, and not solely with respect to assessments of available supplies. Other questions abound. For example, what *uses* (or types of demands) are legally protected? Answering that question will develop a more refined understanding of demands, particularly if the undefined tribal right has a non-consumptive use component in an otherwise predominantly prior appropriation system. Who will control the definition of policies relevant to the use and/or movement of water? If there is a stark divide between relevant state and tribal water-use policies—e.g., sustainable versus maximal development or regional protectionism versus export and marketing—the question of control will have procedural implications relevant to how feasible any water plan might be. For purposes of our general discussion, though, there is only one overarching question: *How will the water planner handle boundary condition uncertainties that relate to “unknowns” at the tribal-state interface?*

Oklahoma's water plan history provides examples of how those uncertainties can be handled, both procedurally and substantively. For instance, in the first iteration of its water plan, released in 1975, the Oklahoma Water Resources Board (“Board”) concluded that state law controlled *exclusively*, without regard for any possible tribal claims:

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 insure 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

41. See *supra* note 17 and accompanying text.

Plan to insure this protection, and water needs for present and long-range tribal development have also been considered.⁴²

The Board's approach did not vary much five years later, with the release of the plan's 1980 iteration. Though it now recognized *Winters*, it did so grudgingly—and ultimately returned to its 1975 position:

In regard to Indian water rights, the State of Oklahoma recognizes the Winters Doctrine derived from the U.S. Supreme Court ruling in *Winters vs. the United States* (1908), 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.⁴³

The approach manifest in Oklahoma's 1975 and 1980 water plans is plain: It asserts an express boundary condition, i.e., tribal water rights are not an issue to be assessed, and proceeds to make its plan based on a presumption of state law predominance and state government authority to plan *for* tribes and tribal populations. I tend to view this sort of approach as a wasted opportunity—a use of the planning exercise for advocacy purposes only, something that may make conflict more likely, not less.

The next iteration of Oklahoma's state water plan, however, traveled a great distance. With its 1997 iteration of the plan, the Board stated:

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

42. OKLA. WATER RES. BD., PHASE 1 – OKLAHOMA COMPREHENSIVE WATER PLAN at summary 7-8 (1975).

43. OKLA. WATER RES. BD., OKLAHOMA COMPREHENSIVE WATER PLAN 11 (1980).

water law as well as the current system of water rights administration and water quality regulation in Oklahoma.⁴⁴

Furthermore, the Board updated its plan to incorporate not only a broader discussion of *Winters* but also to address the non-*Winters* claims asserted by the Five Tribes.⁴⁵ Finally, in its narrative section and its specific itemization of policy priorities, the Board recommended proactive state engagement with tribal governments aimed at “develop[ing] a level of trust” for purposes of addressing and resolving “the Indian water rights issue in a non-confrontational manner”⁴⁶

In its most recent iteration of its water plan, the Board appears to have again travelled some distance. For example, it both expands its discussion of tribal water rights—*Winters* and non-*Winters*, even going so far as acknowledging that federal law may “tend to favor the tribal position.”⁴⁷ Moreover, it incorporates a specific issue report on “Tribal Issues and Concerns,”⁴⁸ based on which the Board calls for the Oklahoma Governor and Legislature to establish formal protocols for state-tribal consultation.⁴⁹ Finally, turning to calculations of “[e]xcess and surplus water” available for transbasin movement, the Board pledges the quasi-substantive steps of establishing an “in-basin reserve amount” and pledging to exclude from its calculations “the quantity of water adjudicated or agreed by cooperative agreement or compact to be reserved for Federal or Tribal rights”⁵⁰

The procedural and quasi-substantive shift that can be measured as between, on the one hand, Oklahoma’s 1975 and 1980 water plans and, on the other, its 1997 and 2012 water plans marks a change from a use of the

44. OKLA. WATER RES. BD., UPDATE OF THE OKLAHOMA COMPREHENSIVE WATER PLAN 1995, at 119 (1997) [hereinafter 1997 PLAN UPDATE].

45. *Id.*; see, e.g., *Oklahoma v. Tyson Foods, Inc.*, 258 F.R.D. 472, 478-79 (N.D. Okla. 2009). See generally Stephen H. Greetham, *Water Policy in the Former Indian Territory: Chickasaw, Choctaw, and Oklahoma at a Crossroads over Sardis Reservoir*, WATER REP., Dec. 2010, at 1.

46. 1997 PLAN UPDATE, *supra* note 44, at 119; see also *id.* at 138 (recommending, inter alia, the request for the formation of a state-tribal group “to explore Indian water rights and quality issues in Oklahoma” and “identify water resource projects warranting cooperative action”).

47. OKLA. WATER RES. BD., OKLAHOMA COMPREHENSIVE WATER PLAN EXECUTIVE REPORT 36 (2012) [hereinafter 2012 EXECUTIVE REPORT].

48. OKLA. WATER RES. BD., OKLAHOMA COMPREHENSIVE WATER PLAN SUPPLEMENTAL REPORT – TRIBAL WATER ISSUES & RECOMMENDATIONS (2011), available at <http://www.owrb.ok.gov/supply/ocwp/ocwp.php>.

49. 2012 EXECUTIVE REPORT, *supra* note 47, at 13.

50. *Id.* at 11.

water planning exercise as a *defensive advocacy tool* to a use of it as a *potential dispute-avoidance tool*. Leaving aside any assessment of the practical impact of the most recent approach, the shift illustrates the *potential* for the use of water plans as proactive dispute avoidance-tools, used for the consideration of issues and articulation of positions in an effort to establish consensus positions on issues arising within the tribal-state interface. It remains to be seen whether the recently initiated Choctaw-Chickasaw Regional Water Plan⁵¹ will be able to further build in this direction, notwithstanding the advent of state-tribal water litigation in Oklahoma.⁵²

Let us now leave Oklahoma for California (as so many did generations ago), and consider the express declaration of the California Department of Water Resources (Department) to use its water planning process to seek “to deepen and expand the relationships between State agencies and California Native American Tribes . . . and thereby improve the overall quality and comprehensiveness of the plan.”⁵³ Most notably, the Department has—building on its prior outreach and state-tribal consultation efforts—established the Water Plan Tribal Advisory Committee, an intergovernmental body meant to “ensure integration of tribal input into California Water Plan Update 2013 . . . , begin addressing the complex water issues facing California Native American Tribes, and improve communication and collaboration between California Native American Tribes and the California Water Plan.”⁵⁴

51. See, e.g., BARNEY AUSTIN ET AL., REGIONAL WATER PLANNING BY THE CHICKASAW AND CHOCTAW TRIBAL NATIONS (2011) (abstract), available at <http://www.awra.org/Summer2011/doc/abs/Austin%20abs%2014-rBNA.pdf>; CHICKASAW NATION & CHOCTAW NATION, WATER PLANNING: SHARED RESOURCES, SHARED FUTURE (2011), available at http://s3.amazonaws.com/choctaw-msldigital/assets/709/Water_Planning_Shared_Resources_original.pdf; Wayne Greene, *Corps of Engineers, Two Tribes to Study Water Issues Together*, TULSA WORLD (Dec. 15, 2011, 5:15:10 AM), http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20111215_16_A8_TheCho667798.

52. See Complaint, Chickasaw Nation v. Fallin, No. 11-927-C (W.D. Okla. Aug. 18, 2011); Petition, Ass’n for the Prot. of Okla. Water v. Okla. Water Res. Bd., No. CJ-2012-1069 (Okla. Cnty. Okla. Feb. 21, 2012); Okla. Water Res. Bd. v. United States, No. 110,375 (Okla. filed Feb. 10, 2012).

53. Cal. Native American Tribal Engagement in the California Water Plan Update 2013 – Tribal Engagement Plan 1 (Nov. 8, 2010), available at http://www.waterplan.water.ca.gov/docs/tribal_engagement/cwpu2013_Tribal_Engagement_Plan_final_11-08%2010_.pdf.

54. Water Plan Tribal Advisory Committee Group Charter 1 (Aug. 6, 2011) (emphasis omitted), available at http://www.waterplan.water.ca.gov/docs/tac/Final_TribalACCharter.pdf.

The plain spoken ambition and optimism of the California approach strides beyond the defensive position staked out by the 1975 and 1980 Oklahoma water plans and goes even further than the aspirational recommendations of the latest iteration of the Oklahoma water plan. Again, leaving aside for now any assessment of practical impacts approach has had with respect to state-tribal relations and the avoidance of water conflict, California has at least shown that the tool is available and, as a matter of policy, has a desirable utility. As more and more water planning exercises explore the issues that arise within the tribal-state interface, we will have an increasing body of empirical evidence on which to base practical assessments of utility.

V. Conclusion

Water law is built on conflict. The fight erupts, and we go to court or a conference room to hammer out positions and find out what the rules will abide. But most often, those conflicts do not *end* once a court declares a “winner” or the parties cut a deal, and that is largely so because water management decisions do not *only* have community-wide impacts; they have broad *intercommunity* impacts. Accordingly, *resolution* of water resource conflicts, particularly those that arise from the complex issues found at the tribal-state interface, take a much more comprehensive and creative effort, something through which the affected parties can determine not only what the law says, but also what science, political will, and common sense suggest is obtainable and workable.

Over the past century, we have relied primarily on litigation to address the questions that arise from that interface zone, and for the past thirty-five years, we have attempted to pursue comprehensive negotiations wherever possible. As the science, technology, and legal systems on which we rely for water management grow more complex, we are increasingly reliant on comprehensive water planning to anticipate and minimize future challenges. Perhaps those water planning efforts can provide us *another* tool for trying to resolve—or better manage—the remaining questions.