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INTRODUCTION

Indian reserved water rights have a strong legal foundation buttressed by powerful moral principles. As explained more fully below, the Supreme Court has implied reserved tribal water rights when construing treaties and other similar legal instruments. The precise scope and extent of these rights in any treaty are unknown until quantified by a court ruling or an agreement ratified by Congress. When litigation is the quantification tool, tribal claims are generally caught up in massive general-stream adjudications. These adjudications are massive because to obtain jurisdiction over the Indian water rights (and over the United States as trustee to the tribes), states must adjudicate *all* claims to a given river system; they may not engage in piecemeal litigation of only the Indian and federal claims. The result can be that there are thousands of state water rights holders who must be joined as parties to exceedingly complex litigation that takes too long and costs too much. Moreover, even when such adjudications are litigated to a conclusion and tribes win a decreed water right, such a "paper right" may do little to advance tribal needs without the financial ability or the infrastructure to put the water to use. At the same time, the general failure of the United States to assert and protect tribal rights until the 1970s, along with its zealous advancement of competing non-Indian uses, created expectations among non-Indians that their state-law water rights were secure. In fact, many non-Indian rights are far from secure.

This Article first reviews the few Indian water rights cases that the U.S. Supreme Court has decided. The Article then traces a threshold issue common to Indian water rights litigation in the federal and state courts: how to determine

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the purposes of a reservation for which a reserved water right should be implied. A review of major Indian water rights cases demonstrates the generally confusing state of the law in significant respects, especially with regard to the "purposes" determination. This Article posits that the relative uncertainty in this area has created an environment in which creative, practical solutions to conflicts have emerged in the Indian water settlements approved by Congress. This practical approach is consistent with the approach manifested in the few Supreme Court decisions that reached the merits of Indian water disputes and fits neatly into the portions of Professor Frickey's scholarship that call for less litigation and more sovereign-to-sovereign negotiation.[1] There have been over two dozen Indian water rights settlements since the 1970s, each usually preceded by years of litigation. Given the Supreme Court's abandonment of long accepted substantive and interpretive rules of Indian law, many tribes now prefer government-to-government negotiations for settling natural resource disputes to "all or nothing" litigation. Non-Indian water right claimants also often endorse such an approach since their rights are frequently suspect not just because of potentially senior tribal rights, but due to infirmities under state law.

In his 1990 article, *Congressional Intent*, Professor Frickey described two modern camps of scholarly work, neither of which is currently supported by a majority on the modern Supreme Court. The foundationalist camp acknowledges federal plenary power over Indian affairs, but couples it with the principle of continued inherent tribal sovereignty informed by traditional canons of construction and a federal trust responsibility that are protective of Indian rights. Under this line of reasoning, tribal treaty rights and powers of sovereignty over members and territory continue unless Congress explicitly limits them.[2] If followed, this Felix Cohen-like approach would provide predictability in determining the relative bounds of tribal and state jurisdiction within Indian country;[3] however, for reasons outlined in Frickey's article, the Court has not followed this approach in a number of recent cases. Since the

1. *See, e.g.*, Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1206–09 (1990) [hereinafter Frickey, *Congressional Intent*]; Philip P. Frickey, *Scholarship, Pedagogy, and Federal Indian Law*, 87 MICH. L. REV. 1199 (1989) (reviewing WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL (2d ed. 1988)).

2. Frickey, *Congressional Intent*, *supra* note 1, at 1206–07.

3. Felix Cohen authored the classic treatise HANDBOOK OF FEDERAL INDIAN LAW (G.P.O. 1945), which is generally credited with bringing some focus and coherence to the field of federal Indian law. Cohen was a legal realist who read federal law as clearly recognizing Indian tribes as domestic sovereigns with inherent powers of self-government and free of state authority, but he also acknowledged comprehensive federal authority over Indian affairs as principally assigned to Congress pursuant to the Indian Commerce Clause. U.S. CONST. art. I, § 8, cl. 3. While Congress has such power, Cohen found in the cases the principle that congressional limitations on tribal power would be found only when Congress had clearly manifested this intent. Further, the federal trust responsibility to tribes required ambiguities in treaties and statutes to be interpreted in favor of the Indian nations.

article's publication in 1990, the Court has continued to resist adopting such an approach, as demonstrated in a series of tribal losses involving tribal jurisdiction over nonmembers.[4] The Court has, however, rendered a few notable victories for tribal interests and recognized tribal property interests are protected by the Just Compensation Clause of the Fifth Amendment.[5]

On the other hand, a camp of critics advocating for rejection of the plenary power doctrine and increased use of international human rights norms has not had any influence on the Court to date. This line of scholarship accurately depicts explicit racism in many of the Court's Indian law decisions and calls for rejection of many of the fundamental colonial assumptions that influence federal Indian law.[6] While recognizing that the Supreme Court is the ultimate arbiter of Indian law controversies (subject of course to congressional override), these critics urge continued confrontation of federal Indian law's racist and colonial roots as a path to increased protection of tribal sovereignty. There is little evidence that the modern Court is influenced by this line of scholarship as it continues to chip away at tribal jurisdiction over nonmembers.[7]

Professor Frickey advanced an approach, distinct from either modern camp, built upon a "ground up" method of "practical reason."[8] He defined this approach as a nonformalistic, multi-faceted review of modern context, historical understanding of legislative motivation, and the evolution of the legal discourse over time.[9] This approach draws upon canons of construction to assist the courts in determining the appropriate outcome in cases where treaties and agreements are silent or ambiguous on a disputed matter,[10] and recognizes the importance of contemporary context as important in treaty interpretation.

The most significant problem in litigating Indian water rights is how to interpret Indian treaties and agreements that rarely, if ever, deal explicitly with water rights. In 1908, the Supreme Court in *Winters v. United States* considered this issue in a way similar to Professor Frickey's "ground up" approach: the

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4. *See, e.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008); City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); Nevada v. Hicks, 533 U.S. 353 (2001); Strate v. A-1 Contractors, 520 U.S. 438 (1997).

5. *See* United States v. Lara, 541 U.S. 193 (2004); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).

6. *See* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON, THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005).

7. The critics' theory was squarely presented to the Court on behalf of Respondent Hicks in the briefing in *Nevada v. Hicks* but did not draw comment from any member of the Court. Concurring Justices in *Hicks* and a four-member concurrence/dissent in *Plains Commerce Bank* adhered to a foundationalist approach as they argued in favor of tribal jurisdiction over nonmembers.

8. *See* Frickey, *Congressional Intent*, *supra* note 1, at 1205–08.

9. *See id.* at 1208.

10. *Id.* at 1228.

Court recognized a default rule that water rights are implied when necessary to fulfill the purposes of an Indian reservation.[11] The Court filled a critical gap in an agreement between the United States and the Fort Belknap Indian Community by looking at the agreement in the context of bilateral negotiations, evaluating the "traditions, preunderstandings, and context" (which are the primary components of Professor Frickey's practical reasoning), and rejecting formalist arguments that would have defeated this practical understanding.[12]

While litigation of Indian water rights persists, there has been a strong trend favoring congressionally approved Indian water settlements. A multi-faceted approach emphasizing "practical reasoning," much like that which Professor Frickey advocated, has brought about most of these settlements. This strategy points the way for more progress in the current era of climate change and changing patterns of water use.

I
INDIAN WATER RIGHTS IN THE SUPREME COURT

Over the past century, the Court has only handed down two substantive decisions on the nature and scope of Indian reserved water rights (*Winters v. United States*[13] and *Arizona v. California* [*Arizona I*][14]), one decision dealing with Indian allotments (*United States v. Powers*[15]), two procedural cases limiting opportunities to bring additional claims (*Arizona v. California* [*Arizona II*][16] and *Nevada v. United States*[17]), and three cases describing the circumstances under which state courts may adjudicate tribal water rights without tribal consent (*Colorado River Water Conservation District v. United States*,[18] *Arizona v. San Carlos Apache Tribe*,[19] and *United States v. Idaho*[20]). The Supreme Court has said precious little directly on the merits, and has invited state courts to adjudicate federal and tribal reserved rights through its broad interpretation of the McCarran Amendment.[21] At the same time, federal

11. 207 U.S. 564, 576–77 (1908).

12. *Id.* (rejecting an argument that tribal rights were defeated based on the Equal Footing Doctrine, because "it 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"); *see* Frickey, *Congressional Intent*, *supra* note 1, at 1232.

13. 207 U.S. 564.

14. 373 U.S. 546 (1963).

15. 305 U.S. 527 (1939).

16. 460 U.S. 605 (1983).

17. 463 U.S. 110 (1983).

18. 424 U.S. 800 (1976).

19. 463 U.S. 545 (1983).

20. 508 U.S. 1 (1993).

21. The McCarran Amendment provides:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or

courts may continue to exercise jurisdiction over reserved right claims in the absence of a state court general stream adjudication or if the state court adjudication has not substantially advanced.[22] Under these circumstances, it is not surprising that there are many gray areas and some areas of outright conflict among the approaches of the various state and federal courts.

A. Historic and Legal Context of Indian Water Rights

As mentioned, there is not a great deal of settled law from the U.S. Supreme Court surrounding many of the important issues that arise in Indian water rights. Consequently, understanding federal Indian law in the water rights context requires understanding the few Supreme Court cases dealing with the merits, the solid trends in lower court decisions, and, most importantly, the past congressional approaches. In light of these challenges to understanding Indian water rights, this Section provides a brief context for a discussion of Supreme Court jurisprudence on the issue, touching on state law, federal government policy, and two foundational Supreme Court decisions.

All of the western states follow some form of the prior appropriation doctrine.[23] The doctrine generally rewards the first party who physically removes water from a stream for beneficial use by granting that party a senior right to divert that amount of water in perpetuity. In periods of shortage, the date of initial diversion determines priority among competing use rights.[24] Typically, the water appropriator may lose the water-use right by abandonment, which generally requires proof of intent to no longer use the water. The appropriator may also lose the right by forfeiture, which is the failure to use the water for a specified period of time—in common colloquial parlance, "use it or lose it." In short, states generally require continuous beneficial use of the water to maintain the right.

In the late nineteenth and early twentieth centuries, the federal government embarked on a policy of assimilating Indians into the general

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

Department of Justice Appropriation Act of 1953, Pub. L. No. 82-495, § 208(a), 66 Stat. 549, 560 (codified at 43 U.S.C. § 666(a) (2006)). *See infra* text accompanying notes 82–90.

22. United States v. Adair, 723 F.2d 1394, 1400, 1402 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

23. For a discussion of the basic elements of the doctrine and a list of the eighteen states that follow the doctrine, see ROBERT E. BECK & AMY K. KELLEY, WATERS AND WATER RIGHTS, §§ 11.01, 12.02 (3d ed. 2009).

24. *Id.*

population with an expectation that traditional modes of life and decision making would fall by the wayside.[25] Establishing reservation homelands as bases for agricultural economies was one important part of the federal assimilation policy, and another was the "allotment policy."[26] Prior to the policy, tribal lands were generally held in common and tribal law and custom determined individual use rights.[27] The new allotment policy authorized the breakup of tribal lands into individual parcels for distribution among tribal members in order to encourage agricultural pursuits.[28] In general, the United States would hold in trust for each individual Indian the legal title to each allotment for a period of time, usually twenty-five years. During the trust period, state and local governments could not tax the land and the Indian owner could not alienate it. At the conclusion of the trust period, the Indian would receive a fee simple patent that he could alienate freely to both Indians and non-Indians.[29]

This assimilation policy was largely abandoned in 1934, when Congress passed the Indian Reorganization Act (IRA).[30] The IRA prohibited further allotment of Indian reservation land and extended existing restrictions on alienation of trust land.[31] It was premised on the notion that the assimilation policy had failed and that the breakup of communal tribal lands into individual parcels had worsened the economic and social conditions within Indian reservations.[32] However, the federal government had already allotted millions of acres of tribal land to individual Indians, and non-Indians had acquired many allotments that had passed from trust status.

Federal promises of permanent homelands were often insufficient to obtain tribal consent to vast land cessions. Many tribes secured treaty guarantees of off-reservation hunting and fishing rights. In *United States v. Winans*, the Supreme Court considered the rights of Yakama Tribe[33] members

25. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04, at 75–84 (Nell Jessup Newton et al. eds., 2005 & 2009 Supp.). At the same time, Indians and their lands remained generally beyond the reach of state law—including state water law. *Id.* § 6.01[2], at 501–06.

26. *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

27. *See* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001).

28. The General Allotment Act of 1887, 24 Stat. 388, authorized the allotment of tribal lands without the consent of the affected tribe. Tribal lands within reservations that were not allotted were often deemed "surplus" and returned to the public domain for disposition under the federal public land laws. *See* Solem v. Bartlett, 465 U.S. 463, 466–68 (1984) (describing impacts of allotment and surplus land acts).

29. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 16.03[2][b], at 1041–42.

30. Indian Reorganization Act (Wheeler-Howard Act), Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified at 25 U.S.C. §§ 461–79 (2006)).

31. 25 U.S.C. §§ 461, 462.

32. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 1.05, at 84–87.

33. The Nation changed the spelling of Yakima to Yakama in 1994 by Resolution T-053-94. U.S. ARMY CORPS OF ENGINEERS, FEDERALLY-RECOGNIZED TRIBES OF THE COLUMBIA-SNAKE BASIN 7, *available at* http://stories.washingtonhistory.org/treatytrail/teaching/pdfs/Yakama

to cross privately owned land in order to exercise off-reservation treaty rights to fish at usual and accustomed grounds and stations.[34] The confederated tribes of the Yakama Reservation had ceded most of their land to the United States in 1855 in exchange for exclusive rights to occupy a smaller reservation, along with "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory."[35] The private landowners argued that because their patents from the United States government said nothing about an easement for access to Indian fishing sites on the now private land, one should not be implied.

The Court rejected the argument, noting that the treaty reserved rights "to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein."[36] The Court reasoned that the reserved easement followed from the principle that Indian treaties are "not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted."[37] This implied reservation theory quickly ran up against the state-based rights of non-Indian water users.

B. Indian Reserved Water Rights

Indian water rights are rooted in the landmark case of *Winters v. United States*, which held that when the federal government set aside land for the Fort Belknap Indian Reservation in Montana, it impliedly reserved sufficient water from the Milk River to fulfill its purpose for creating the reservation, which was to provide a permanent tribal homeland with an agricultural economy.[38] Nonetheless, non-Indians who had settled upstream of the reservation claimed paramount rights to use water from the Milk River based on the state law of prior appropriation. If the state law applied, the Fort Belknap Indians would lose water rights because the reservation's actual use of the river water occurred later than that of the non-Indian settlers. The Court found, however, that the Indians' agreements with the federal government impliedly created water rights for the Indians that trumped the non-Indians' state law water rights. In

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34. United States v. Winans, 198 U.S. 371 (1905). A number of treaties between the United States and Pacific Northwest tribes used the phrase "usual and accustomed grounds stations." It simply refers to the locations at which tribal members customarily fished. FAY G. COHEN ET AL., TREATIES ON TRIAL 37–38 (1986).

35. Treaty with the Yakamas of 1855, art. III, 12 Stat. 951.

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

37. *Id.*

38. 207 U.S. 564, 577 (1908). *See* JOHN SHURTS, INDIAN RESERVED WATER RIGHTS: THE *Winters* DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT, 1880S–1930S (2000). For a comprehensive review of the Indian reserved rights doctrine, see COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 19.03, at 1174–201.

Winters, the United States, as trustee to the tribes, sued the non-Indians, arguing that in 1888 Congress had reserved sufficient water under federal law to fulfill the purposes for establishing the reservation, which were to encourage farming by Indians and to serve as a homeland for the tribes. The argument was simple. If the Indians were to become farmers as contemplated by the agreement creating the reservation, they would need water being used by non-Indians. The Supreme Court ruled that the federal government had the power to exempt waters from appropriation under state water law, and that the United States intended to reserve the waters of the Milk River to fulfill the purposes of the agreement between the Indians and the United States.[39] The Court accordingly upheld an injunction limiting non-Indian use to the extent it interfered with the current needs of the tribes.

The ruling in *Winters* was a departure from the federal government's usual deference to state water law in the arid West. Moreover, the open-ended nature of the tribes' reserved water rights became a source of great discontent among the western states and non-Indian water users, because Indian reserved rights could effectively get to the front of the line ahead of state water rights. Thus, state-law appropriators could establish rights relative to one another but never be certain if an upstream or downstream Indian tribe might have a senior reserved right, and if so, of its quantity. These users feared that unquantified Indian reserved rights could someday destroy or undermine their investments in infrastructure to use the water under state law.[40] Some early to mid twentieth century cases in lower federal courts also recognized implied Indian reserved water rights but similarly did not quantify the amount reserved with any finality.[41] While *Winters* set out the basic parameters of the Indian reserved water rights doctrine, there have been few other Supreme Court cases dealing with the nature of the rights. And aside from the modern Indian water rights settlements,[42] Congress has not spoken to the substance of Indian water rights.

The situation in *Winters* is typically described as a case where the United States reserved the water through Congress's establishment of the Fort Belknap

39. 207 U.S. at 576–77; *see generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 19.02, at 1171–73.

40. There was in fact little interference with state law rights due to the general lack of development of Indian water rights on the ground. The National Water Commission in 1973 concluded that "[i]n the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the reservations it set aside for them is one of the sorrier chapters." NAT'L WATER COMM'N, WATER POLICIES FOR THE FUTURE – FINAL REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES 475 (G.P.O. 1973); *see also* Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 NAT. RESOURCES J. 399 (2006).

41. *See* Conrad Inv. Co. v. United States, 161 F. 829 (9th Cir. 1908); United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957). The Ninth Circuit in both cases recognized reserved rights that could increase as tribal needs expanded.

42. See appendix for a list of all such settlements.

Reservation. There is, however, language in *Winters* indicating that it was instead the tribe that did the reserving.[43] Recall that under the *Winans* rationale, courts need not look to congressional action *conferring* water rights on a tribe if the tribe was the original owner of an area. Instead, the *Winans* inquiry looks to whether the tribe surrendered such rights by treaty or through other congressional action.[44] In most modern cases, however, and as the Supreme Court found in both *Winters* and *Arizona I*, the question is whether a reservation of water should be implied from congressional action to fulfill the purposes of the reservation.[45]

Furthermore, *Winters* exemplified how the Indian law canons of construction may serve as important tiebreakers between a conflict of implications.[46] If one were to take a formalist approach after *Winans*, one could forcefully argue that because there was no explicit surrender of water on the reservation, the tribes continued to own it all. The courts have instead determined ownership of water rights in a fashion that takes into account at some level the background principles of state water law, the expectations of the parties when the relevant treaty was negotiated, and and modern circumstances of the parties. In short, courts appear to be engaged in "practical reasoning."

The Supreme Court's next Indian reserved water rights case examined a provision of the allotment legislation. In *United States v. Powers*, the Court

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43. "The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this?" Winters v. United States, 207 U.S. 564, 576 (1908). In its brief to the Court, the United States stated that the Indians retained or were granted by the United States the right to divert and use for domestic, irrigation, and other beneficial purposes the amount of Milk River waters sufficient to meet their needs and carry out the objects of their agreement. Brief for the United States at 12, Winters v. United States, 207 U.S. 564 (1908) (No. 158); *see* BECK, WATERS AND WATER RIGHTS, *supra* note 23, at § 37.01(b)(2) (noting the ambiguity); *see also* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 402 (1993) [hereinafter Frickey, *Marshalling Past and Present*] (noting the roots of *Winans* and *Winters* in Chief Justice Marshall's recognition of retained tribal sovereignty in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)). The Court may have glossed over this point because in *Winters*, and in most Indian water rights cases, a priority date as of the date of the federal action setting aside land will be sufficiently early to precede any competing state rights.

44. Any surrender of such rights must be clear and express. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 2.02[1], at 120 ("[T]ribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous.").

45. Winters v. United States, 207 U.S. 564, 567, 577–78 (1908); Arizona v. California, 373 U.S. 546, 599 (1963). See *supra* note 43 for a possible reason that the *Winans* rationale is often ignored.

46. By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relations to the Government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government . . . .

Winters, 207 U.S. at 576–77.

addressed whether non-Indian successors to allotment owners acquired any right to use a portion of the water right originally reserved by a tribe under the *Winters* doctrine.[47] The United States allotted the Crow Reservation early in the twentieth century and developed an irrigation project to serve approximately 20,000 acres of reservation land—including some allotments—but not all reservation lands and allotments. The federal government argued that because the allotments at issue (which non-Indians had acquired) were not included within the original irrigation project area, the non-Indian owners had not gained any reserved water right and thus should be enjoined from taking water from the Little Big Horn River and Lodge Grass Creek. In other words, the government claimed that the Secretary of the Interior had effectively allocated the water in the Little Big Horn River and Lodge Grass Creek to the exclusion of the allotments that were served by upstream diversions—including the former allotments now held by the non-Indian parties. The Court rejected the government's arguments, stating that "when allotments of land were duly made for exclusive use [of individual tribal citizens] and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the [new] owners."[48] Because the issue was not properly framed, the Court did "not consider the extent or precise nature of respondents' rights in the waters."[49] While the Court denied the federal government's requested injunction, language in the opinion indicates that the allotments and the non-Indian successors could have been limited, but only by the development of "rules and regulations" under the Dawes Act, 25 U.S.C. § 381 (2006).[50]

The Supreme Court did not revisit the Indian reserved rights doctrine until 1963, when it rendered a one-hundred-page decision in *Arizona v. California* (*Arizona I*), a case dealing primarily with the division of the water in the Colorado River among the affected upper and lower basin states.[51] The United States intervened on behalf of several Colorado River Indian tribes and asserted claims for full and permanent allocations of water rights to the tribes.[52] The claims went a step beyond the ruling of *Winters*, which had resulted in an injunction against certain uses, but had left the tribes with an indeterminate right and an open-ended decree. The Supreme Court agreed with the United States that a final quantification was desirable and endorsed the practicably

47. United States v. Powers, 305 U.S. 527 (1939). For background on the allotment legislation, see *supra* text accompanying notes 25–28.

48. *Id.* at 532.

49. *Id.* at 533.

50. *Id.* at 530. This issue has vexed the Department of the Interior ever since. *See, e.g.*, Entitlements to Water Under the Southern Arizona Water Rights Settlement Act, Sol. Op. M-36982 (Mar. 30, 1995).

51. Arizona v. California (*Arizona I*), 373 U.S. 546 (1963).

52. The tribes were the Colorado River Indian Tribes, Fort Mojave Indian Tribe, Chemehuevi Indian Tribe, Cocopah Indian Tribe, and Fort Yuma (Quechan) Indian Tribe. *Id.* at 595 n.97.

irrigable acreage (PIA) doctrine,[53] which allowed a quantification of reserved water rights for the present and future needs of the several Indian reservations. In general, the PIA test awards water for present and historical irrigation, for those tribal lands capable of sustaining irrigation in the future, and for growing crops in an economically feasible manner.[54] The *Arizona I* Court concurred with the position the United States urged before the Special Master.

> We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations. Arizona, on the other hand, contends that the quantity of water reserved should be measured by the Indians' "reasonably foreseeable needs," which, in fact, means by the number of Indians. How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.[55]

The Court explained its agreement with the Special Master by noting a number of practical factors, such as the establishment of reservations in areas where water was essential to allow the Indians to survive, and by emphasizing fairness and feasibility as justifications for reliance on irrigable acreage as the measure.[56] The Court could have simply followed the *Winters* rule and provided for current use, subject to future expansion as the Indians' needs increased. In the context of a division of the waters of the Colorado River among the various states, however, it would have made no sense to leave potentially large claims unquantified. Thus, instead of following a formal rule, the Court engaged in practical reasoning in order to provide a final resolution of the water rights controversy before it. In so doing, however, it continued the mode of analysis used by the Court in *Winters* nearly fifty years earlier—interpreting the legal instruments establishing the various reservations broadly to fulfill the purpose of creating permanent tribal homelands with agricultural economies. At the same time, the Court approved the use of agricultural water

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53. *Id.* at 600–01.

54. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, at § 19.03[5], at 1184–88.

55. 373 U.S. at 600–01. The Court referred to Special Master Simon H. Rifkind's conclusions on pages 264–65 of his report ("Rifkind Report") to the Supreme Court in *Arizona I*. The report is available at Western Waters Digital Libraries, http://www.westernwaters.org (search for "Rifkind") and at the Colorado River Central Arizona Project Collection, Arizona State University, http://digital.lib.asu.edu/cdm4/browse.php (search for "Rifkind"). *See also* Note, *The Irrigable Acres Doctrine*, 15 NAT. RESOURCES J. 375 (1975) (describing alternative proposals to measure Indian water rights for present and future needs). For a discussion of the PIA standard, see COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, §19.03[5][b], at 1185–86.

56. *Arizona I*, 373 U.S. at 599–600.

for other purposes as time and the desires of the tribes changed.[57]

The only other case to reach the Court on the merits, besides *Arizona I*, was *Wyoming v. United States*, which involved Wyoming's general adjudication of water rights to the Big Horn River, including the rights of the Shoshone and Arapahoe Tribes.[58] Although the Court granted review to consider the Wyoming Supreme Court's application of the PIA standard, there was no Opinion for the equally divided Court. Part II considers this case, along with other lower court decisions.

C. Non-Indian Reserved Rights

In a development that would later have far-reaching repercussions for Indian reserved rights, the *Arizona I* Court also applied the reserved rights doctrine to land set aside as federal reservations for non-Indian purposes.[59] While the amount of water awarded for the non-Indian federal reservations was relatively insignificant,[60] the Master had "ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests"[61] and the Supreme Court agreed that "the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest."[62]

The Court took up the question of non-Indian federal reserved water rights again, thirteen years later, in *Cappaert v. United States*,[63] which involved the federal government's claim that groundwater pumping conducted in accordance with state law unlawfully interfered with water rights reserved by the United States for the protection of the desert pupfish. The district court had enjoined non-Indian groundwater pumpers located over two miles from an underground pool from depleting the aquifer below a point that would endanger survival of the fish.[64] On appeal, the Supreme Court upheld the district court decision, concluding that the establishment of Devil's Hole National Monument carried with it an implied reservation "in unappropriated water which vests on the date

57. Arizona v. California, 439 U.S. 419, 422–23 (1979) (supplemental decree).

58. Wyoming v. United States, 492 U.S. 406 (1989) (per curiam), *aff'g by an equally divided Court In re* Gen. Adjudication of All Rights to Use Water in the Big Horn River Syst., 753 P.2d 76 (Wyo. 1988).

59. The Court held in *Fed. Power Comm'n v. Oregon*, 349 U.S. 435, 448 (1955), that the Desert Land Act, which generally authorized the application of state water law to grantees of federal land, did not apply to water rights on federally reserved land.

60. *See* Arizona v. California, 376 U.S. 340, 345–46 (1964) (decree).

61. Arizona v. California (*Arizona I*), 373 U.S. 546, 601 (1963). For a review of the evolution of the doctrine, see John D. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the-Century Evaluation*, 4 U. DENV. WATER L. REV. 271, 288 (2001).

62. *Arizona I*, 373 U.S. at 601.

63. 426 U.S. 128 (1976).

64. *Id.* at 133, 136.

of the reservation and is superior to the rights of future appropriators."[65] Because Congress established the Monument for the singular purpose of protecting the desert pupfish fish and its habitat, it followed naturally, according to the Court, that Congress intended to reserve water to fulfill the purpose of the Monument. The Court cited *Winters* to reject the notion that the reserved rights doctrine called for a balancing of interests between state law water users and the federal water rights.[66] Further, the Court described the district court's injunction as tailored to the "minimal need" required to protect the pool and thus the pupfish.[67] While this language appeared to be more descriptive of what was done by the lower court, it took on a life of its own in the next federal reserved water rights case before the Court.

In *United States v. New Mexico*,[68] the Court signaled a shift in its treatment of non-Indian reserved rights when it narrowly construed reserved water rights for national forests by making it clear that such rights would only be implied where needed to fulfill the "primary purposes" of the reservation and only if the primary purposes would be "entirely defeated" without an implied reservation of water.[69] It accordingly held that water was reserved in national forests for dual primary purposes: "to preserve the timber or to secure favorable water flows for private and public uses under state law."[70] The Court conveyed a sense of hostility toward non-Indian federal reserved rights when it noted that in the case of fully appropriated rivers, "federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators."[71] Justice Rehnquist's opinion for the Court stated, "[e]ach time this Court has applied the 'implied-reservation-of-water doctrine,' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated."[72] The statement was hardly true; for example, *Arizona I* devoted but two sentences to non-Indian federal reserved rights issues for five different federal reservations.[73] Nevertheless, the cautionary language in

65. *Id.* at 138.

66. *Id.* at 138–39.

67. *Id.* at 141.

68. 438 U.S. 696 (1978).

69. *Id.* at 700. In the associated footnote, the Court cited to *Winters*, noting that "[w]ithout water to irrigate the lands, however, the Fort Belknap Reservation would be 'practically valueless' and 'civilized communities could not be established thereon.' The purpose of the Reservation would thus be '"impair[ed] or defeat[ed]."' *Id.* at 700 n.4 (internal citation omitted).

70. *Id.* at 718.

71. *Id.* at 705; *see* 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 5:36 (Thomson/West 2007) (providing a comprehensive review of federal reserved water rights litigation after *United States v. New Mexico*).

72. 438 U.S. at 700.

73. *Cappaert* contributes little to Justice Rehnquist's argument, because the Proclamation on its face reserved the pool for the pupfish, and the limiting "minimal need" language was simply a quotation from the district court's opinion.

Cappaert and *New Mexico* regarding non-Indian federal reserved rights opened the door for some courts to construe narrowly Indian reserved rights as well.[74] Before reviewing the substantive application of the doctrine, however, it is necessary to review a series of important cases dealing with state court jurisdiction.

D. Reopening Decrees and Tribal Intervention

The Court's later cases have been largely procedural, but extremely significant, and the Court's several rulings in favor of state court jurisdiction are consistent with the negative attitude the Court expressed toward non-Indian federal reserved rights in *United States v. New Mexico*. Indian tribes, on the other hand, have generally viewed state court jurisdiction as inconsistent with fundamental notions of tribal sovereignty and the historic tribal immunity from state law. The Supreme Court's broad interpretation of the McCarran Amendment (discussed in Part I.E, below) permitting jurisdiction over tribal claims is generally viewed as inconsistent with countervailing Indian law principles limiting state court jurisdiction over Indian tribes and their property in the absence of express delegation of such authority to the states.

In 1983, the Court reemphasized the importance of finality in water rights litigation when it rejected claims by the United States and tribes to reopen the 1963 *Arizona I* decree in order to seek water for lands omitted from the 1963 claims.[75] In rejecting the effort, the Court explained that "[a] major purpose of this litigation, from its inception to the present day, has been to provide the necessary assurance to States of the Southwest and to various private interests, of the amount of water they can anticipate to receive from the Colorado River system."[76] The Court also noted, "[t]he standard for quantifying the reserved water rights [in *Arizona I*] was also hotly contested by the States, who argued that the Master adopted a much too liberal measure."[77] The Court cautioned that reopening the decree to allow claims might also allow the states to pursue arguments that the quantified tribal share should be circumscribed.[78]

Significantly, the Court recognized the right of the tribes to intervene in the case to assert their own rights and not depend solely on the United States' representation of them as trustee. The States had argued that tribal intervention was barred by Eleventh Amendment immunity from suit. The Court rejected the States' argument in one of the few positive rulings for tribes since 1963:

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74. *See infra* text accompanying notes 97–98.

75. Arizona v. California (*Arizona II*), 460 U.S. 605 (1983).

76. *Id.* at 620.

77. *Id.* at 617 (citation omitted). In the latest iteration of this case, the Supreme Court held that the Quechan tribe of the Fort Yuma Reservation could assert additional claims for lands within reservations with disputed boundaries at the time of the 1963 proceeding. Arizona v. California, 530 U.S. 392 (2000). The Court approved a final settlement of these claims in 2006 and thus ended this long-running litigation. Arizona v. California, 547 U.S. 150 (2006).

78. *Arizona II*, 460 U.S. at 617.

> The Tribes do not seek to bring new claims or issues against the States, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised. See, *e.g.*, *Maryland v. Louisiana,* 451 U.S. 725, 745, n. 21 (1981).[79]

This ruling cleared the way for direct tribal participation in the many general stream adjudications commenced throughout the West.

The importance of tribal intervention was made apparent by the ruling in *Nevada v. United States* less than two months later, when the United States' failure to assert all tribal claims in an adjudication precluded a later attempt to assert those claims. The *Nevada* Court rejected efforts by the United States and the Pyramid Lake Paiute Tribe to reopen the Orr Ditch decree of 1946 in which the federal government had failed to assert all tribal claims.[80] Despite the existence of a clear conflict of interest on the part of the United States, the Court held that principles of res judicata precluded both the Tribe and the United States from asserting a claim for water for tribal fisheries.[81] Consequently, most tribes now intervene in state general stream adjudications to ensure that *all* their reserved water right claims are presented and not just those that the U.S. Department of Justice deems merit worthy.

E. Interpretation of the McCarran Amendment

Another group of Supreme Court cases involving federal Indian reserved rights interpreted the McCarran Amendment.[82] In these cases, the Court read the Amendment broadly to provide states with authority to adjudicate federal water rights.[83] The Court also held that the Amendment requires that the adjudications be comprehensive—inclusive of the rights of all owners on a given stream—for a state court to assert jurisdiction over federal claims.[84]

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79. *Id.* at 614.

80. Nevada v. United States, 463 U.S. 110 (1983).

81. *Id.* at 142–44; *see also* Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307, 1341–55 (2003) (discussing the *Nevada* opinion).

82. *See supra* note 21.

83. *See, e.g.*, Dugan v. Rank, 372 U.S. 609 (1963). For a comprehensive pre- and post-enactment history of the amendment, see John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. DENV. WATER L. REV. 355 (2005) [hereinafter Thorson, *Dividing Western Waters*] and John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II*, 9 U. DENV. WATER L. REV. 299 (2006) [hereinafter Thorson, *Dividing Western Waters, Part II*].

84. In dismissing the claims in *Dugan*, the Court noted:

> that the United States may be joined in suits "for the adjudication of rights to the use of water of a river system or other source," is not applicable here. Rather than a case involving a *general* adjudication of "all of the rights of various owners on a given stream," S. Rep. No. 755, 82d Cong., 1st Sess. 9 (1951), it is a private suit to determine water rights solely between the respondents and the United States and the local

Although the statute on its face says nothing about state court authority to adjudicate federal *reserved* rights, or Indian *reserved* water rights,[85] the Court interpreted the McCarran Amendment to allow states to assert jurisdiction over both federal[86] and Indian reserved water rights.[87] Even states that had disclaimed jurisdiction over Indian lands in enabling acts as a condition for their entry into the Union could now assert jurisdiction over reserved water rights under the Amendment.[88] And while tribal sovereign immunity stood as a separate bar to joining tribes without their consent, tribes would now be bound by any decree in which the United States as trustee was properly brought into a general stream adjudication.[89] In its latest word on the joinder of the United States, and thereby on tribal rights, the Court cautioned the following:

> State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.[90]

II
INDIAN RESERVED RIGHTS IN THE LOWER COURTS

Given the Court's endorsement of the PIA doctrine in *Arizona I*, it was not surprising that the doctrine would be the centerpiece of the substantive law for the measure of Indian water rights in *Wyoming v. United States*.[91] In the Wyoming Supreme Court, the parties had agreed that PIA consisted of "those acres susceptible to sustained irrigation at reasonable costs."[92] The Wyoming

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Reclamation Bureau officials.

372 U.S. at 618.

85. General rules of Indian law preclude the exercise of state regulatory or adjudicatory jurisdiction over Indian tribes, their members and their property within Indian country. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 6.01, at 499–514.

86. *See* United States v. Dist. Court (*Eagle County*), 401 U.S. 520 (1971).

87. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). The *Colorado River* Court also held that while the Amendment does not deprive federal courts of jurisdiction over Indian water rights cases, they should abstain from asserting jurisdiction over water rights disputes when a state is asserting jurisdiction over the same matter. *Id.* at 819–21; *see also* United States v. Idaho, 508 U.S. 1 (1993) (holding that the McCarran Amendment waiver does not permit States to require federal government to pay exorbitant state court filing fees).

88. Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

89. Nevada v. United States, 463 U.S. 110, 135 (1983).

90. *San Carlos Apache Tribe*, 463 U.S. at 571.

91. Wyoming v. United States, 492 U.S. 406 (1989), *aff'g by an equally divided Court In re* Gen. Adjudication of All Rights to Use Water in the Big Horn River Syst., 753 P.2d 76 (Wyo. 1988). *See supra* text accompanying note 58. According to the United States' Brief to the Court, as of 1990, the PIA standard was a central component in more than a dozen water Indian rights cases in the western states. Brief for the United States at 49 n.46, Wyoming v. United States, 492 U.S. 406 (No. 88-309).

92. *Big Horn River System*, 753 P.2d at 101 (internal quotation marks omitted).

Supreme Court recognized a substantial reserved right for the tribes,[93] and the U.S. Supreme Court affirmed the decision in a 4-4 vote.[94] In his brief to the Supreme Court in *Wyoming*, the Solicitor General pointed out that "the PIA standard has generated significant expectations, reliance, and investment, both legal and financial. For example, it forms the basis of proof in ongoing litigation, or is the cornerstone of current settlement negotiations, in virtually all western water rights quantifications."[95] There has been no further word from the Court on the substance of the quantification of Indian reserved water rights, although a draft opinion for the Court by Justice O'Connor before her recusal advocated change in administration of the PIA standard.[96]

The critical determination in any Indian reserved water rights case, and the area of greatest disagreement among the lower courts, is the determination of the purposes of an Indian reservation.

The Court's intervening decisions regarding non-Indian federal reserved rights, especially *United States v. New Mexico*,[97] have affected the analysis due to then-Justice Rehnquist's emphasis on the historical primacy of state water law and his observation that the federal reserved rights doctrine "is [treated as] an exception to Congress' explicit deference to state water law in other areas."[98] As noted in the leading Indian law treatise, results have been mixed,

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93. The court recognized about 290,000 acre feet of water for historic and current irrigation and 210,000 acre feet for future irrigation of lands never irrigated. It applied the PIA analysis to both classes of lands. *Id.* at 101–09. In its petition for review, the State of Wyoming described the State Supreme Court's holding:

> A closely divided Wyoming Supreme Court (3-2) affirmed the judgment of the district court, except for (1) an increase of 21,000 acre-feet in the amount of the 1868 reserved water right based on the future projects, reversing a 10% reduction recommended by the Master and adopted by the district court and increasing the total award to 500,420 acre feet.

Petition for Certiorari at 9, Wyoming v. United States, 492 U.S. 406 (No. 88-309). The United States responded in its merits brief:

> The Wyoming Supreme Court affirmed most of the district court's rulings and awarded the Tribes 500, 717 acre-feet per year based strictly on agricultural use. In each instance, the Wyoming courts determined the Tribes' reserved water rights for agricultural use through the application of the 'practicably irrigable acreage' (PIA) standard—the same standard that this Court employed in [*Arizona I*]. Wyoming, which initially argued that if a reserved water right exists, it should be quantified through the PIA standard, now thinks that this was a mistake.

Brief for the United States, *supra* note 91, at 2–3 (citation omitted).

94. *See Wyoming*, 492 U.S. at 407.

95. Brief for the United States, *supra* note 91, at 48–49 (citations omitted).

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

97. 438 U.S. 696 (1978); *see supra* text accompanying notes 71–74.

98. 438 U.S. at 715. Even Justice Powell's partial dissent—joined by three others—began by stating, "I agree with the Court that the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and to Congress' general policy of deference to state water law." *Id.* at 718 (Powell, J., dissenting in part); *cf.* Mergen & Liu, *supra* note 96 (criticizing proposed "sensitivity analysis" as inconsistent

with some lower courts, such as the Arizona Supreme Court, rejecting application of the *New Mexico* test to the Indian reserved rights context, but looking to it for guidance. Other courts, such as the Ninth Circuit, have stated that they would apply the test, but did so in a generous fashion given the Indian law canons of construction, while the Wyoming Supreme Court applied *New Mexico* to limit strictly the purposes for which water was reserved.[99]

A. Ninth Circuit Precedent

In litigation involving the Confederated Tribes of the Colville Indian Reservation, the Ninth Circuit found reserved rights to water for both agricultural and fisheries purposes.[100] The court stated:

> We apply the *New Mexico* test here. The specific purposes of an Indian reservation, however, were often unarticulated. The general purpose, to provide a home for the Indians, is a broad one and must be liberally construed. We are mindful that the reservation was created for the Indians, not for the benefit of the government.[101]

After concluding that the reservation, like most in the West, had been set aside for agricultural purposes, the court supplemented its award of water under the PIA standard with water for instream flows to support tribal fisheries, due to the tribe's demonstrated traditional reliance on fisheries resources.[102]

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with Supreme Court precedent and detrimental to atmosphere in which Indian water rights settlements have flourished).

99. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 19.03[4]–[5][a], at 1181–85 (citing cases); *see also* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 379–84 (5th ed. 2009). Although Judge Canby's work is part of the nutshell series, it has received glowing reviews in earlier editions that remain applicable. *See, e.g.*, Frickey, *Scholarship, Pedagogy, and Federal Indian Law*, *supra* note 1.

100. Colville Confederated Tribes v. Walton, 647 F.2d 42, 47–49 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981). The Executive Order creating the reservation provided: "It is hereby ordered that the country . . . bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon." Executive Order of July 2, 1872, *reprinted in* 1 Kappler, Indian Affairs and Treaties, 916 (2d ed. 1904).

101. *Colville Confederated Tribes*, 647 F.2d at 47 (citations omitted).

102. *Id.* at 48. The court also stated that "Congress envisioned agricultural pursuits as only a first step in the 'civilizing' process" and that "[t]his vision of progress implies a flexibility of purpose." *Id.* at 47 n.9 (citing 11 Cong. Rec. 905 (1881)). For a state court following a similar approach, see *State Department of Ecology v. Yakima Reservation Irrigation District*, 850 P.2d 1306 (Wash. 1993) (en banc):

> A right to water may be reserved for any primary purpose of the reservation and there may be more than one such purpose.
>
> . . . .
>
> The "controlling" purpose of the treaty was to "make possible the permanent settlement of the Yakima Indians and their transformation into an agricultural people." . . . All of the parties to this litigation agree that the Yakima Indians are entitled to water for irrigation purposes and, at least at one time, were entitled to water for the preservation of fishing rights. The disagreement here is the extent of the treaty rights remaining.

Id. at 1316–17 (citations omitted).

Application of the narrow *New Mexico* standard for non-Indian federal reservations seems wrong.[103] While it may be appropriate to limit implied reserved water rights when construing federal actions establishing federal reservations, the instruments creating Indian reservations are governed by canons of construction that require ambiguities to be interpreted in favor of the Indians. Moreover, the Indian tribes were preexisting owners of the lands reserved for their permanent use and occupancy. As such, the notion that they reserved all rights except those explicitly ceded to the United States argues for a broad interpretation of Indian reserved rights as opposed to non-Indian federal reserved rights.[104]

Similarly, in *United States v. Adair*, the Ninth Circuit considered claims by the United States and the Klamath Tribes to water for instream flows and lake levels to protect treaty rights to fish, wildlife, and plants.[105] The court applied the *Winans* rationale in evaluating the Klamath Tribe's water rights: "[T]he 1864 Treaty [with the Klamaths] is a recognition of the Tribe's aboriginal water rights and a confirmation to the Tribe of a continued water right to support its hunting and fishing lifestyle on the Klamath Reservation." Such water rights necessarily carry a priority date of time immemorial. The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights.[106]

The Klamath Tribes also claimed reserved water to provide irrigation for individual Indians who had received allotments of tribal land. The court stated "*New Mexico* and *Cappaert*, while not directly applicable to *Winters* doctrine rights on Indian reservations . . . establish several useful guidelines."[107] The court explained, "[w]hile the purpose for which the federal government reserves other types of lands may be strictly construed . . . the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained."[108] Other lower courts have taken different, and inconsistent approaches to evaluating the purposes of Indian reservations.

B. Inconsistency Among State Courts

The decisions of the Arizona Supreme Court and the Wyoming Supreme Court present an interesting contrast to the Ninth Circuit's approach. In the general stream adjudication of the Gila River, the Arizona Supreme Court endorsed a "homeland" approach that has superficial appeal in its interpretive

103. *See supra* text accompanying note 99.

104. *See supra* discussion at notes 34–37.

105. 723 F.2d 1394, 1397 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

106. *Id.* at 1414. (citing Washington v. Wash. State Commercial Fishing Vessel Ass'n, 443 U.S. 658, 678–81 (1979)).

107. *Id.* at 1408 (citations omitted).

108. *Id.* at 1408 n.13 (quoting WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 245–46 (1981)).

analysis that looks to the general purpose behind the treaty.[109] The court concluded that the essential purpose of Indian reservations is to provide Indian tribes with a permanent home and abiding place that is a "livable" environment, but expressed concern that awarding "too much water" under the PIA analysis to tribes would be inconsistent with the "minimal need" approach it borrowed from the non-Indian federal reserved water cases.[110] The answer to this, of course, is that once a federal reserved water right is recognized under a PIA or any other consumptive use standard, the water may be marketed to other users or used for other purposes by the tribe.[111] Relegating the PIA measure to a matter merely for consideration as part of a total award focused on "minimal need" seems to invite trial courts to balance Indian reserved rights against non-Indian uses to avoid adverse effects on state water rights—an approach rejected by the U.S. Supreme Court in *Cappaert*.[112] Leading commentators also share pessimism regarding the fairness of the Arizona approach, but it remains to be seen whether it will ever be implemented.[113]

On the other hand, the Wyoming Supreme Court, in the *Big Horn* case, adhered strictly to the PIA standard and rejected claims for other uses such as

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109. *In re* Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 35 P.3d 68, 74, 77–79 (Ariz. 2001) (en banc).

110. *Id.* at 78 ("Another concern with PIA is that it forces tribes to pretend to be farmers in an era when 'large agricultural projects . . . are risky, marginal enterprises.'"). It is doubtful that a tribe would undertake an agricultural operation if it would not at least break even financially (as required to demonstrate PIA), thus obviating the Arizona Supreme Court's concern that a tribe would somehow be "forced" into an uneconomic activity, or to "pretend to be farmers."

111. The only relevant U.S. Supreme Court decision permitted a change in use of agricultural water to other uses. Arizona v. California, 439 U.S. 419, 422 (1979) (approving agreement quantifying rights and recognizing potential for non-agricultural uses); *see also* Rifkind Report, *supra* note 55, at 265–66; CANBY, supra note 99, at 481; *cf. In re* Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 835 P.2d 273, 279 (Wyo. 1992) (change in use not permitted).

112. The Arizona Supreme Court stated:

> The PIA standard also potentially frustrates the requirement that federally reserved water rights be tailored to minimal need. Rather than focusing on what is necessary to fulfill a reservation's overall design, PIA awards what may be an overabundance of water by including every irrigable acre of land in the equation.
>
> . . . .
>
> The court's function is to determine the amount of water necessary to effectuate this [homeland] purpose, tailored to the reservation's minimal need. We believe that such a minimalist approach demonstrates appropriate sensitivity and consideration of existing users' water rights, and at the same time provides a realistic basis for measuring tribal entitlements.

Gila River, 35 P.3d at 79, 81. See *supra* text accompanying note 69 for the relevant discussion of *Cappaert*.

113. CANBY, *supra* note 99, at 480 ("The fact that [the Arizona Supreme Court's] formula is likely to lead to a lower award to the tribes is suggested by the fact that they and the United States urged adherence to the standard of practicably irrigable acreage."); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 19.03[5][b], at 1187 ("Although the Arizona court's approach avoids the problems inherent in PIA, its focus on minimal needs may ultimately leave some tribes with less water than the imperfect PIA standard."). In 2004, the claims of several Arizona tribes were settled. Arizona Water Settlements Act, Pub. L. No. 108-451, 118 Stat. 3478 (2004) (Gila River, Tohono O'odham, San Carlos).

instream flows for fisheries or mineral and industrial development.[114] However, the court's approach is plainly incorrect in that it ignores the Indian law canons of construction and thus narrowly construes the purposes of a reservation.[115] While the court did find that other uses such as municipal, domestic and commercial uses were subsumed within the agricultural right,[116] the court later compounded its error in narrowly construing the treaty by refusing to permit the tribe to change the use of a portion of its agricultural water to instream flows to enhance fisheries habitat.[117]

III
INDIAN WATER RIGHTS SETTLEMENTS

Despite the hundreds of treaties establishing, enlarging, and diminishing Indian land reservations, which rarely mention water, Congress as a general matter has said even less than the Supreme Court on the subject of Indian reserved water rights. The Dawes Act of 1887 provides the Secretary of the Interior with authority to make an equitable distribution of water for irrigation purposes to allottees on reservations.[118] The McCarran Amendment of 1952 says nothing explicitly about federal or Indian reserved water rights. However, Congress has enacted twenty-three modern Indian water rights settlement statutes, ratifying federal-state-tribal agreements.

Although there was little development of water resources for tribes in the aftermath of the Supreme Court's landmark decision in *Winters v. United States*,[119] an increase in litigation involving both the McCarran Amendment and potential threats to extant non-Indian uses led to the settlement of a number of Indian water rights controversies in the late twentieth and early twenty-first centuries. Since 1978, Congress has approved twenty-three Indian water rights settlements;[120] two other agreements were not subject to congressional

114. *See, e.g.*, *In re* Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 753 P.2d 76, 98–99 (Wyo. 1988) (applying primary purpose test strictly), *aff'd by an equally divided Court*, Wyoming v. United States, 492 U.S. 406 (1989).

115. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 19.03[4], at 1183.

116. *In re* Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 753 P.2d 76, 99 (Wyo. 1988).

117. *In re* Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 835 P.2d 273 (Wyo. 1992). There was no single opinion explaining the court's rationale.

118. *See supra* text accompanying note 50.

119. *See* 207 U.S. 564 (1908); *see also* NAT'L WATER COMM'N, *supra* note 40; Anderson, *supra* note 40.

120. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 19, at 1212 n.327. In addition to the settlements cited in COHEN, Congress in 2009 approved the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement and a settlement of the Navajo Nation's rights to the San Juan River Basin in New Mexico. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, §§ 10301–704, 123 Stat. 991, 1367–405 (Navajo Nation); §§ 10801–09, 123 Stat. at 1405–14 (Shoshone-Paiute Tribes). Legislation introduced in the first session of the 111th Congress would settle claims of the White Mountain Apache Tribe,

ratification.[121] In addition, there are approximately twenty-five tribes currently involved in eighteen settlement negotiations,[122] all of which are the result of litigation.

Given the paucity of both Supreme Court precedent and general congressional legislation on the issues, the question arises as to the precedential value of these settlements. The first modern settlement, Ak Chin, contained no disclaimer at all.[123] The Fort McDowell Indian Community Water Rights Settlement Act of 1990 has a simple disclaimer apparently designed to protect similarly situated tribes from any unintended legal effects: "Nothing in the Agreement or this title shall be construed in any way to quantify or otherwise adversely affect the land and water rights, claims or entitlements to water of any Arizona Indian tribe, band or community, other than the Community."[124]

On the other hand, most of the recent settlements contain disclaimers purporting to limit any precedential effect. For example, the Soboba Band of Luiseño Indians Settlement Act provides:

> (d) PRECEDENT.—Nothing in this Act establishes any standard for the quantification or litigation of Federal reserved water rights or any other Indian water claims of any other Indian tribes in any other judicial or administrative proceeding.
>
> (e) OTHER INDIAN TRIBES.—Nothing in the Settlement Agreement or this Act shall be construed in any way to quantify or otherwise

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S. 313; Crow Tribe, S. 375; Taos Pueblo, S. 965; and Pueblos of Nambe, Pojoaque, San Ildefonso & Tesuque, S. 1105. See Appendix for a state-by-state list of settlements.

121. These are the Fort Peck Compact and a settlement at Warm Springs. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 19.05[2], at 1212 n.327. The Warm Springs agreement was subsequently incorporated into a state court decree. *In re* The Determination of Relative Rights to the Use of the Waters of the Deschutes River and Its Tributaries, No. 99CCV0380ST (Cir. Ct. Deschutes Co. Jan. 7, 2003). Litigation over groundwater on the Lummi Indian Reservation in Washington was settled with a consent decree entered with the court. United States *ex rel.* Lummi Indian Nation v. Washington, No. C01-0047Z, 2007 WL 4190400 (W.D. Wash. Nov. 20, 2007) (groundwater on Lummi Indian reservation), *aff'd*, 328 Fed. App'x. 462 (9th Cir. 2009) (unpublished decision approving consent decree).

122. The negotiation figure is derived from the list of "Federal Water Rights Negotiation Teams for Indian Water Rights Settlements" (Sept. 21, 2009) kept by the Secretary of the Interior's Indian Water Rights Office. The tribes involved in negotiations are Pueblos of Nambe, Pojoaque, San Ildefonso, Tesuque, Jemez, Zia, Acoma, Laguna, Taos, Santa Ana & Zuni, Blackfeet Tribe, Crow Tribe, Confederated Salish & Kootenai Tribes, Gros Ventre & Assiniboine Tribes, Hopi Tribe, San Juan Southern Paiute Tribe, Navajo Nation, Lummi Nation, Soboba Band of Luiseno Indians, Tule River Indian Tribe, San Carlos Apache Tribe, Walker River Paiute Indian Tribe, Bridgeport Indian Colony, Yerington Paiute Tribe, and White Mountain Apache Tribe. *See* Thorson, *Dividing Western Waters*, *supra* note 83, at 449–58. A useful table setting forth the status of all western state general stream adjudications can be found in Thorson, *Dividing Western Waters, Part II*, *supra* note 83, at 439–42.

123. *See* Act of July 28, 1978, Pub. L. No. 95-328, 92 Stat. 409 (1978) (settling water rights claims of the Ak-Chin Indian community against the United States). The Jicarilla Apache Tribe Water Rights Settlement Act, Pub. L. No. 102-441, 106 Stat. 2237 (1992), also does not contain a disclaimer.

124. Pub. L. No. 101-628, § 413, 104 Stat. 4469, 4480, 4492 (1990).

> adversely affect the water rights, claims, or entitlements to water of any Indian tribe, band, or community, other than the Soboba Tribe.[125]

In similar fashion, the Snake River Water Rights Act of 2004 provides, "Nothing in this Act—(A) establishes any standard for the quantification of Federal reserved water rights or any other Indian water claims of any other Indian tribes in any other judicial or administrative proceeding . . . ."[126] Likewise, the recent act codifying the San Juan River Basin settlement between the Navajo Nation, New Mexico, and the United States provides:

> Except as provided in paragraph (2), nothing in the Agreement, the Contract, or this section quantifies or adversely affects the land and water rights, or claims or entitlements to water, of any Indian tribe or community other than the rights, claims, or entitlements of the Nation in, to, and from the San Juan River Basin in the State of New Mexico.[127]

Parallel to the disclaimers are Congress's findings in the various settlements. In the Shoshone-Paiute Settlement, Congress found that "quantifying rights to water and development of facilities needed to use tribal water supplies is essential to the development of viable Indian reservation economies and the establishment of a permanent reservation homeland."[128] The Yavapai-Prescott Indian Tribe Water Rights Settlement contains a finding that Congress supports the settlement to further the "goals of Federal Indian policy and to fulfill the trust responsibility of the United States to the Tribe . . . so as to enable the Tribe to utilize fully its water entitlements in developing a diverse, efficient reservation economy."[129] The Truckee-Carson-Pyramid Lake Water Rights Settlement provides authority for acquisition of water for fisheries and habitat protection[130] despite the adverse ruling to the United States and Pyramid Lake Paiute Tribe in *Nevada v. United States*.[131] Indeed, even in situations in which all the details of a settlement have not yet been reached, Congress has also acted to encourage a final agreement.[132]

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125. Pub. L. No. 110-297, § 9, 122 Stat. 2965, 2981–83 (2008).

126. Pub. L. No. 108-447, tit. X, § 11, 118 Stat. 2809, 3431, 3440 (2004).

127. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 10701(f)(1), 123 Stat. 991, 1401; *see also* San Juan River Basin in New Mexico: Navajo Nation Water Rights Settlement Agreement (Apr. 19, 2005), *available at* http://www.ose.state.nm.us/water-info/Navajo Settlement/NavajoSettlement.pdf.

128. Omnibus Public Land Management Act § 10801(2). The Act contains a disclaimer of application to other situations similar to that in the Soboba Settlement quoted above. *See id.* § 10809(b).

129. Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, Pub. L. No. 103-434, § 102(a)(9), 108 Stat. 4526, 4527.

130. Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618, § 201, 104 Stat. 3289, 3294 (1990).

131. 463 U.S. 110 (1983); *see supra* text accompanying note 80.

132. Congress has been flexible in approving settlements of various types. In the San Luis Rey Indian Water Rights Settlement Act, for example, Congress provided for a settlement of a long-running piece of litigation even though the parties had only reached an agreement in

As much as, if not more than, in any other area, negotiations of Indian water rights are conducted "from the ground up,"[133] meaning that all parties to litigation and negotiations quite naturally look to what has been done before, regardless of disclaimer language in prior legislated settlements. This is exactly how it should be. As demonstrated above, there is not a great deal of settled law from the Supreme Court surrounding many of the important issues that arise in Indian water rights litigation. There is, however, a good deal of guidance, albeit not completely consistent, from the lower courts.[134] When parties leave it to the courts to decide these critical issues, they take a tremendous risk, which sometimes results in even more ambiguity, as with the Arizona Supreme Court's 2001 ruling in *Gila River*.[135] Thus, understanding federal Indian law in the water rights context requires a thorough comprehension of the few Supreme Court cases dealing with the merits, solid trends in lower court decisions,[136] and

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principle. Pub. L. No. 100-675, § 103(a)(1),(6), 102 Stat. 4000, 4000–01 (1988) (affecting "the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians"). Although the agreement was not yet final, the congressional action was a key demonstration of support and encouragement toward the final settlement.

133. *See* Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 651 (2006). Frickey states:

> If, as legal realism suggests, the law that counts is the law in action, and the law in action should be measured by a bottom-up consequential calculus rather than some top-down consistency with abstract doctrine, the legal community cannot hope to understand, much less appreciate, federal Indian law without a much better sense of grounded reality.

Id.

134. The chief difference relates to the inquiry into the determination of the purposes of a reservation. However, even that difference is relatively narrow since it arises from two state supreme courts—Arizona and Wyoming—and the Arizona approach has never been applied to a concrete fact situation. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 19.03[4], at 1183 ("The approach of the majority of courts is more consistent with the Indian law canons of construction that call for the documents creating an Indian reservation to be construed liberally in favor of the Indians.").

135. *See supra* text accompanying notes 113–117.

136. In the category of solid trends, I place recognition of tribal instream flows for protection of fisheries habitat. Thus, in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), the court supplemented its award of water under the PIA standard with water for instream flows to support tribal fisheries. The Ninth Circuit reached the same outcome in *United States v. Adair*, 723 F.2d 1394 (1984). In the same vein, the Washington Supreme Court recognized that tribes with treaty language or history reflecting a reservation of aboriginal rights to fish also have water rights for instream flow habitat protection. State Dep't of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306, 1317 (Wash. 1993) (en banc) ("Water to fulfill the fishing rights under the treaty may be found to have been reserved, if fishing was a primary purpose of the reservation."); *see also* Joint Bd. of Control of Flathead Irrigation Dist. v. United States, 832 F.2d 1127, 1132 (9th Cir. 1987); United States v. Anderson, 591 F. Supp. 1, 5 (E.D. Wash. 1982), *aff'd in part, rev'd in part*, 736 F.2d 1358 (9th Cir. 1984) (water reserved to maintain favorable temperature conditions to support fishery); Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032 (9th Cir. 1985) (court acted appropriately in ordering release of water to protect habitat for treaty fishery); State *ex rel.* Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 712 P.2d 754, 764–66 (Mont. 1985) (tribal reserved rights may include water for fisheries as well as agriculture and other purposes). On the other hand, a state district court in Idaho rejected Indian reserved rights for instream flows. *In re*

most importantly, the past congressional approaches. While federal Administrations of both political parties have complained about the cost of Indian water rights settlements, many of the intractable problems faced in the arid West today are the result of a more than a century of federal neglect of tribal water needs and a corresponding encouragement of non-Indian development.[137] As a consequence, the tribes and other parties to litigation look to the United States to help settle conflicts that, in the view of the non-federal parties, the federal government did the most to create in the first instance. The bulk of the harm from the federal government's action (and inaction) most often was inflicted on the tribes, while non-Indian irrigation projects and state law appropriators have only recently begun to feel pressure as a result of the assertion of federal reserved rights, climate change, drought, and other environmental laws such as the Endangered Species Act.

At least on paper, the federal government's participation in Indian water settlements negotiations is guided by formal criteria and procedures for Indian water settlements that were established in 1991.[138] Non-federal parties generally regard these as unhelpful tools in promoting settlements, except to the extent they express a general federal policy promoting settlement of Indian water right claims. Like formal scholarly approaches to Indian water rights that foundationalists or critics might advocate, the guidelines provide a jumping off point for the exploration of settlement alternatives among motivated parties. As noted elsewhere, the criteria do not appear to have played any substantive role in the comprehensive settlement of the Snake River Basin Adjudication,[139] but in testimony in 2008 on the Navajo-San Juan Settlement, the Bush Administration relied heavily on the criteria in its formal opposition to the Settlement: "The Administration did not participate in the drafting of the water rights settlement embodied in S. 1171, and does not support a water settlement under these circumstances. For these reasons, the Administration opposes the cost and cannot support the legislation as written."[140] Lawmakers reintroduced the Settlement in the 111th Congress and it became law early in the Obama

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SRBA, Case No. 39576, Consolidated Subcase No. 03-10022 (Idaho Dist. Ct., Nov. 10, 1999). Congress mooted the controversy by approving an Indian water rights settlement, the Snake River Basin Adjudication, which provided for instream flow protection. Snake River Water Rights Act of 2004, Pub. L. No. 108-447, tit. X, § 11, 118 Stat. 2809, 3431.

137. *See* NAT'L WATER COMM'N, *supra* note 40; Anderson, *supra* note 40.

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

139. *See* Robert T. Anderson, *Indian Water Rights: Litigation and Settlements*, 42 TULSA L. REV. 23, 33–35 (2006).

140. S. REP. NO. 110-401, 2d Sess., at 35 (2008). The Bush Administration's statement at least gave lip-service to flexibility, but the position appeared to be primarily cost driven. *Id.* at 37 ("The Administration believes that the policy guidance found in the Criteria and Procedures . . . provides a flexible framework in which we can evaluate the merits of this bill. . . . As we have testified previously, the Criteria is [sic] a tool that allows the Administration to evaluate each settlement in its unique context while also establishing a process that provides guidance upon which proponents of settlements can rely.").

Administration.[141] It is not clear whether the new Administration will rely on the guidelines as a ready source of opposition to pending settlements on fiscal grounds, but preliminary indications in testimony regarding the proposed Aamodt Litigation Settlement Act are promising.[142] The Aamodt Settlement Act, along with two other Indian water rights settlements, passed the House of Representatives with apparent Administration support as H.R. 3342 on Jan. 21, 2010.[143] In a letter to Senate Indian Affairs Committee Chairman Byron Dorgan, Commissioner of Reclamation Michael Connor stated that the Obama Administration "would like to work with Congress to identify and implement clear criteria for going forward with future settlements on issues including cost-sharing and eligible costs."[144] The willingness of the Administration to discuss the core elements of the Criteria and Procedures with Congress (and presumably the tribes and other constituents) is a welcome sign of flexibility and indicates great potential for resolution of other difficult water rights disputes. It is certainly a major improvement over the Bush Administration's practice of sometimes sitting on the sidelines with no official input, and then simply appearing at Committee hearings to voice last-minute opposition as dictated by the Office of Management and Budget.

Another encouraging development is the establishment of the Reclamation Water Settlement Fund[145] to fund Indian water rights settlements without either decimating the budget of the Bureau of Indian Affairs or completely reordering the Bureau of Reclamation's operations. While the Fund is not scheduled to provide a funding stream until 2020, its creation is a significant step in the right direction, and the current Administration is reliably rumored to favor advancing the timing of its availability. Access to this fund is a response to years of efforts by Indian and non-Indian advocates to encourage increased federal support for Indian water settlements.[146]

The momentum in favor of settlements owes a great deal to federal executive branch policy, congressional action, and the realization that lengthy

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141. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 10701, 123 Stat. 991, 1396.

142. *See* S. REP. NO. 111-115, 2d Sess., at 12 (2010) (statement of Michal Connor, Commissioner, Bureau of Reclamation, regarding S. 1105). This proposed settlement involves the Pueblos of Nambe, Pojoaque, San Ildefonso, and Tesuque in New Mexico.

143. H.R. 3342, 111th Cong. (as passed by House, Jan. 21, 2010); *see* H. Rep. No. 111-399, 2d Sess. (2010) (reporting the Taos, Aamodt, and White Mountain Apache Settlements for passage by the House). For committee reports on the Aamodt settlement, see H. Rep. 111-390, 2d Sess., at 28–29 (2010), and S. Rep. 111-115, 2d Sess. (2010); for the Taos reports, see S. Rep. 111-117, 2d Sess. (2010), and H. Rep. 111-395, 2d Sess. (2010); and for the White Mountain Apache Tribe Settlement, see S. Rep. 111-119, 2d Sess. (2010), and H. Rep. 111-391, 2d Sess. (2010).

144. S. Rep. 111-115, 2d Sess., at 15 (2010).

145. Omnibus Public Land Management Act § 10501.

146. These efforts have been led by the Native American Rights Fund and the Western States Water Council. *See* Western States Water Council – Celebrating Our 40th Anniversary, at 21–22 (2005), *available at* http://www.westgov.org/wswc/ca-westernstates.pdf.

state court litigation under the McCarran Amendment is not a panacea to water rights disputes.[147] Perhaps more important is an understanding that the history of Indian water settlements is generally a successful one. To be sure, there are cases where full funding has taken longer than expected, and Congress may need to occasionally revisit some of the settlements. That should not, however, hinder the use of settlements in the future. The problems of water use and supply are ongoing, and the need for innovative solutions will only increase as climate change alters the hydrograph of the arid West. Many scholars, in documenting the specifics of Indian water settlements, have suggested approaches for the complex and multi-disciplinary effort to find such solutions.[148]

CONCLUSION

For years, federal courts, scholars, tribes, and the federal government have interpreted the "purposes" of Indian reservations in a generous manner in the water rights context.[149] This broad interpretive approach is what Professor Frickey calls "purposivism, which implements actual or presumed public-policy purposes attributed to a rational, public-spirited legislature."[150]

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147. The State of Washington's so-called *Acquavella* litigation is ongoing in 2010—thirty-four years after its commencement in 1975—and is only an adjudication of surface water; ground water may be next. *See* Dep't of Ecology v. Acquavella, 935 P.2d 595 (Wash. 1997). The last order entered by the trial court was a default judgment against a number of parties who were named as defendants and served, but never appeared in the action. Dep't of Ecology v. Acquavella, Order of Default and Entry of Default Judgment (Yakima County Super. Court No. 77-2-01484-5) (Dec. 10, 2009). Some might consider Idaho's Snake River Basin Adjudication fast-track litigation since the Nez Perce tribal claims took only twenty years of litigation before a settlement was reached. For Idaho Law Review's collection of articles regarding the Snake River Basin Adjudication and the Nez Perce Water Rights Settlement, see generally 42 IDAHO L. REV. 547–793 (2006).

148. *See Nez Perce Water Rights Settlement Articles*, *supra* note 147; JOHN E. THORSON ET AL., TRIBAL WATER RIGHTS: ESSAYS IN CONTEMPORARY LAW, POLICY, AND ECONOMICS (2006); BONNIE G. COLBY ET AL., NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST (2005); DANIEL W. MCCOOL, NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA (2002); Reid Peyton Chambers & John E. Echohawk, *Implementing the* Winters *Doctrine of Indian Reserved Water Rights: Producing Indian Water and Economic Development Without Injuring Non-Indian Water Users?*, 27 GONZ. L. REV. 447 (1991–92); *Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in the Negotiations for the Settlement of Indian Water Rights Claims*, 55 Fed. Reg. 9223 (Mar. 12, 1990); Barbara A. Cosens, *The 1997 Water Rights Settlement Between the State of Montana and the Chippewa Cree Tribe of the Rocky Boy's Reservation: The Role of Community and of the Trustee*, 16 UCLA J. ENVTL. L. & POL'Y 255, 257 (1998). All of the Montana Tribal-State Compacts are collected in a publication of the Montana Reserved Water Rights Compact Commission, MONTANA WATER COMPACTS (2008).

149. The Supreme Court recently reiterated the principle that when interpreting treaties courts must "look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999) (quoting Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943)).

150. Frickey, *Marshalling Past and Present*, *supra* note 43, at 406–07 n.112.

Congressional action ratifying Indian water settlements is consistent with this approach. Such action reflects the reality that while litigation may be necessary to frame issues and provide a framework within which settlement discussions may occur, the negotiation process achieves better outcomes. As Professor Frickey notes:

> In the last analysis, negotiation seems to promise to bring Indians into Indian law far better than does adjudication. Negotiation turns not on incoherent or misunderstood legal doctrines, but on practical realities. Negotiation gives people . . . a piece of the legal action and a chance to own, if only partially, both the resolution of particular disputes and a greater sense of the structure and efficacy of the long-term relationships between the parties.[151]

Anyone involved in the litigation, settlement, or study of Indian water rights can see the wisdom in Professor Frickey's words. Critical to achieving success in the settlement of these controversies is a practical approach premised on the secure foundation of the reserved rights doctrine, coupled with an eye on the history of each situation and the helpful participation of the United States. Federal participation must not only include zealous legal representation of tribal interests as trustee in litigation, but also a willingness to assist resolution of discrete controversies with creative approaches and financial support. Practical reasoning in the Indian water rights context requires general acknowledgement of the validity of Indian reserved rights claims. The United States should support settlements that tribal and non-federal parties achieve as a mechanism to give meaning to treaty promises unfulfilled for too many years, and to avoid unproductive and contentious litigation.

151. Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1783 (1996) (citations omitted).

APPENDIX: INDIAN WATER RIGHTS SETTLEMENTS*

Arizona

Arizona Water Settlements Act (Gila River, Tohono O'odham, San Carlos), Pub. L. No. 108-451, 118 Stat. 3478 (2004).

Zuni Indian Tribe Water Rights Settlement Act of 2003 (Zuni Heaven), Pub. L. No. 108-34, 117 Stat. 782.

Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, Pub. L. 103-434, tit. I, 108 Stat. 4526, amended by Pub. L. No. 104-91, § 201, 110 Stat. 7 (1996).

San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-575, tit. XXXVII, 106 Stat. 4600, 4740, amended by Pub. L. No. 103-435, § 13, 108 Stat. 4566, 4572 (1994), amended by Pub. L. No. 104-91, § 202, 110 Stat. 7, 14 (1996), amended by Pub. L. No. 104-261, § 3, 100 Stat. 3176, 3176 (1996), amended by Pub. L. No. 105-18, § 5003, 111 Stat. 158, 181 (1997).

Southern Arizona Water Rights Settlement Act of 1982 (Tohono O'odham), Pub. L. No. 97-293, tit. III, 96 Stat. 1261, 1274, amended by Southern Arizona Water Rights Settlement Technical Amendments Act of 1992, Pub. L. No. 102-497, § 8, 106 Stat. 3255, 3256, amended by Arizona Water Rights Settlement Act, Pub. L. No. 108-451, 118 Stat. 3478 (2004).

Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512, 102 Stat. 2549, amended by Technical Amendments to Various Indian Laws Act of 1991, Pub. L. No. 102-238, § 7, 105 Stat. 1908, 1910.

Fort McDowell Indian Community Water Rights Settlement Act of 1990, Pub. L. No. 101-628, tit. IV, 104 Stat. 4469, 4480.

Act of July 28, 1978 (Ak-Chin), Pub. L. No. 95-328, 92 Stat. 409, amended by Pub. L. No. 98-530, 98 Stat. 2698 (1984), amended by Ak-Chin Water Use Amendments Act of 1992, Pub. L. No. 102-497, § 10, 106 Stat. 3255, 3258, amended by Ak-Chin Water Use Amendments Act of 2000, Pub. L. No. 106-285, 114 Stat. 878.

California

San Luis Rey Indian Water Rights Settlement Act (La Jolla, Rincon, San Pasquale, Pauma, and Pala Bands of Mission Indians), Pub. L. No. 100-675, tit. I, 102 Stat. 4000 (1988), amended by Pub. L. No. 102-154, 105 Stat. 990 (1991), amended by Pub. L. No. 105-256, § 11, 112 Stat. 1896, 1899 (1998), amended by Pub. L.106-377, § 211, 114 Stat. 1441 (2000).

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Soboba Band of Luiseño Indians Settlement Act, Pub. L. No. 110-297, 122 Stat. 2975 (2008).

Colorado

Colorado Ute Indian Water Rights Settlement Act of 1988 (Southern Ute and Ute Mountain Ute), Pub. L. No. 100-585, 102 Stat. 2973, amended by Pub. L. No. 104-46, tit. V, § 507, 109 Stat. 402, 419 (1995), amended by Pub. L. No. 106-554, tit. III, 114 Stat. 2763 (2000).

Florida

Seminole Indian Land Claims Settlement Act of 1987, Pub. L. No. 100-228, § 7, 101 Stat. 1556, 1560 (1987).

Idaho

Snake River Water Rights Act of 2004 (Nez Perce Tribe), Pub. L. No. 108-447, tit. X, 118 Stat. 2809, 3431.

Fort Hall Indian Water Rights Act of 1990, Pub. L. No. 101-602, 104 Stat. 3059.

Montana

Chippewa Cree Tribe of The Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999, Pub. L. No. 106-163, 113 Stat. 1778.

Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. L. No. 102-374, 106 Stat. 1186, amended by Pub. L. No. 103-263, § 1(a), 108 Stat. 707, 707 (1992).

Fort Peck-Montana Compact (Assiniboine and Sioux Tribes of the Fort Peck Reservation), Mont. Code Ann. § 85-20-201 (1985).

Nevada

Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618, tit. II, 104 Stat. 3289, 3294 (1990).

Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Pub. L. No. 101-618, tit. I, 104 Stat. 3289, 3289, amended by Native American Technical Corrections Act of 2006, Pub. L. No. 109-221, § 104, 120 Stat. 336.

Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement Act, Pub. L. 111-11, tit. X, §§ 10801–09, 123 Stat. 1405, 1405–14 (2009).

New Mexico

Jicarilla Apache Tribe Water Rights Settlement Act, Pub. L. No. 102-441,

106 Stat. 2237 (1992), amended by Pub. L. No. 104-261, § 2, 110 Stat. 3176, 3176 (1996), as amended, Pub. L. No. 105-256, § 10, 112 Stat. 1896 (1998).

Northwestern New Mexico Rural Water Projects Act (Navajo San Juan Settlement), Pub. L. 111-11, tit. X, §§ 10301–05, 123 Stat. 1367–71 (2009).

Oregon

Confederated Tribes of the Warm Springs Reservation Water Rights Settlement Agreement (1997)), entered as consent decree in In the Matter of the Determination of Relative Rights to the Use of the Waters of the Deschutes River and Its Tributaries, No. 99CCV0380ST (Cir. Ct. Deschutes Co. Jan. 7, 2003).

Utah

Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act, Pub. L. No. 106-263, 114 Stat. 737 (2000).

Reclamation Projects Authorization and Adjustment Act of 1992 (Ute), Pub. L. No. 102-575, tit. V, 106 Stat. 4600, 4650.

Washington

United States ex rel. Lummi Indian Nation v. Washington, No. C01-0047Z, 2007 WL 4190400 (W.D. Wash. Nov. 20, 2007) (order approving consent decree governing groundwater on Lummi Indian reservation), *aff'd*, 328 Fed. App'x 462 (9th Cir. 2009) (unpublished decision).

Pending Settlements--111th Congress

Aamodt Litigation Settlement Act, S. 1105 (introduced May 20, 2009) (Pueblos of Nambe, Pojoaque San Ildefonso and Tesuque), Passed House of Representatives, H.R. 3342 (Jan. 20, 2010).

Crow Tribe Water Rights Settlement Act of 2009, S. 375 (introduced Feb. 4, 2009).

Taos Pueblo Indian Water Right Settlement Act, S. 965 (introduced May 4, 2009), Passed House of Representatives, H.R. 3254 (Jan. 20, 2010).

White Mountain Apache Tribe Water Rights Quantification Act of 2009, S. 313 (introduced Jan. 26, 2009), Passed House of Representatives, H.R. 1065 (Jan. 20, 2010).