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Current Developments in Indian Water Law and Treaty Rights: Old Promises, Recent Challenges, and the Potential for a New Future

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Chapter 9
CURRENT DEVELOPMENTS IN INDIAN WATER LAW AND TREATY RIGHTS: OLD PROMISES, RECENT CHALLENGES, AND THE POTENTIAL FOR A NEW FUTURE

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Synopsis

§ 9.01 Introduction[*] [**]

In late 2016, thousands of people gathered on the wind-swept plains of North Dakota to support the fight of the Standing Rock Sioux Tribe against the Dakota Access Pipeline.[1] Though tribal members had begun protesting the pipeline earlier that year, by fall, the movement had gained worldwide attention

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[1] *See, e.g.*, Jack Healy, "North Dakota Oil Pipeline Battle: Who's Fighting and Why," *N.Y. Times* (Aug. 26, 2016).

and tribes and non-Indians from around the world traveled to the Standing Rock Reservation.[2] The fight over the Dakota Access Pipeline raised many issues from environmental concerns, to climate change, to the potential destruction of cultural sites; however, the rallying cry that unified all those supporting the tribal position, "Mni Wiconi," or "Water is Life," is telling.[3] At the core of the dispute was the Tribe's desire to protect its access to and use of water from the existential threat posed by the pipeline's route under the Missouri River.

While the fight over the Dakota Access Pipeline gained national attention, it is merely one recent example of the ways in which Indian tribes have fought to protect and preserve their rights to water.[4] These fights revolve around the rights tribes reserved in treaties with the United States or the terms by which the United States set aside lands for tribes to use as their permanent homelands.[5] Far from relics of history, the terms of these agreements have been insulated by the U.S. Supreme Court from interference by states and other non-tribal interests for over a century.[6] But as history stretches further away from those treaties, competing pressures and the passage of time make the assertion of tribal rights to use and access water increasingly contentious and complicated for tribes, states, and the federal government.

Tribes and tribal governments are becoming ever more sophisticated and powerful players on the national (and international) stage; concurrently, the federal government is promoting tribal sovereignty and self-determination.[7] This evolution of tribal governance is particularly striking when considering that, less than 70 years ago, the express policy of the federal government was to terminate the status of tribes.[8] But

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[2] *See, e.g.*, Saul Elbein, "These Are the Defiant 'Water Protectors' of Standing Rock," *Nat'l Geographic* (Jan. 26, 2017).

[3] *See* Rosalyn R. LaPier, "For Native Americans, a River Is More Than a 'Person,' It Is Also a Sacred Place," *The Conversation* (Oct. 8, 2017).

[4] *See* § 9.04, *infra*.

[5] *See, e.g.*, United States v. Washington, 853 F.3d 946 (9th Cir. 2017), *aff'd by an equally divided Court per curiam*, 138 S. Ct. 1832 (2018) (mem.); Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 468 (2017) (mem.).

[6] *See, e.g.*, United States v. Winans, 198 U.S. 371, 381–82 (1905) (recognizing a continuing right against the United States, individual states, and their grantees reserved by treaties with Indian tribes).

[7] *See, e.g.*, Charles F. Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (2006); Indian Trust Asset Reform Act, Pub. L. No. 114-178, § 102, 130 Stat. 432, 433 (2016) (codified at 25 U.S.C. § 5602) (reaffirming federal trust responsibility toward Indian tribes, including "a duty to promote tribal self-determination regarding governmental authority and economic development").

[8] H.R. Con. Res. 108, 53d Cong., 67 Stat. B132 (1953).

as the events following the 2016 Dakota Access Pipeline protests demonstrate,[9] tribal efforts to assert rights to or protection of water resources often face an uphill battle, particularly in light of a long history of development and use that has proceeded without regard to those rights. In 1973, for example, a report to the President and Congress by the National Water Commission noted that the federal government's failure to protect tribal water rights is "one of the sorrier chapters" in a long history of dismal federal-tribal relations.[10] Nonetheless, like the larger social movement sparked by the Standing Rock Sioux Tribe, tribes across the country continue to push their claims in both legal and political arenas and their efforts show the potential to move beyond that history and toward broader protection for tribal rights.

That broader protection for tribal rights may directly undermine if not upset well-established state laws and regulations, the settled expectations of other water users, and the ongoing relationships between states, tribes, and the federal government. As a general matter, for example, the federal government defers to state authority with regard to the allocation of water resources and the regulation of fish and wildlife within state borders.[11] In exercise of those authorities, states established comprehensive water adjudication schemes and allocated water among their citizens pursuant to those laws and regulations.[12] Beyond direct regulation of water resources, state and local governmental authorities are also responsible for a number of governmental actions, such as constructing roads and approving land uses that cross rivers and streams, which may affect waters within their boundaries. Thus, the assertion by Indian tribes of claims to water

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[9] *See* Robinson Meyer, "Oil Is Flowing Through the Dakota Access Pipeline," *The Atlantic* (June 9, 2017).

[10] "Water Policies for the Future: Final Report to the President and to the Congress of the United States by the National Water Commission," at 475 (June 1973) (Water Policies Report)

[11] *See, e.g.*, 43 U.S.C. § 666 (authorizing state adjudication of water claims, including those of the United States); United States v. New Mexico, 438 U.S. 696, 702 (1978) ("[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law"); Hughes v. Oklahoma, 441 U.S. 322, 338 (1979) (states may "protect and conserve wild animal life within their borders" consistent with constitutional limitations found in the Commerce Clause); Riverside Irrigation Dist. v. Andrews, 758 F.2d 508, 513 (10th Cir. 1985) (the Clean Water Act indicates that "where both the state's interest in allocating water and the federal government's interest in protecting the environment are implicated, Congress intended an accommodation").

[12] *See, e.g.*, Justin Anthony Brown, "Uncertainty Below: A Deeper Look Into California's Groundwater Law," 39 *U.C. Davis L. Rev.* 45 (2015) (detailing the history and evolution of California's groundwater laws); Mont. Code Ann. tit. 85, ch. 2 (statutory standards for adjudication of water rights in Montana).

rights or for the protection of waters potentially challenges these state systems or the rights and obligations that have already been established and recognized.

A number of current developments related to tribal treaty and water rights demonstrate the potential impact of these claims. During its 2017–2018 term, for example, the U.S. Supreme Court considered two significant cases related to tribal claims to protect water and accepted one for review.[13] Simultaneously, lower courts continue to hear similar cases and potential settlements of tribal water rights claims work their way through the halls of Congress.[14] Given their roots in the inherent sovereignty of Indian tribes and the history of federal Indian law, understanding the nature of these claims and their potential implications requires an understanding of the historical legal context from which they arise.

This chapter serves as a resource for those interested in or handling litigation involving water-related tribal treaty or reserved rights by giving the historical and legal foundations for understanding such challenges. It begins with the federal Indian law basis from which water-related tribal claims spring and gives a brief history of relevant precedent in that area. The chapter then reviews the history of *Washington v. United States*,[15] which poses the potential to reshape the scope and reach of tribal treaty rights, and one pending lower court case brought by the Agua Caliente Band of Cahuilla Indians to secure their rights to groundwater underlying the deserts of Palm Springs.[16] Following these case histories, the chapter offers concluding thoughts on a future of increased collaboration with the recognition that, particularly as water resources grow scarcer, tribal claims will continue to shape the future of water law.

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[13] *See* Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 468 (2017) (mem.); United States v. Washington, 853 F.3d 946 (9th Cir. 2017), *aff'd by an equally divided Court per curiam*, 138 S. Ct. 1832 (2018) (mem.).

[14] *See, e.g.*, United States v. Gila Valley Irrigation Dist., 859 F.3d 789 (9th Cir. 2017) (addressing challenges brought by the United States and Gila River Indian Community to applications to sever and transfer water rights); Navajo Nation v. DOI, 876 F.3d 1144 (9th Cir. 2017) (reinstating the Nation's breach of trust claim alleging a failure to consider the Nation's rights and interests when the U.S. Department of the Interior developed guidelines for managing the Colorado River); Navajo Utah Water Rights Settlement Act of 2017, S. 664, 115th Cong. (2017); Hualapai Tribe Water Rights Settlement Act of 2017, S. 1770, 115th Cong. (2017).

[15] 138 S. Ct. 1832 (2018) (per curiam) (mem.).

[16] Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., No. 5:13-cv-00883 (C.D. Cal. filed May 14, 2013).

§ 9.02 Background

Understanding the nature of tribal treaty rights and claims to water requires a basic understanding of federal Indian law.[17] Like most issues raised in that body of law, the resolution of disputes over tribal rights to water turns on a fundamental conflict between historical rights reserved by Indian tribes and those asserting rights based on the legal structures subsequently established through America's constitutional framework.[18] Understanding the current conflicts requires recognition of the historical context of federal Indian law and a basic background in the development of Supreme Court jurisprudence on reserved treaty rights and Indian reserved water rights. This section provides both, in turn.

[1] Federal Indian Law

Since before America's founding, Indian tribes interacted with other sovereign governments to establish and protect their rights to property and resources.[19] Early treaties between European colonists and tribes laid the groundwork for European settlement of the "New World" while setting the terms of relations between both tribal and colonial governments.

These relations remained a core concern for America's founding fathers who, among other concerns, listed King George's perceived failure to protect them from "merciless Indian savages" as one of the motivations for declaring the new nation's independence.[20] Indian affairs also played a significant role in shaping and securing America's constitutional structure.[21] Importantly, the Constitution secured the supremacy of treaties that the United States entered into with Indian nations,[22] a practice that the federal government would officially continue until 1871.[23]

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[17] For a more detailed examination of the basics of the landscape of federal Indian law, see Monte Mills, "Why Indian Country? An Introduction to the Indian Law Landscape," *Indian Law and Natural Resources: The Basics and Beyond* 1-1 (Rocky Mt. Min. L. Fdn. 2017).

[18] *See, e.g.*, United States v. Winans, 198 U.S. 371, 385 (1905) (addressing Washington's equal footing argument against tribal treaty rights).

[19] *See, e.g.*, *Cohen's Handbook of Federal Indian Law* § 1.01[1] (Nell Jessup Newton et al. eds., 2012); David H. Getches et al., *Cases and Materials on Federal Indian Law* 85–98 (7th ed. 2017).

[20] The Declaration of Independence ¶ 29 (U.S. 1776).

[21] *See, e.g.*, Gregory Ablavsky, "The Savage Constitution," 63 *Duke L.J.* 999, 1072 (2014) (many southern states, like Georgia, viewed constitutional "ratification as quid pro quo: allegiance in return for military support to eradicate the Indian threat").

[22] U.S. Const. art. VI, cl. 2.

[23] Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566.

While the interests of the United States and Indian nations and the relationships between them varied over the decades in which treaties were made, each side sought to ensure its interests were represented in treaty documents. In the early years of treaty-making, for example, the United States sought peaceful relations with the numerous tribes on the western frontier that, if allied with European rivals or each other, posed a significant military threat to the young and impoverished revolutionaries.[24] Tribes, on the other hand, sought protection from further interference and invasion by non-Indian settlers and states eager to dispose of Indian lands and Indian people within their borders.[25] The treaty language of the era reflects the agreements made in pursuit of these interests.[26]

But as time progressed, the relationship between the United States and tribes changed. Rather than just securing peace with potentially threatening Indian nations, the burgeoning United States instead sought to expand its territorial rights and ownership by removing Indian people to the western frontier and isolating them in certain areas. This practice, combined with drastically dwindling native populations and military prowess, changed the nature of treaty negotiations. Thus, as the 1800s progressed, treaties increasingly imposed America's will upon Indian tribes. Treaties of the Great Peace Commission of 1867 and 1868,[27] for example, demanded the cession of vast swaths of tribal territories, the isolation of tribes to certain established reservations, and the provision of particular resources in order to promote the transition of tribal people from traditional lifeways to more sedentary and agrarian pursuits.[28]

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[24] *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 551 (1832) ("When the United States gave peace, did they not also receive it? Were not both parties desirous of it? If we consult the history of the day, does it not inform us that the United States were at least as anxious to obtain it as the Cherokees? We may ask, further: did the Cherokees come to the seat of the American government to solicit peace; or, did the American commissioners go to them to obtain it?").

[25] *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

[26] *See, e.g.*, Treaty of Hopewell (Cherokee Indians), Nov. 28, 1785, art. XIII, 7 Stat. 18 ("The hatchet shall be forever buried, and the peace given by the United States, and friendship re-established between the said states on the one part, and all the Cherokees on the other, shall be universal; and the contracting parties shall use their utmost endeavors to maintain the peace given as aforesaid, and friendship re-established.").

[27] For more on the Great Peace Commission, see Kerry R. Oman, "The Beginning of the End: The Indian Peace Commission of 1867–1868," 22 *Great Plains Q.* 35 (Winter 2002).

[28] *See, e.g.*, Treaty with the Navajo Tribe of Indians, June 1, 1868, 15 Stat. 667; Treaty of Fort Laramie (Sioux Indians), Apr. 29, 1868, 15 Stat. 635.

Despite those changing dynamics and the obvious challenges of negotiating agreements across language and cultural barriers, however, Indian tribes still argued for and secured important rights. In treaties across the Pacific Northwest, for example, tribes who had relied on salmon since time immemorial negotiated for and protected their right to take fish at all usual and accustomed places throughout that region.[29] Similarly, tribes of the Great Plains preserved their rights to hunt, often "so long as game may be found."[30] Perhaps most importantly, tribes also reserved specific territories as their ongoing homelands and, despite later federal policies of allotment and assimilation that shattered the integrity of those homelands,[31] many of those reservations remain sacred areas. Even after formal treaty-making ended in 1871, similar territories were still reserved and established through congressional action or executive order.[32]

The promises secured through treaties and the continuing insulation of tribal homelands from intrusion also found protection in decisions of the U.S. Supreme Court. In the early 1830s, for example, Chief Justice John Marshall relied upon treaties to define Indian tribes as "domestic dependent nations," existing outside of the constitutional structure but connected to the United States through those agreements.[33] In part relying on this description, the Court subsequently utilized the federal-tribal nature of treaties to exclude tribes from the application of state laws and state authority.[34] These decisions have come to form the foundation of federal Indian law and emphasize the deferential manner in which the Supreme Court has often viewed treaties.[35] While subsequent decisions certainly contradict that deference,[36] there

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[29] *See, e.g.*, Treaty with the Nez Percé Indians, June 11, 1855, art. III, 12 Stat. 957; Treaty with the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, July 16, 1855, art. III, 12 Stat. 975; Treaty with the Dwámish, Suquámish, and Other Allied and Subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, art. V, 12 Stat. 927.

[30] Treaty with the Crow Tribe of Indians, May 7, 1868, art. IV, 15 Stat. 649.

[31] *See, e.g.*, Judith V. Royster, "The Legacy of Allotment," 27 *Ariz. St. L.J.* 1, 7–20 (1995) (detailing the decimation of the tribal land base due to allotment).

[32] *See, e.g.*, Exec. Order of May 15, 1876 (establishing the Agua Caliente Reservation).

[33] Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

[34] Worcester v. Georgia, 31 U.S. 515, 561–62 (1832).

[35] *Cohen's Handbook*, *supra* note 19, at §§ 2.01–.02[1].

[36] *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 567–68 (1903) (recognizing congressional authority to abrogate treaty promises).

remains, in the words of leading Indian law scholar Charles F. Wilkinson, a "tremendously evocative" aura surrounding treaties and their negotiation that "most judges cannot shake."[37]

Taking account of this history and in line with the precedents of Chief Justice Marshall, the Supreme Court's subsequent interpretation of treaties in conflicts over water and water rights established new doctrines that continue to animate the current conflicts in these areas.

[2] Indian Treaty and Water Rights

Chief Justice Marshall's decisions of the early 1800s positioned tribes within American federal structure as a legal matter.[38] Thereafter, the removal of tribes to reservations, secured by treaties or created by executive order, located tribes geographically within the country as well. Two landmark Supreme Court decisions in the first decade of the twentieth century would then set the path for situating the rights of tribes to use and access natural resources both within and beyond the boundaries of their reservations.

In 1905, the Supreme Court took up the first of these cases in *United States v. Winans*.[39] The case arose from an effort to prevent the non-Indian Winans brothers from fencing off their property along the Columbia River on which they had erected a fish wheel to harvest salmon.[40] Though the Winans had received a permit for their fish wheel from the State of Washington, the United States, on behalf of members of the Yakama Tribe, sought injunctive relief to prohibit the fence and fish wheel.[41]

The United States based its request for injunctive relief on its treaty with the Yakama, which was entered into in 1855 and reserved to the Tribe "the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory . . . ."[42] By seeking to fence off their patented property to protect their fish wheel and exclude tribal members, the Winans were interfering with the rights of the Yakama to access one of their usual and accustomed fishing places.[43]

In deciding the case, the Supreme Court provided an important framework for the analysis of future treaty-related conflicts. Rejecting arguments from the Winans that the treaty ensured the Yakama only those

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[37] Charles F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* 121 (1987).

[38] *Cherokee Nation*, 30 U.S. at 17; *Worcester*, 31 U.S. at 561–62.

[39] 198 U.S. 371 (1905).

[40] *Id.* at 379.

[41] *Id.* Though the Court used "Yakima" to refer to the Tribe, the Yakama Nation changed the spelling of its name in 1993 to reflect the spelling used in the Nation's 1855 treaty with the United States. 12 Stat. 951 (ratified Mar. 8, 1859).

[42] Treaty with the Yakama Nation of Indians, Mar. 8, 1859, art. III, 12 Stat. 951.

[43] *Winans*, 198 U.S. at 379.

rights that any other state citizen would have, the Court made clear that result would be "an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more."[44] Instead, while recognizing that the changing times and circumstances that led to the treaty imposed certain limitations on the Yakama's rights, the treaty itself was "not a grant of rights to the Indians, but a grant of right from them,—a reservation of those not granted."[45] The Court described the rights reserved by the Yakama as a continuing interest in crossing the land to access their fishing places and made clear that those rights would run against the United States, the State of Washington, and its future grantees.[46]

Even the contention that such rights would necessarily diminish the sovereignty of the State of Washington in contravention of the equal footing doctrine was not sufficient to convince the Court to allow the Winans to erect a fence and fish wheel.[47] The Court made clear that the United States was free to make enforceable and durable treaty promises prior to statehood; however, the Court did note that those promises may not "restrain the state unreasonably, if at all, in the regulation" of the promised rights.[48]

Thus, with *Winans*, the Supreme Court staked out critical protections for treaty reserved rights. First, by recognizing the treaty as a grant of rights *from* the Tribe as opposed to a charitable grant by the federal government of rights *to* the Tribe, the Court cemented the idea of reserved rights into its foundational treaty interpretation jurisprudence. Second, the insulation of the Yakama treaty rights from Washington's equal footing arguments further confirmed treaties as the "supreme law of the land" and demanded state recognition of those federal rights. But the Court's caution that state regulatory authority over such rights may not be restrained left significant questions to be resolved in various litigation over the subsequent century.[49] Finally, by approaching treaty interpretation from the perspective that treaties "seemed to

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[44] *Id.* at 380.

[45] *Id.* at 381.

[46] *Id.* at 381–82.

[47] *Id.* at 384.

[48] *Id.*

[49] *See, e.g.*, Tulee v. Washington, 315 U.S. 681, 685 (1942) (relying on treaty rights to reverse conviction under Washington law of a Yakama tribal member charged with fishing without a state fishing license); Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392, 399 (1968) (recognizing treaty right to fish but also state authority to regulate "the time and manner of fishing . . . necessary for the conservation of fish" (quoting *Tulee*, 315 U.S. at 684)); Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44, 49 (1973) (invalidating state fishing regulations as discriminatory against Indians exercising treaty rights but recognizing that "[t]he police power of the State is adequate to prevent" species extinction); Puyallup Tribe, Inc. v. Dep't of Game of Wash., 433 U.S. 165, 173, 177 (1977) (upholding the Tribe's claim of sovereign

promise more" to tribes than just the rights otherwise enjoyed by state citizens, the Court highlighted the unique nature of those rights, a status that would continue to complicate the accommodation of such rights by non-tribal legal and regulatory regimes.

Less than six weeks after the Court decided *Winans*, the U.S. Attorney for Montana filed a complaint with the local federal district court on behalf of the Assiniboine and Gros Ventre Tribes of the Fort Belknap Indian Community in northcentral Montana.[50] Severe drought in the northern Great Plains in 1904 and 1905 had drastically reduced available water supplies in the Milk River and the federal government, concerned over the potential for the loss of the Tribes' crops, sought injunctive relief in order to prevent upstream irrigators, including lead defendant Henry Winter,[51] from diverting all of the Milk River's flow before it reached the reservation.[52] Though the United States presented a number of arguments in the Tribes' favor, the newly minted precedent of *Winans* played a central role in judicial consideration of the case's merits.[53]

Unlike the Yakama, the Tribes of Fort Belknap were not parties to a treaty reserving them the right to fish both within and at prescribed locations outside of their reservation. Instead, after the formal end of treaty-making in 1871, the federal government and a number of northern plains tribes agreed to terms establishing various reservations that would serve as their "permanent homes" and help them become "a pastoral and agricultural people."[54] Following a survey, the Fort Belknap Indian Reservation was established along the Milk River, to include the south half of that river as the Reservation's northern border.[55]

Consistent with the purposes of that agreement, the federal government supported the construction of irrigation facilities on the Reservation, some of which were funded through federal payments in exchange

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immunity from state court orders regulating fishing but rejecting tribal claims to exclusive rights to take fish passing through its reservation and lack of conservation necessity).

[50] Judith V. Royster, "Water, Legal Rights, and Actual Consequences: The Story of *Winters v. United States*," *in Indian Law Stories* 81, 88–89 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2011).

[51] Winter's name was misspelled throughout the proceedings, which ended up styled as *Winters v. United States*, 207 U.S. 564 (1908). Royster, *supra* note 50, at 87.

[52] Royster, *supra* note 50, at 87–88.

[53] *Id.* at 90–93 (reviewing lower court decisions); *Winters*, 207 U.S. at 577.

[54] Act of May 1, 1888, ch. 213, 25 Stat. 113.

[55] *Id.*

for additional cessions of land by the Tribes.[56] But with the drought of 1904–05 and Henry Winter and his upstream neighbors diverting water from the Milk River, the ongoing viability of the Reservation as both a home- and farmland was in jeopardy. The Supreme Court took up the United States' claims in 1908.

As with *Winans*, Justice McKenna authored the Court's majority opinion and, while cryptic and without direct cite to that case, the first portion of the Court's opinion in *Winters v. United States* echoes the reasoning of *Winans*. Like the 1859 Treaty in *Winans*, the Court viewed *Winters* as turning on the interpretation of the 1888 agreement establishing the Fort Belknap Reservation, but that agreement was silent as to the Tribes' rights to water.[57] Consistent with the reserved rights doctrine announced in *Winans*, however, McKenna noted that, prior to the 1888 agreement, the Tribes exercised control and authority over a vast swath of land and water and rhetorically questioned whether that agreement could, through silence, strip them of such rights.[58]

Rejecting such an interpretation, the Court concluded that neither the federal government nor the Tribes would have reached an agreement giving away the Tribes' rights to water, thereby rendering the "arid" lands "practically valueless."[59] The Court also noted that, in view of the rules for interpreting agreements with Indian tribes, the interpretation favoring the Tribes' interests is preferred.[60]

Beyond relying on the notion of reserved rights and the interpretative rules for Indian treaties, the *Winters* Court also rejected a state sovereignty argument like that made in *Winans*. Like the contentions of the Winans brothers, Winter and his fellow appellants argued that, regardless whether the 1888 agreement establishing the Reservation also reserved water rights, any such rights were rendered meaningless by Montana's subsequent admission to the Union in 1889.[61] According to the appellants, in order to be on equal footing with other states, Montana would have to retain the authority to allocate and protect the waters

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[56] Royster, *supra* note 50, at 85–87.

[57] *Winters*, 207 U.S. at 575.

[58] *Id.* at 576 ("The Indians had command of the lands and the waters,—command of all their beneficial use . . . . Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?").

[59] *Id.*

[60] *Id.* Though not cited in *Winters*, these canons of construction for Indian treaties originated in the Cherokee cases described in the preceding subsection. *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 556–57 (1832) (interpreting the Treaty of Hopewell in view of congressional policy to "treat [tribes] as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate").

[61] *Winters*, 207 U.S. at 577.

within its boundaries.[62] But, relying expressly on *Winans*,[63] the Court instead recognized the federal government's authority to reserve waters from state appropriation and emphasized the disconnect between the federal government's 1888 agreement, which was intended to provide an ongoing homeland for the Tribes, and the notion that any rights reserved by virtue of that agreement were repealed the very next year by Montana's statehood.[64]

The *Winters* decision staked out important protections for tribal homelands and claims to water. Although the intent behind both the 1888 agreement and the federal policies at the time was to promote assimilation of Indians through agricultural pursuits, the Court's recognition of the necessity of water for the survival of tribes and tribal homelands, regardless of whether such rights were expressed in a treaty, agreement, or executive order,[65] provided an important legal avenue for tribes and the federal government to protect these rights. Furthermore, because much of the arid west followed prior appropriation schemes for water allocation, where first in time meant first in right, tribal claims could often be the most senior, particularly in light of the treaty-making periods of the late 1800s.[66] But, while tribes have revived these protections in recent years and they remain at the heart of current conflicts over tribal water rights,[67] they would go largely ignored for the first half of the twentieth century.

[3] Twentieth Century Challenges

In its 1973 report to the President and Congress, the National Water Commission succinctly summed up the treatment of Indian water rights in the first half of the 1900s:

> Following *Winters*, more than 50 years elapsed before the Supreme Court again discussed significant aspects of Indian water rights. During most of this 50-year period, the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the *Winters* doctrine.[68]

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[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *See* Arizona v. California, 373 U.S. 546, 598–99 (1963).

[66] *See, e.g.*, Todd A. Fisher, Note, "The Winters of Our Discontent: Federal Reserved Water Rights in the Western States," 69 *Cornell L. Rev.* 1077, 1078–80 (1984).

[67] *See, e.g.*, Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1268 (9th Cir. 2017) (analyzing tribal claims to groundwater in accordance with *Winters* doctrine), *cert. denied*, 138 S. Ct. 468 (2017) (mem.).

[68] Water Policies Report, *supra* note 10, at 474 (footnote omitted).

The lack of understanding and recognition of the *Winters* doctrine and the reserved rights of tribes remains significant to the resolution of tribal claims. The expectations of states and non-Indian water users established during the first half of the twentieth century often present powerful obstacles to tribal claims. On the Colorado River, for example, a 1922 compact between the seven states within the basin allocated the river's water based on the then-current hydrologic understanding.[69] But, despite the presence of numerous Indian tribes and their reservations along the Colorado,[70] Indians and their *Winters* rights are not mentioned in the compact. It was not until 1963 that the Supreme Court confirmed that *Winters* did apply to apportionment of Colorado River water and required that the states recognize reserved rights claims of the tribes.[71] The Court also identified the practicably irrigable acreage of each reservation as a quantification standard for such rights.[72] Even recently, the calculation and inclusion of these tribal claims in the Colorado River's supply remain secondary.[73]

Beyond the challenges presented by the development of agreements and projects that ignored tribal rights during the first half of the 1900s, the legal avenues for resolving such challenges became more complicated by virtue of Congress's enactment, in 1952, of the McCarran Amendment.[74] That law, which,

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[69] Act of Aug. 19, 1921, ch. 72, 42 Stat. 171.

[70] *See Arizona v. California*, 373 U.S. at 595–96 (describing claims of the United States on behalf of five Indian reservations in Nevada, Arizona, and California).

[71] *Id.* at 600.

[72] *Id.* at 601.

[73] *See, e.g.*, "Agreement Regarding Importance of the Colorado River Basin Tribal Water Study—As Identified in the Colorado River Basin Water Supply and Demand Study" (2013), https://www.usbr.gov/lc/region/programs/crbstudy/agreement.pdf (recognizing that a purportedly comprehensive study of water rights in the Colorado basin performed by the federal Bureau of Reclamation "does not fully account" for tribal water rights). Similarly, the U.S.-Canada Columbia River Treaty, which established important rights and responsibilities for managing that river, entirely excluded consideration of tribes and tribal treaty rights, despite the Supreme Court's recognition of such rights in *Winans*. *See* Treaty Between the United States of America and Canada Relating to Cooperative Development of the Water Resources of the Columbia River Basin, U.S.-Can., Jan. 17, 1961, 15 U.S.T. 1555 (entered into force Sept. 16, 1964). Although that treaty is now being renegotiated, tribes still appear to be on the sidelines. *See, e.g.*, Emily Schwing, "Northwest Tribes Noticeably Absent in Columbia River Treaty Renegotiations," *KNKX* (Apr. 26, 2018).

[74] 43 U.S.C. § 666.

according to the U.S. Department of Justice, kicked off the "modern era of western water rights litigation,"[75] authorized the adjudication of federal reserved water rights claims in comprehensive, stream-wide state court water right adjudications.[76] The Supreme Court subsequently determined that, although not expressly mentioned in the law, the McCarran Amendment authorized state jurisdiction over claims brought by the United States on behalf of tribes to secure reserved rights to water as well.[77] Thus, while state courts "have a solemn obligation to follow federal law" as the source of Indian reserved rights,[78] they are still free to determine the scope, nature, and extent of *Winters* rights in the context of adjudicating other water rights within the state. As a result, approaches to resolving these claims vary widely.[79]

Beyond water rights, conflicts over tribal treaty rights also expanded over the second half of the twentieth century. While subsequent cases fleshed out the scope of the rights recognized by the Supreme Court in *Winans* over the first half of the 1900s,[80] conflicts over treaty fishing rights significantly intensified in the 1960s and 1970s. In the Pacific Northwest in particular, the so-called "fish wars" resulted in arrests,

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[75] U.S. Dep't of Justice, "The McCarran Amendment," https://www.justice.gov/enrd/mccarran-amendment).

[76] *See, e.g.*, Dugan v. Rank, 372 U.S. 609, 618–19 (1963).

[77] Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 811–12 (1976).

[78] Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 571 (1983); *see also* State *ex rel.* Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 712 P.2d 754, 762–68 (Mont. 1985) (analyzing adequacy of Montana law to adjudicate federally reserved water rights).

[79] *See, e.g.*, *In re* Gen. Adjudication of All Rights to Use Water in Big Horn River, 753 P.2d 76, 96 (Wyo. 1988) (narrowly interpreting treaty to find a "sole agricultural purpose" and correspondingly limiting tribal reserved rights to those necessary to fulfill such purpose), *aff'd by an equally divided Court per curiam sub nom.* Wyoming v. United States, 492 U.S. 406 (1989) (mem.); *In re* Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 35 P.3d 68, 76 (Ariz. 2001) (en banc) (broadly interpreting purposes to find a "permanent home and abiding place"); Mont. Code Ann. §§ 85-2-701 to -702 (authorizing a reserved water rights compact commission to negotiate and settle tribal claims to reserved water rights).

[80] *See, e.g.*, Seufert Bros. Co. v. United States, 249 U.S. 194 (1919) (prohibiting Oregon from limiting or abridging fishing rights of the Yakamas being exercised on the south side of the Columbia River); Tulee v. Washington, 315 U.S. 681 (1942) (prohibiting Washington from requiring that treaty rights be exercised only with state fishing licenses).

violence, and numerous protests.[81] In 1970, the United States, for itself and on behalf of a number of tribes across the State of Washington, filed what would become perhaps the most important litigation over treaty rights since *Winans* itself.[82] Through the initial proceedings in the case, the United States and subsequent tribal intervenors established the rights of tribes to up to half of the harvest of salmon across most of the state.[83] Both *Winans* and *Winters* were crucial to the Supreme Court's 1979 confirmation of those rights.[84]

As significant as securing up to half of the salmon catch was, however, additional subproceedings in *United States v. Washington* potentially implicated much broader protections for salmon and the waters that they need to survive. As part of the initial case, the United States and intervening tribes also sought relief for damage "due to state authorization of, or failure to prevent, logging and other industrial pollution and obstruction of treaty right fishing streams."[85] Those claims were initially put off pending resolution of the fishing claims,[86] but in 1976, the plaintiffs reinstituted them and sought judicial declaration that the "right to take fish incorporates the right to have treaty fish protected from man-made despoliation . . . ."[87] In 1985, however, the U.S. Court of Appeals for the Ninth Circuit rejected those claims as too speculative and general, holding that the requested declaratory relief demanded "[p]recise resolution" that must "depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case."[88] It would take over 30 years for such a case to arise.

This brief history of federal Indian law and overview of the foundations and development of reserved water and treaty rights jurisprudence provide necessary context for considering issues currently pending in these areas.

§ 9.03 Current Issues

The challenges over tribal water and treaty rights presently before various courts and policymakers echo all the way back to *Winans* and *Winters* and are rooted in the foundations of federal Indian law. Tribal

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[81] *See* Charles Wilkinson, *Messages from Frank's Landing: A Story of Salmon, Treaties, and the Indian Way* 34–46 (2000).

[82] United States v. Washington, 384 F. Supp. 312, 327 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

[83] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (*Fishing Vessel*), 443 U.S. 658, 685–86 (1979).

[84] *Id.* at 679–82 (reviewing *Winans*), 685–86 (citing both *Winans* and *Winters*).

[85] *United States v. Washington*, 384 F. Supp. at 328.

[86] *Id.*

[87] United States v. Washington, 759 F.2d 1353, 1356 (9th Cir. 1985).

[88] *Id.* at 1357.

arguments in favor of rights to groundwater or broader environmental protection from state actions spring from the history and supremacy of the tribes' relationship with the federal government. Meanwhile, states, local governments, and neighboring non-Indian citizens counter that honoring such claims could significantly impair, if not destroy, their otherwise legally protected interests. The resolution of these conflicts will, therefore, largely define the next generation of state-tribal relations and, potentially, the future of water allocation and use.

[1] Supreme Court: *Washington v. United States*

The most recent iteration of the original 1970 case discussed in the preceding section began in 2001, when a group of tribes and the United States reinitiated the environmental claims that had been deemed "phase II" of the original 1970 litigation.[89] Rather than seeking a general declaration that their treaty rights included certain mandates of environmental protection, however, the latest subproceeding focused on specific actions that, in the view of the federal and tribal petitioners, directly harmed salmon. According to the first sentence of the Tribes' initial pleading, "[t]he Tribes bring this subproceeding to enforce a duty upon the State of Washington to refrain from constructing and maintaining culverts under State roads that degrade fish habitat so that adult fish production is reduced, which in turn reduces the number of fish available for harvest by the Tribes."[90] Thus, where earlier efforts to enforce environmental protections had failed by virtue of their generality and lack of specific facts, the "culverts case" would be much more narrowly focused. Despite its narrow focus, however, the case presented a question of significant import—can there be a treaty-reserved right to environmental protection?

The State responded to that question with a range of defenses and counterclaims that would form the basis of the State's arguments throughout the subproceeding.[91] As an initial matter, the State argued that nothing in the relevant treaties or the Supreme Court's Indian treaty jurisprudence supported the claims of the United States and the Tribes.[92] Instead, the State read the language of the treaties in which Tribes ceded the land that eventually became the State of Washington to the United States as a recognition on the

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[89] *See* Request for Determination Regarding State Construction of Road Culverts, United States v. Washington, No. 2:70-cv-09213, Subproceeding No. 2:01-sp-00001 (Culverts) (W.D. Wash. Jan. 12, 2001); *see also* Bryan Bougher, "Fixing Barrier Culverts Aim of Treaty Tribes' Suit," *Nw. Indian Fisheries Comm'n* (Jan. 16, 2001).

[90] Request for Determination, *supra* note 89, at 1.

[91] *See* State of Washington's Answer and Cross and Counter Requests for Determination, United States v. Washington, No. 2:70-cv-09213, Subproceeding No. 2:01-sp-00001 (Culverts) (W.D. Wash. Mar. 16, 2001).

[92] *Id.* ¶¶ 5.3, .31–.33.

part of the Tribes and the United States that, but for the expressly reserved "right to take fish," there would be no ongoing duty imposed upon the State by such agreements.[93] In the State's view, the Ninth Circuit had already decided the question of an environmental servitude in its 1985 decision in the matter and neither the plain language nor a reasonable interpretation of the relevant treaty language could support the injunctive relief requested by the United States and the Tribes.[94] Before the Ninth Circuit, the State even went so far as to argue that the State could conceivably block every salmon stream in the region because the treaties imposed no duty to protect salmon habitat.[95]

In addition to its defenses based on the treaties, however, the State also raised counterclaims against both the United States and the Tribes.[96] In doing so, the State acknowledged that its road projects and culverts "have been a factor" in blocking salmon migration but made clear that many of its culvert projects required input, if not review and approval from, the federal government.[97] In 1996, for example, the State developed a habitat conservation plan addressing management of over one million acres of state trust lands, including lands within the "case area" of the culverts subproceeding.[98] As part of that plan, which included road management activities and required the State to identify and retrofit or replace stream-blocking culverts, the State sought approval from the U.S. Fish and Wildlife Service pursuant to the terms of the Endangered Species Act.[99] But despite the federal government's trust responsibility to the Tribes and status as a party to the treaties at issue, "[a]t no time during the permit application process did the federal government inform [the State] that any treaties would be violated if [the State] implemented the culvert remediation strategy proposed in the [habitat conservation plan]."[100]

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[93] *Id.* ¶ 5.31.

[94] *See, e.g.*, State of Washington's Motion for Summary Judgment and Argument in Support at 2, United States v. Washington, No. 2:70-cv-09213, Subproceeding No. 2:01-sp-00001 (Culverts) (W.D. Wash. Aug. 14, 2006), 2006 WL 2825385.

[95] *See* United States v. Washington, 853 F.3d 946, 962 (9th Cir. 2017) (quoting oral argument transcript), *aff'd by an equally divided Court per curiam*, 138 S. Ct. 1832 (2018) (mem.). In oral argument before the Supreme Court, the State retracted this line of argument, calling it a "mistake." Transcript of Oral Argument at 5, Washington v. United States, 138 S. Ct. 1832 (2018) (No. 17-269), 2018 WL 2446093.

[96] State of Washington's Answer and Cross and Counter Requests for Determination, *supra* note 91, at ¶¶ 7.1–.6.

[97] *Id.* ¶ 3.12.

[98] *Id.* ¶ 5.2.

[99] *Id.*

[100] *Id.* ¶ 5.3.

The State also alleged that both the federal government and the Tribes installed and maintained culverts, as well as other stream impediments such as dams, that block fish passage and contributed to the salmon decline.[101] In the State's view, if the treaties impose a duty of protection, then singling out the State for constructing and maintaining culverts that violate that duty would unfairly burden the State and interfere with the State's sovereign authority to manage its resources in violation of the equal footing doctrine and principles of federalism.[102]

Just as with *Winans* or *Winters* over a century before, and like the earlier subproceedings in the same case, the central issues in the culverts subproceeding revolved around the ongoing vitality of rights established under federal law to protect tribal interests, especially in view of changed circumstances since the treaties were entered. Like those earlier cases, the arguments raised issues of equal footing and state authority, while also presenting the fundamental question of how the federal government's promises of the 1800s might still resonate in the 2000s and beyond. According to the State, however, those promises simply did not impose burdens on its ability to manage its resources and, even if they did, those burdens must be shared, if not borne entirely, by the federal government. Throughout the case, the parties' arguments reflected these general positions.

Relying primarily upon the Supreme Court's decision in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n* (*Fishing Vessel*),[103] which established that the treaties reserved "the right to *take* fish, not just the right to fish," Judge Martinez initially granted summary judgment in favor of the Tribes and the United States.[104] Following that decision, he then issued a preliminary injunction and, after holding a trial on further remedies, issued a detailed 35-page memorandum and decision[105] and a permanent injunction against the State.[106] As the Ninth Circuit later noted, in crafting the injunction Judge Martinez sought assistance from the State but the State declined to participate.[107] The

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[101] *Id.* ¶¶ 5.22–.29.

[102] *Id.* ¶¶ 5.32–.33.

[103] 443 U.S. 658 (1979).

[104] United States v. Washington, No. 2:70-cv-09213, Subproceeding No. 2:01-sp-00001 (Culverts), 2007 WL 2437166, at *8 (W.D. Wash. Aug. 22, 2007) (order on cross-motions for summary judgment).

[105] United States v. Washington, 20 F. Supp. 3d 986, 1000 (W.D. Wash. 2013).

[106] Permanent Injunction Regarding Culvert Correction, United States v. Washington, No. 2:70-cv-09213, Subproceeding No. 2:01-sp-00001 (Culverts) (W.D. Wash. Mar. 29, 2013).

[107] *See* United States v. Washington, 864 F.3d 1017, 1019 (9th Cir. 2017) (order denying en banc review) (noting that although "[t]he State has fought the proceeding tooth and nail," and refused to

injunction required the State to consult with the United States and the Tribes about culverts and develop a plan for replacing any culvert that impairs or affects 200 linear meters of stream habitat within 17 years.[108] The State quickly appealed to the Ninth Circuit.

The Ninth Circuit panel issued its decision on June 27, 2016, affirming the district court, and amended it on March 2, 2017.[109] The panel decision largely tracked both the district court's analysis and the arguments of the United States and the Tribes by starting with the history of the treaties and the Supreme Court's favorable interpretation of the relevant language in *Fishing Vessel*.[110] Relying on the record of treaty negotiations, the court determined that Governor Isaac Stevens, in negotiating the treaties, had expressly promised to the Tribes that the treaties secured their fish in perpetuity.[111] But, even beyond the express promises of the treaties, the court, relying on *Winters*, also found that the treaties inferred the same rights.[112] Like the implied reservation of water in conjunction with the reservation of land for the Fort Belknap Tribes in that case, the court would infer a promise to the Tribes that would "support the purpose" of the treaties to sustain them through fishing.[113] Thus, the court supplemented the analysis of the district court by finding that the treaties both expressly and impliedly promised the Tribes an ongoing and perpetual right to fish that, in the court's view, was being violated by the State.[114]

The Ninth Circuit panel went on to dismiss the State's concerns over the scope of the injunction and its arguments that the United States had both waived its claims and was subject to counterclaims.[115] While the court answered each of the State's contentions regarding the injunction in detail, the court generally determined that the injunction was appropriately and narrowly crafted to remedy the harm caused by the State's ongoing violation of the treaties. Therefore, according to the court, the State's detailed objections to the scope of the injunction, and its costs and effect on state government and authority, were not compelling.

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participate in crafting a remedial injunction, "the district court entered an injunction that was substantially more favorable to the State than the injunction sought by the United States").

[108] Permanent Injunction, *supra* note 106, at ¶ 6.

[109] United States v. Washington, 853 F.3d 946 (9th Cir. 2017), *amending and superseding* 827 F.3d 836 (9th Cir. 2016).

[110] *Id.* at 962–65.

[111] *Id.* at 964.

[112] *Id.* at 965.

[113] *Id.*

[114] *Id.* at 966.

[115] *Id.* at 966–70 (waiver and counterclaims), 970–79 (scope of the injunction).

Following an unsuccessful request for en banc review,[116] the State then petitioned for, and was granted, certiorari by the Supreme Court.[117] The State's opening merits briefing before the Court largely tracked the issues argued before and by the Ninth Circuit, presenting questions regarding the nature and scope of treaty rights, the availability of equitable defenses, and the breadth and enforceability of the injunction.[118] But in responsive briefing, both the Tribes and the United States shifted their focus within the treaty rights argument to promote the theory that the rights reserved in the treaties prevent "substantial degradation" of the fishery resource.[119] In crafting these arguments, both respondents went beyond their prior Indian law-based arguments and relied upon common law principles prohibiting stream barriers as nuisances in other, non-Indian contexts.[120] That shift in focus prompted the State to contend that the respondents were abandoning earlier arguments and now seeking to rely upon an alternative theory not previously argued.[121]

These matters animated much of the oral argument before the Court, with a number of the eight justices hearing the case pressing counsel for both sides to detail what would constitute "substantial degradation" of the fishery.[122] Echoing the State's reply brief, for example, Chief Justice John Roberts grilled counsel for the United States about whether the matter should be remanded in order to address the common law nuisance argument, which was raised only before the Supreme Court.[123] Reiterating the crux of the challenge in the case all along, counsel responded that the common law rights available to all citizens are simply supportive of the broader tribal claims for protection, but not essential to considering the treaty-based claims.[124]

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[116] United States v. Washington, 864 F.3d 1017 (9th Cir. 2017) (order denying en banc review).

[117] 138 S. Ct. 735 (2018) (mem.).

[118] Brief for the Petitioner, Washington v. United States, 138 S. Ct. 1832 (2018) (No. 17-269), 2018 WL 1083741.

[119] *See* Brief for the United States at 20–21, Washington v. United States, 138 S. Ct. 1832 (2018) (No. 17-269), 2018 WL 1479470; Brief for the Tribal Respondents at 19–20, 23–26, Washington v. United States, 138 S. Ct. 1832 (2018) (No. 17-269), 2018 WL 1557066.

[120] *See, e.g.*, Brief for the Tribal Respondents, *supra* note 119, at 34–37.

[121] Reply Brief for the Petitioner at 1–5, Washington v. United States, 138 S. Ct. 1832 (2018) (No. 17-269), 2018 WL 1738815.

[122] *See* Transcript of Oral Argument, *supra* note 95, at 12–14, 17, 43–44, 54. Justice Kennedy recused himself from further consideration of the case less than a month before oral argument.

[123] *Id.* at 37–38.

[124] *Id.* at 38.

On June 11, 2018, the Supreme Court summarily affirmed the Ninth Circuit's decision by virtue of a 4-4 deadlock among the justices hearing the case.[125] The Court's one-sentence ruling provided an anticlimactic end to the most recent chapter in the ongoing half-century battle over treaty-reserved tribal fishing rights in the State of Washington. But just as a majority of the Justices were unable to agree how to situate those historically reserved rights in the present-day, lower courts continue to wrestle with that same issue in different contexts.

[2] Developments in the Lower Courts: *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*

While *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District* continues in federal district court, the case has already resulted in a landmark ruling from the Ninth Circuit.[126] Although various state courts previously considered whether reserved *Winters* rights include a right to groundwater,[127] no federal court had yet squarely tackled that question.[128] Beyond that important decision, the case continues to present unique tribal claims to water, both in quantity and quality, and highlights the complicated challenge of tribal claims in an era of increasing water scarcity.

The Agua Caliente Band of Cahuilla Indians have resided in southern California since time immemorial. In 1876, President Ulysses S. Grant established the Tribe's reservation via executive order.[129]

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[125] Washington v. United States, 138 S. Ct. 1832 (2018) (per curiam) (mem.).

[126] 849 F.3d 1262 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 468 (2017) (mem.).

[127] *See, e.g.*, *In re* Gen. Adjudication of All Rights to Use Water in Big Horn River, 753 P.2d 76, 99–100 (Wyo. 1988), *aff'd by an equally divided Court per curiam sub nom.* Wyoming v. United States, 492 U.S. 406 (1989) (mem.); *In re* Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 989 P.2d 739, 748 (Ariz. 1999) (en banc); Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Stults, 2002 MT 280, ¶ 31, 59 P.3d 1093.

[128] *See* Cappaert v. United States, 426 U.S. 128, 142 (1976) (recognizing the lack of Supreme Court precedent on the question but ultimately determining the water at issue to be surface water due to the physical interrelationship between the groundwater and surface water); State *ex rel.* Reynolds v. Aamodt, 618 F. Supp. 993, 1010 (D.N.M. 1985) (analyzing pueblo water rights and recognizing rights to "the ground water physically interrelated to the surface water as an integral part of the hydrologic cycle" (citing *Cappaert*, 426 U.S. at 142)).

[129] Exec. Order of Dec. 27, 1875, *in* Charles J. Kappler, *Indian Affairs: Laws and Treaties* vol. 1, pt. III, at 820–21 (Gov't Printing Office 1904) (Kappler Vol. 1); Exec. Order of May 15, 1876, *in* Kappler Vol. 1, at 821 (establishing the Agua Caliente Reservation).

Though modified by subsequent executive orders,[130] the reservation was intended to be the Tribe's homeland in the arid southern California desert, where the City of Palm Springs is now located. Though none of these executive orders mentioned water rights, the reservation's location made access to water essential for the Tribe's survival.

In recognition of the Tribe's preexisting use of surface water in the area, largely from the Whitewater River and its tributaries, the United States recommended certain water rights for the Tribe during California's adjudication of local claims to water rights in the 1930s.[131] As a result, the United States secured, in trust for the Tribe, about 8,000 acre-feet of water per year from the local Tahquitz and Andreas creeks.[132] But as population and water use within the local Coachella Valley grew, water supplies and availability became increasingly challenging.

As noted in a summary of the Coachella Valley's history of water use and development prepared by local water agencies,[133] groundwater has served as the major source of water since the early 1900s. Early in the twentieth century, however, the valley's groundwater supply began dropping and the Coachella Valley Water District (CVWD) searched for water sources to recharge the groundwater supply. By the early 1960s, with the construction of the All-American Canal to supply water from the Colorado River, CVWD was able to recharge the underground aquifer and restore groundwater levels to historical measures.[134] But that did not solve the problem for the entire valley as the western portion of the valley continued to experience groundwater shortages.[135] The Desert Water Agency (DWA) was formed to assist by bringing additional water from California's supply into the valley to recharge those regional aquifers.[136] Growth and water use in the valley continued to increase and, by the 1980s, the aquifer was in what the agencies refer to as "overdraft," when more water was being extracted from the aquifer than could be used to recharge it.[137] As such, pumping and development costs increased, more planning and supply strategy became

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[130] *See, e.g.*, Exec. Order of Jan. 17, 1880, *in* Kappler Vol. 1, at 822; Exec. Order of Mar. 14, 1887, *in* Kappler Vol. 1, at 824.

[131] *See* Complaint for Declaratory and Injunctive Relief at 10, Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., No. 5:13-cv-00883 (C.D. Cal. May 14, 2013).

[132] *Id.*

[133] "Coachella Valley Water Management Plan Update—Final Report," at ES-3 (Jan. 2012).

[134] *Id.*

[135] *Id.*

[136] *Id.* Rather than build an expensive aqueduct, DWA and CVWD agreed with other state water agencies to exchange Colorado River water for their state water allocation. *Id.*

[137] *Id.* at ES-4.

necessary, increased conservation measures were called for, and the valley's future growth and access to water was threatened.[138] Thus, in January 2012, CVWD and DWA developed an updated water management plan with an objective of eliminating long-term groundwater overdraft, among others.[139]

In May 2013, however, the Tribe, concerned about the long-term environmental and water quality impacts of the use of Colorado River water to recharge groundwater aquifers, introduced a potentially significant complication for the agencies' planning efforts.[140] Claiming reserved rights to groundwater under both *Winters* and *Winans*, the Tribe brought suit against both CVWD and DWA (as well as their board members in their official capacity), seeking declaratory relief establishing their reserved and aboriginal rights to that water and injunctive relief prohibiting the agencies from further overdrafting the aquifer and injecting recharge water into it.[141]

Beyond seeking to break new legal ground, the Tribe's case also marked a potentially significant disruption to the local non-Indian residents' and water agencies' existing system of water rights and access to groundwater. Like the impacts to the State of Washington occasioned by the treaty-based claims of the United States and tribes there, the Agua Caliente Band of Cahuilla Indians' suit pitted the weight and meaning of historical rights against modern (and settled) expectations and complexities.[142]

Before getting to those weighty matters, however, the parties agreed to split the case into three procedural phases.[143] The case's first phase would be limited to the purely legal issues of whether the Tribe had either an aboriginal or reserved right to groundwater.[144] Only if phase I resolved in the Tribe's favor would phase II be necessary, which would entail determining the Tribe's ownership rights to the pore space within the aquifer and whether the Tribe also had a right to a particular quality of groundwater, in addition to the defendant water agencies' affirmative defenses.[145] Phase III, if necessary, would seek to quantify the

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[138] *Id.* at ES-5.

[139] *Id.* at ES-18.

[140] *See* Complaint, *supra* note 131, at 14.

[141] *Id.* at 18–20.

[142] The Supreme Court has, on occasion, viewed similar "longstanding observances and settled expectations" as "prime considerations" when considering tribal rights. City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 218 (2005).

[143] *See* Stipulation to Trifurcate the Case, Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., No. 5:13-cv-00883 (C.D. Cal. Dec. 2, 2013).

[144] *Id.* at 2.

[145] *Id.* at 3.

Tribe's rights to water and water quality as well as shape remedies.[146] By dividing the case in this fashion, the parties were able to isolate the fundamental legal questions for early resolution and leave the more complex challenges for a later, and perhaps unnecessary, fight. After the case was trifurcated, the United States, seeking to protect its trust interests and responsibilities toward the Tribe, intervened.[147]

In summary judgment briefing, the Tribe argued that the reserved rights issue required only a straightforward application of *Winters*, which, while directly applicable only to surface water, had been applied by other state courts to recognize reserved rights to groundwater as well.[148] The United States supported the Tribe's position and further emphasized that the reserved rights claimed by the Tribe are federal rights that would preempt state law or state attempts to limit them.[149]

The water agencies countered the Tribe's position by acknowledging the existence of *Winters* rights but disputing the application of the reserved rights doctrine to the Tribe's claims. DWA, for example, relying on cases involving water rights associated with non-tribal federal land reservations, argued that *Winters* rights exist only where "necessary" to fulfill the primary purpose of the reservation.[150] In addition, the agency pointed out that, as evidenced by the McCarran Amendment and noted by the Supreme Court in *United States v. New Mexico*,[151] federal law defers to state law regarding water allocation and

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[146] *Id.*

[147] Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 162 F. Supp. 3d 1053 (C.D. Cal. 2014) (order granting intervenor United States' motion to intervene).

[148] *See* Agua Caliente Band of Cahuilla Indians' Memorandum of Points and Authorities in Support of Summary Judgment on Phase I Issues at 5–6, Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., No. 5:13-cv-00883 (C.D. Cal. Oct. 21, 2014), 2014 WL 11152398. In addition to the reserved rights argument, the Tribe also pushed a claim for an aboriginal right to groundwater, which, unlike its reserved rights claim, would secure a priority date of time immemorial. *Id.* at 18.

[149] United States' Memorandum of Points and Authorities in Support of Summary Judgment on Phase I Issues at 16–23, Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., No. 5:13-cv-00883 (C.D. Cal. Oct. 21, 2014) (the United States focused only on the Tribe's reserved rights claim and did not explicitly support the Tribe's aboriginal right claim).

[150] Defendant Desert Water Agency's Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 15–19, Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., No. 5:13-cv-00883 (C.D. Cal. Oct. 21, 2014) (DWA Brief).

[151] 438 U.S. 696, 701 (1978) ("Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.").

management.[152] Therefore, according to the agencies, because the Tribe had an existing state-law right to use groundwater, no additional reserved right was "necessary."[153] Beyond that argument, DWA also noted the potentially significant impact that recognition of a tribal reserved right to groundwater could have on the agencies' ability to manage and protect groundwater for other users.[154]

The district court granted summary judgment to the Tribe and the United States on the existence of a reserved, *Winters* right to groundwater.[155] With regard to the reserved right question, the court relied heavily on the narrow nature of phase I and focused its ruling only on the existence of a reserved right, not the quantification, scope, or impact of such a right.[156] Accordingly, the court only analyzed the Tribe's claims in the context of *Winters* and its progeny, ultimately determining that "[t]he federal government intended to reserve water for the Tribe's use on its reservation," and that "[r]ights to the groundwater underlying the reservation are appurtenant to the reservation itself."[157]

Identifying those two factors as the only considerations relevant for determining the existence of a *Winters* right to groundwater, the court largely dismissed the agencies' arguments as focused on issues beyond phase I.[158] In dismissing the agencies' "insistent reliance" on *New Mexico*, for example, the court noted that Ninth Circuit precedent has cautioned against strictly applying federal reserved rights case law to Indian reserved rights cases and that, because the Tribe's reservation was clearly established to provide a permanent homeland, that was sufficient to support the existence, but not delineate the breadth, of a

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[152] DWA Brief, *supra* note 150, at 11–12.

[153] *Id.* at 15.

[154] *Id.* at 26–28.

[155] Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., No. 5:13-cv-00883, 2015 WL 13309103, at *7–8 (C.D. Cal. Mar. 24, 2015) (order granting in part and denying in part plaintiffs' and defendants' motions for partial summary judgment). The court rejected the Tribe's aboriginal right argument and granted summary judgment to defendants on that issue. *Id*. at *8–10. The Tribe did not appeal that matter further.

[156] *Id.* at *5 ("The upshot of this well-established [*Winters*] framework, especially in light of the parties' agreement to split this case into three phases, is that the Court addresses here only the existence of the Tribe's *Winters* rights; quantification comes later.")

[157] *Id.* at *6.

[158] *See id.* (defendant water agencies' arguments "mainly talk past whether *Winters* rights include groundwater, and focus on the quantum of the Tribe's entitlement").

reserved right to groundwater.[159] Thus, while repeatedly acknowledging that the agencies' arguments raised in phase I may be relevant in later phases of the case, the court recognized a *Winters* right to groundwater for the Tribe.

Before the Ninth Circuit, the water agencies joined forces to file consolidated briefs and, despite the district court's admonishment about the inapplicability of *New Mexico*, the agencies doubled down on that argument. In their opening brief, for example, the agencies insisted that the district court should have considered *New Mexico* when determining whether a reserved right to groundwater existed, not postpone its consideration until quantifying that right.[160] According to the water agencies, such analysis is necessary in the first instance to ensure that a reserved right is necessary to fulfill the primary purposes of the reservation and comply with Congress's traditional deference to state water law.[161] Furthermore, because the Tribe already had rights to use groundwater under the California correlative rights scheme for groundwater, the agencies argued that recognizing a reserved right that granted a priority date was inconsistent with that scheme and not necessary to fulfill the reservation's purposes.[162] Finally, emphasizing the recurring theme in these cases, the agencies highlighted the disruptions to the existing state water management scheme that the Tribe's reserved right would have, including the Tribe's ability to use groundwater free from state law restrictions on other users that, in the agencies' view, would jeopardize the use of water by those other users.[163]

Responding to the agencies' arguments, both the Tribe and the United States reiterated the straightforward rationale of *Winters*.[164] Both appellees also dismissed the agencies' *New Mexico* arguments

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[159] *Id.* at *7 ("Of course, delineating the reservation's purpose will ultimately dictate the breadth of the Tribe's *Winters* rights, but the Agua Caliente's reservation, at a minimum, provides the Tribe with a homeland for now and for the future, and *Winters* ensures a federal right to appurtenant water to realize that end.")

[160] *See* Joint Brief of Appellants at 28–29, Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262 (9th Cir. 2017) (No. 15-55896), ECF No. 24.

[161] *Id.* at 26 ("the existence of [a federally reserved right to groundwater] itself, and not just its quantification, conflicts with Congress' deference to state water law")

[162] *Id.* at 43–44.

[163] *Id.* at 59–66.

[164] *See, e.g.*, Brief for Appellee Agua Caliente Band of Cahuilla Indians at 27–28, Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262 (9th Cir. 2017) (No. 15-55896), 2016 WL 613978 ("The district court's analysis and holding are fully consistent with all prior case law addressing the *Winters* doctrine and the reservation of water for Indian reservations.").

as irrelevant to the reserved rights inquiry and inapplicable to the phase I questions. Also irrelevant in their view were the potential impacts on California law and California water users of a reserved right to groundwater.[165] On the latter contention, the Tribe noted that the non-Indian water users of the Milk River near Fort Belknap had the exact same concerns leading up to the *Winters* decision.[166]

In deciding the matter, the Ninth Circuit began its analysis of the Tribe's claimed reserved right by addressing the application of *New Mexico*, ultimately concluding that *New Mexico* is consistent with *Winters* but is relevant only to determining "the question of *how much* water is reserved," not the existence of a reserved right to begin with.[167] Therefore, the court went on to analyze the federal government's primary purpose for the Agua Caliente Reservation, whether that purpose required water, and, if so, whether groundwater should be included in that reservation.[168] Affirming the district court's opinion and analysis, the Ninth Circuit answered all three questions in the affirmative, expressly holding that "the *Winters* doctrine encompasses both surface water and groundwater appurtenant to reserved land."[169] The court also dismissed the agencies' concerns about conflicts with state law, noting the supremacy of the federal rights.[170] But, in concluding its opinion, the court recognized that the posture of the case prevented consideration of all of the issues raised by the water agencies, including a full analysis under *New Mexico*, which, in the court's view, would be relevant for the later quantification of the Tribe's rights.[171] In an effort to provide guidance to the resolution of these questions, the court closed its decision by making clear that though it could not predict the answer to those quantification questions, the existence of a reserved right to groundwater meant the Tribe had at least a right to some quantity of groundwater.[172]

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[165] *See, e.g.*, *id.* at 55 ("That reserved water rights are not subject to state laws, however, does not justify ignoring those rights.").

[166] *Id.* at 56.

[167] *Agua Caliente*, 849 F.3d at 1270. The author participated in briefing the case before the Ninth Circuit, submitting an amicus curiae brief on behalf of a group of law professors in support of Agua Caliente's claims. *See* Brief of Amicus Curiae Law Professors in Support of Plaintiff/Appellee and Affirmance of the District Court's Order, Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262 (9th Cir. 2017) (No. 15-55896), 2016 WL 764748.

[168] *Agua Caliente*, 849 F.3d at 1270.

[169] *Id.* at 1271.

[170] *Id.* at 1272.

[171] *Id.*

[172] *Id.* at 1273 ("[W]hile we express no opinion on how much water falls within the scope of the Tribe's federal groundwater right, there can be no question that water in some amount was necessarily

Despite support from a number of states as amici curiae, the U.S. Supreme Court denied certiorari,[173] leaving in place the first precedential federal case expressly recognizing a reserved right to groundwater under the *Winters* doctrine. But, as the phase I issues were appealed, the litigation continued in the district court, with the court hearing phase II summary judgment issues in April and July 2018.

In doing so, the court is considering whether the Tribe's claim for ownership of the pore space within the aquifer and claimed right to groundwater quality were ripe for review because, according to the water agencies, the Tribe has failed to specifically allege any injury.[174] If ripe, the Tribe's water quality claim, arguing that a reserved right to groundwater is essentially meaningless unless that groundwater is of suitable quality for use, could build on the *Winters* doctrine in the same way that the Ninth Circuit relied on that doctrine to protect stream habitat for salmon in the culverts case.[175]

Beyond ruling on phase II issues, which may generate appeals to the Ninth Circuit and beyond, the court also faces phase III questions as well, which will require quantification of the Tribe's rights to groundwater both in amount and quality and, potentially, injunctive relief to protect those rights.[176] Unless the parties settle these hotly contested issues, more judicial guidance on the meaning and scope of Indian reserved rights to groundwater under the *Winters* doctrine is forthcoming.

§ 9.04 Conclusion: Looking Ahead

These and other recent tribal actions to protect and assert rights to water are a drastic change from the majority of the last century, during which such rights sat dormant or were largely misunderstood or ignored.[177] As both cases discussed in this chapter highlight, these demands present historical and legal challenges for tribes, the federal government, states, and state and local agencies. From the tribal perspective, the cases described herein are necessary battles to insulate the ongoing vitality of their treaties and reserved homelands from external impacts and pressures. Similarly, from the state and local agency

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reserved to support the reservation created. Thus, to guide the district court in its later analysis, we hold that the creation of the Agua Caliente Reservation carried with it an implied right to use water from the Coachella Valley aquifer.").

[173] 138 S. Ct. 468 (2017) (mem.).

[174] *See, e.g.*, Defendant Coachella Valley Water District's Notice of Motion and Motion for Partial Summary Judgment on Phase 2 Issues; Memorandum of Points and Authorities at 11–13, Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., No. 5:13-cv-13-00883 (C.D. Cal. Oct. 20, 2017), ECF No. 200.

[175] *See supra* notes 110–12 and accompanying text.

[176] *See* Complaint, *supra* note 131, at 17–18.

[177] For additional examples of recent efforts in both the courts and Congress, see *supra* note 14.

perspective, these tribal claims present significant threats to their ongoing ability to manage and protect their water and natural resources. Given the stakes, the potentially intractable conflict of these winner-take-all litigation battles is understandable.[178]

Ultimately, however, once court decisions are penned and attorney's fees paid, the parties will still need to protect and provide for the interests of their citizens, whether through the continued exercise of time-honored tribal treaty rights and use of reserved water or under the terms and conditions of state law and agency management. While the ferocity of litigation may spawn enmity in the short term, the long-term viability of both tribal and non-tribal communities will depend on intergovernmental cooperation and collaborative approaches to resource management. The Columbia River Inter-Tribal Fish Commission (CRITFC), which grew out of the need for effective tribal salmon management in the wake of the culverts case's precursor subproceedings and has established itself as a leader in scientific and collaborative fisheries management, is a prime example.[179]

Similarly, recent settlements of tribal water rights claims have shown the potential for intergovernmental cooperation and compromise to serve the broader interests of federal, state, and tribal citizens. The 2015 settlement of the water rights claims of the Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Reservation in Montana, which marked the culmination of negotiations between the Tribes, the United States, and the State of Montana, is another such example.[180] That compact resolves thousands of tribal claims to aboriginal and reserved water rights across the western third of Montana that, but for the settlement, would require adjudication in Montana's ongoing state-wide adjudication process.[181] Beyond avoiding such complex and burdensome litigation, the compact also seeks to implement adaptive management of water resources, including the protection of instream flows aimed at restoring a natural hydrograph that was long ago disrupted by irrigation and other water uses, and protect existing water users, both Indian and non-Indian.[182] While the settlement still awaits congressional approval, the Tribes and the

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[178] *See* United States v. Washington, 864 F.3d 1017, 1019 (9th Cir. 2017) (order denying en banc review) (noting that the State was fighting "tooth and nail" against the tribal treaty claims).

[179] *See* CRITFC, "The Founding of CRITFC," http://www.critfc.org/about-us/critfcs-founding/.

[180] *See* Mont. Code Ann. § 85-20-1901.

[181] *See* Mont. Dep't of Natural Res. & Conservation, "CSKT Claim Filing Maps," http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/confederated-salish-and-kootenai-tribes/cskt-claim-filing-maps.

[182] *See* "Summary of the Compact and Ordinance for the Flathead Reservation Water Rights Settlement," at 1, 4–5, 7 (Jan. 2017), http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/docs/2017-summary-of-compact-and-ordinance-final.pdf.

State of Montana were able to work together to overcome significant political challenges and reach agreement.[183]

Therefore, in addition to the value of recognizing the broader historical and legal context in which both *Washington v. United States* and *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District* arise, practitioners would be well-served to consider the broader context of the future beyond such challenges. As the history of federal Indian law demonstrates, the assertion of historical tribal rights may significantly disrupt established non-Indian interests, but as both the CRITFC and CSKT settlement examples show, such disruptions may also provide an opportunity for new collaborative solutions that provide broader benefit.[184]

The assertion of these claims, just like those in *Winans* and *Winters* over 100 years ago, presents the potential for a future of increased collaboration and cooperative governance among our nation's three sovereigns. Realizing such potential will demand practitioners who deeply understand each case and the context in which it arises. Hopefully, this chapter assists in that effort.

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[183] *See, e.g.*, Tristan Scott, "CSKT Water Compact Faces Long Journey from Helena to Washington," *Flathead Beacon* (Apr. 21, 2015).

[184] *See* Matthew L.M. Fletcher, Kathryn E. Fort & Dr. Nicholas J. Reo, "Tribal Disruption and Indian Claims," 112 *Mich. L. Rev. First Impressions* 65, 66 (2014) ("Tribal claims . . . clear out a legal space for creative and improved governance institutions.").