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Indian Reserved Water Rights: An Overview

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Nathan Brooks
Legislative Attorney
American Law Division

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Summary

With the dramatic population increase in the West over the last thirty years, the Western states have been under increasing pressure from their citizens to secure future access to water. In planning to meet this goal, however, Western officials have had to confront a heretofore obscure doctrine of water law: the doctrine of Indian reserved water rights, also known as the *Winters* doctrine. This doctrine holds that when Congress reserves land for an Indian reservation, Congress also reserves water to fulfill the purpose of the reservation. When this doctrine is applied to the water laws of the Western states, tribal rights to water are almost always senior to other claimants. Therefore, in order for Western water officials to effectively plan for a stable allocation of water on which all parties can rely, they must find a way to satisfy the water claims of local Indian tribes. The parties originally took to the courts to resolve these issues, only to find themselves in an endless cycle of litigation that rarely produced definitive rulings. As a result, negotiated settlements - which require Congressional authorization in order to be valid - are fast becoming the norm. This report provides an overview of the legal issues surrounding Indian reserved water rights disputes.

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Indian Reserved Water Rights: An Overview

Introduction

"When the well is dry," wrote Benjamin Franklin, "we learn the worth of water."[1] The people of the arid American West have always lived in fear of a dry well, and the dramatic increase in the Western population over the last century has brought with it a rise in the number of mouths clamoring for water.[2] Consequently, the drive to secure water often pits states, municipalities, and individual landowners against each other in epic political struggles. This drive also spurs planning and innovation as officials look for new technological means to deliver water from wherever it can be found. As a result, we have water projects like the Central Utah Project (CUP) and the massive Central Arizona Project (CAP).

In planning to ensure that their citizens have access to water in the future, Western states have had to confront a heretofore obscure doctrine of water law: the doctrine of Indian reserved water rights, also known as the *Winters* doctrine. This doctrine holds that when Congress reserves land for an Indian reservation, Congress also reserves water to fulfill the purpose of the reservation. When this doctrine is applied to the water laws of the Western states, tribal rights to water are almost always senior to other claimants. Therefore, in order for Western water officials to effectively plan for a stable allocation of water on which all parties can rely, they must find a way to satisfy the water claims of local Indian tribes.

Satisfying these claims has proven a difficult task, largely because the *Winters* doctrine offers very little guidance regarding just how much water the tribes are entitled to. The effort started with litigation but, as this report will discuss, judges have proven unable to fashion an effective method for balancing the literally thousands of interests in water rights adjudications. Increasingly, then, these disputes have moved from the courtroom to the negotiating table, and settlements are fast becoming the norm.[3] Because of the federal government's unique role with respect to Indian tribes, Congress must ratify these settlement agreements in order for them to be valid. As more and more of these settlements come to Congress for approval,

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[1] Benjamin Franklin, Poor Richard's Almanack (1746 ed.).

[2] Studies done by the Western Water Policy Review Advisory Commission found that, from 1972 to 1997, the 17 Western states saw a 32% increase in population, compared to the national average of 19%. In addition, those same studies estimated that the current population of the Western states will increase another 25% by the year 2022. Denise Fort, *The Western Water Policy Review Advisory Commission: Another Look at Western Water*, 37 Nat. Resources J. 909, 915 (Fall 1997).

[3] Regarding this transition, *see generally* Daniel McCool, Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era (2002).

it is important for legislators to have an understanding of the *Winters* doctrine and the very complicated legal issues surrounding it.

Winters and the Reserved Water Rights Doctrine

The Western states all determine water rights using some form of the prior appropriation doctrine, which holds that rights to water belong to the party that first puts the water to "beneficial use."[4] As long as the party continues to put that water to beneficial use, its prior appropriation right remains senior to all other users.[5] Many commentators condense the entire doctrine, somewhat glibly, into six words: first in time, first in right.

In 1908, the Supreme Court added a complicated twist to this system when it promulgated what came to be known as the reserved rights doctrine in *Winters v. United States*.[6] There, the Court ruled that when Congress set aside land for the Fort Belknap Indian Reservation, Congress also impliedly reserved water to help transform the tribe into a "pastoral and civilized people."[7] It is important to stress here that the Court reached this conclusion not by looking to the Constitution or explicit statutory language, but rather by *implying* a certain Congressional intent. To this day, the *Winters* doctrine remains such an implication.

The Supreme Court has continued to imply the same Congressional intent with regard to all federal reservations - tribal or otherwise (e.g., national parks) - stating that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."[8] The amount must satisfy both present and future needs of the reservation.[9] This reserved water right vests on the date that Congress reserves the land,[10] and remains regardless of non-use.[11] Therefore, because most Indian reservations were created in the 1800's or early 1900's, such reservations are generally both first in time and first in right under the Western prior appropriation system.[12]

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[4] David H. Getches, Water Law in a Nutshell 6 (3d ed. 1997).

[5] *Id.*

[6] 207 U.S. 564 (1908).

[7] 207 U.S. at 576.

[8] *Cappaert v. United States*, 426 U.S. 128, 138 (1976). The Colorado Supreme Court has held "appurtenant" water to be that water "on, under or touching the reserved lands." *United States v. City and County of Denver*, 656 P.2d 1, 35 (Colo. 1983).

[9] *Arizona v. California*, 373 U.S. 546, 600 (1963).

[10] *Id.* at 600 (1963).

[11] *Hackford v. Babbit*, 14 F.3d 1457, 1461 (10th Cir. 1994).

[12] The priority date can be even earlier if the water use fits under the category of aboriginal title. In *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983), the Ninth Circuit found

(continued...)

While *Winters* established a reserved water right for Indian reservations, for most of the last century that right amounted to nothing more than "paper water,"[13] as many took to calling it, because without either a standard for quantifying that right or the technological means to take advantage of it, Indian tribes had little hope of seeing a drop of actual (i.e., "wet") water. To remedy this situation, the tribes were forced to seek assistance from the United States government, which holds most reservation property in trust for the Indian tribes. Congress has charged the Interior and Justice Departments with many of its responsibilities as trustee to advance the water rights of the Indian tribes.[14] However, these departments are also charged with advancing the broader national interest in water use, creating a conflict of interest which, until relatively recently, almost always weighed in favor of non-Indian interests, and against the development of tribal water projects.[15] While under normal fiduciary principles such a conflict would not be tolerated, the Supreme Court has recognized that the United States in its unique relationship with Indian tribes cannot be held to the same standards as a private trustee. As the Court put it in a water rights case involving a conflict in legal representation,

> It may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands. But Congress chose to do this...the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent.[16]

With the population increasing in the West and the resulting need to secure access to water, Westerners were forced to deal with the senior claims of the tribes

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[12] (...continued)
that the tribe's water rights accompanying its historical right to hunt and fish did not come into being with the reservation, but dated instead to "time immemorial." The court also found that this right is not consumptive in nature, but rather "consists of the right to prevent other appropriators from depleting the stream's water below a protected level in any area where the...right applies." *Id.*, at 1411 (citing *Cappaert v. United States*, 426 U.S. 128, 143 (1976)).

[13] Indian water rights literature is replete with references to the paper water/wet water distinction, which is commonly used to highlight the difference between a right to water versus actually possessing both the water and the means to put it to beneficial use. *See, e.g.*, Daniel McCool, Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era 101 (2002).

[14] *Id*, at 597.

[15] The most glaring example of this conflict is the fact that the Bureau of Indian Affairs and the Bureau of Reclamation are both within the Department of the Interior. In 1970, President Nixon sent a message to Congress pointing out that when such conflicts within Interior arise, "[t]here is considerable evidence that the Indians are the losers." H.R. Doc. No. 363, 91st. Cong., 2d Sess. 10 (1970), *reprinted at* 116 Cong. Rec. 23258, 23261 (1970).

[16] *Nevada v. United States*, 463 U.S. 110, 128 (1983). *See also Cobell v. Babbitt*, 91 F. Supp. 2d 1, 30-31 (D.D.C. 1999) (declining to hold the Secretary of the Interior to common law fiduciary duties, instead looking purely to statute in determining duties owed).

holding reserved water rights. Against this backdrop, various state, local, and tribal claimants to water have filled the courts for decades in order to settle the myriad of issues left open by the Supreme Court in *Winters*. In the process, the question of which courts possess the power to resolve these issues has been almost as contentious as the issues themselves.

The McCarran Amendment

For most of the last century, the doctrine of sovereign immunity shielded tribes and the federal government from state water rights adjudications, and so federal courts had near-exclusive power to determine *Winters* rights.[17] In 1952, however, Congress passed an appropriations rider waiving the federal government's sovereign immunity and permitting joinder of the United States in suits involving the adjudication of water rights of a river system or other source.[18] Known today as the McCarran Amendment, the law provides for consent to join the United States "in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) the administration of such rights, where it appears that the United States is the owner of, or is in the process of acquiring water rights under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit."[19] In a momentous 1976 decision, the Supreme Court held that the McCarran Amendment allows state courts to adjudicate Indian water rights where the United States is sued in its role as trustee for the tribes.[20] For Indian tribes that have long considered state courts to be hostile territory, the prospect of having those same courts adjudicate Indian water rights has been one of the primary motivations for pursuing negotiated settlements.[21]

In its decision allowing state court adjudications of tribal water rights under the McCarran Amendment, the Supreme Court held that the policy behind the amendment - namely, the avoidance of piecemeal adjudication of water rights in a river system - requires that state court adjudications under the McCarran Amendment must be "comprehensive" in order to be valid. As the Court put it, "The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights."[22] Factors that contribute to a particular adjudication's "comprehensiveness" include the parties, the types of rights at issue, the definition of the basin to be included in the adjudication, and the time frame covered by the adjudication.[23]

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[17] Conference of Western Attorneys General, American Indian Law Deskbook 212 (2d ed. 1998).

[18] Act of July 10, 1952, 66 Stat. 549, 560 (codified at 43 U.S.C. § 666).

[19] 43 U.S.C. § 666(a).

[20] *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 811 (1976).

[21] *See* Daniel McCool, Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era 75-76 (2002).

[22] *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 819 (1976).

[23] *See generally* Peter W. Sly, Reserved Water Rights Settlement Manual 177-184 (1988).
(continued...)

While the law is clear that the McCarran Amendment grants state courts the right to adjudicate Indian water rights, the question of who has the power to *administer* water rights determined in a McCarran Amendment adjudication is not so clear.[24] Some argue that the above-quoted language of the McCarran Amendment distinguishing between administration and adjudication of water rights is meant to limit a state's ability to administer such rights.[25] The Wyoming Supreme Court has held, though, that state courts have the power to administer as well as adjudicate Indian water rights.[26] Significantly, the court also ruled that an appointed State Engineer has the power to "monitor" water use under a court's reserved rights decree, but enforcement by that same official against either the tribes or the United States would require judicial action.[27]

The benefit of the McCarran Amendment is that it allows a state to take a more active role in the determination of a resource so precious to all of that state's citizens. As discussed above, however, the Supreme Court in *Winters* left many questions regarding reserved water rights to be determined by other courts. In the wake of the McCarran Amendment, most of the courts to take up these questions have been various state judicial bodies, with different states sometimes providing very different answers. This lack of uniformity breeds confusion, which is nowhere more evident than in the courts' handling of the quantification problem.

Litigation and Quantification

Using the *Winters* rationale to guide them in their search for a quantification standard, courts have generally focused first on each reservation's purpose, and then determined the amount of water necessary to fulfill that purpose. Until recently, virtually every court to consider the question of a reservation's purpose held that purpose to be agricultural, in that the federal government, in reserving the land, intended that the Indians who inhabited the reservation would cultivate the land in order to become self-sufficient.[28] Subsequent judicial attempts to establish a quantification standard in line with this agricultural purpose have resulted in some

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[23] (...continued)
A Federal Appeals Court has held that a failure to include groundwater in a state general stream adjudication does not invalidate the adjudication on "comprehensiveness" grounds. *United States v. Oregon*, 44 F.3d 758, 768-769 (9th Cir. 1994).

[24] What exactly the power to "administer water rights" entails is not immediately apparent. The most widely followed definition seems to be the one given by a Nevada Federal District Court over thirty years ago: "To administer a decree is to execute it, to ensure its provisions, to resolve conflicts as to its meaning, to construe and interpret its language." *United States v. Hennen*, 300 F.Supp. 256, 263 (D. Nev. 1968).

[25] *See* Conference of Western Attorneys General, American Indian Law Deskbook 220-221 (2d ed. 1998).

[26] *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 114-115 (Wyo. 1988).

[27] *Id.*

[28] Conference of Western Attorneys General, American Indian Law Deskbook 194 (2d ed. 1998).

standards, but also more confusion.[29] While some courts followed the Supreme Court's lead in *Winters* and refused to establish a quantification standard,[30] other courts tried a "reasonable needs" approach that looked to past and present water use as a benchmark.[31]

The Supreme Court made its most significant contribution to the quantification debate in *Arizona v. California*, in which the Court expressed its approval of the Special Master's use of a fixed calculation of water needs based on the physical capacity of the reservation land, rather than the number of Indians on the reservation.[32] The Special Master based this "practicably irrigable acreage" (PIA) standard, as it has come to be known, on the aforementioned assumption that the purpose of an Indian reservation is agricultural. Starting from that assumption, the Special Master reasoned, and the Court agreed, that "the only feasible and fair way by which reserved water for the reservation can be measured is irrigable acreage."[33] Interestingly, while the Supreme Court endorsed the Special Master's use of the PIA standard in *Arizona*, the Court did not technically adopt it. As the Court put it, "While we have in the main agreed with the Master, there are some places we have disagreed and some questions on which we have not ruled. Rather than adopt the Master's decree...we will allow the parties, or any of them, if they wish, to submit...the form of decree to carry this opinion into effect."[34] This unusual set of facts has led many to question the precedential value of the Court's decision in *Arizona*.[35]

Notwithstanding the debate over *Arizona*'s precedential value, the PIA standard is today by far the favorite judicial method for quantifying Indian reserved water rights,[36] and lower courts have fashioned a three-step process for determining a reservation's practicably irrigable acreage.[37] First, soil scientists determine the largest area of arable land that can reasonably be considered for an irrigation

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[29] *See, e.g.*, Note, *Indian Reserved Water Rights: the Winters of Our Discontent*, 88 Yale L.J. 1689, 1695 (1979).

[30] *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956); *Conrad Investment Company v. United States*, 161 F. 829 (9th Cir. 1908).

[31] *See, e.g.,United States v. Walker Irrigation District*, 104 F.2d 334, 340 (9th Cir. 1939).

[32] *Arizona v. California*, 373 U.S. 546, 601 (1963).

[33] 373 U.S. at 601.

[34] 373 U.S. at 602.

[35] *See, e.g.*, Jennele Morris O'Hair, *The Federal Reserved Rights Doctrine and Practicably Irrigable Acreage: Past, Present, and Future*, 10 BYU J. Pub. L. 263, 273 (1996). The Supreme Court had an opportunity to clarify its position regarding the PIA standard in *Wyoming v. United States*, but an evenly split Court (made possible by Justice O'Connor's recusal) merely affirmed the Wyoming Supreme Court's judgment without opinion. *Wyoming v. United States*, 492 U.S. 406 (1989).

[36] *See* Barbara A. Cosens, *The Measure of Indian Water Rights: The Arizona Homeland Standard, Gila River Adjudication*, 42 Nat. Resources J. 835, 842-844 (Fall 2002).

[37] *See, e.g., Fort Mojave Indian Tribe v. United States*, 32 Fed. Cl. 29, 35 (1994).

project.[38] Second, engineers develop an irrigation system based on the available water supply and the arable land base.[39] Third, economists evaluate the crop patterns, yields, pricing, and the net returns for crops that the irrigation project might support.[40]

While the widespread judicial adoption of the PIA standard currently provides parties with some degree of certainty as to how Indian water rights will be quantified by courts, that standard is by no means set in stone, and there is evidence to suggest not only that courts may soon be moving away from the PIA standard, but also that they may be doing so in slightly different directions, adding to the uncertainty. First, non-Indian appropriators argue that agricultural water use is highly consumptive, and therefore the PIA standard is too friendly to Indians and insensitive to state and private appropriators.[41] There is evidence in Justice Thurgood Marshall's papers that before Justice O'Connor recused herself in *Wyoming v. United States*,[42] she authored a draft majority opinion in which the Court would have held that the quantification of Indian water rights must include a sensitivity analysis, taking into account the effect on other state and private appropriators.[43] Given how close the Supreme Court came to restructuring the PIA standard in *Wyoming*, it is possible that the Court might adopt a stricter standard in the future.

On the other side of the ideological spectrum, some argue that the PIA standard is not friendly enough to Indians, in that linking water rights to agriculture is anachronistic and unfair given the current state of the agricultural economy in this country.[44] Others contend that the PIA standard does not take into account the realities of modern-day life and the diversity of reservations' geographies and purposes.[45] Agreeing with both sides of the PIA debate in some respects, the Arizona Supreme Court in its 2002 *Gila River* ruling abandoned agriculture as the sole purpose for Indian reservations and found instead that the essential purpose of an

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[38] *Id.*

[39] *Id.*

[40] *Id.* The *Fort Mojave* court went on to say that "In general, the PIA analysis is grounded upon project development with the overall goal of maximizing the income from the project and not maximizing the water claim."

[41] *See* Peter W. Sly, Reserved Water Rights Settlement Manual 104 (1988).

[42] 492 U.S. 406 (1989).

[43] *See* Andrew C. Mergen and Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. Colo. L. Rev. 683 (Summer 1997).

[44] *See, e.g.,* Peter W. Sly, Reserved Water Rights Settlement Manual 104 (1988).

[45] *See, e.g.,* Barbara A. Cosens, *The Measure of Indian Water Rights: The Arizona Homeland Standard, Gila River Adjudication*, 42 Nat. Resources J. 835, 837 (Fall 2002) ("Whereas southern tribes located in alluvial valleys near a large surface water source [e.g. the Colorado River] are entitled under an agricultural purpose quantified by the PIA method to ample water, tribes in more northern climes or mountainous terrain are left with insufficient rights to meet basic drinking water needs").

Indian reservation is to establish a "permanent home and abiding place."[46] Citing various water settlements, the court found its construction necessary "to achieve the twin goals of Indian self-determination and economic self-sufficiency."[47] In quantifying water rights in line with that purpose, the court held as proper a reservation-by-reservation analysis of, among other things, (1) the tribe's history and culture; (2) the reservation's geography and natural resources, including groundwater availability; (3) the reservation's physical infrastructure, human resources, technology, and capital; (4) past water use; and (5) a tribe's present and projected future population.[48]

While the Arizona Supreme Court's approach addresses many of the criticisms leveled at the PIA standard, its "reservation-by-reservation" focus does not lend itself to a specific formula, and so could lead to more uncertainty for authorities trying to account for Indian reserved water rights when planning large water projects. Of course, the *Gila River* decision is only one case with no precedential value in other states. It is still too soon to tell whether or not the Arizona Supreme Court's *Gila River* ruling will spur other states to follow suit and reassess the PIA standard. What is clear, however, is that there are serious questions - from all sides - about the effectiveness of that standard.

Winters and Allottee Rights

While the task of quantifying *Winters* water often frustrates judges, adjudications involving *Winters* rights become even more confusing when allotments are involved. In an effort to assimilate Indians into mainstream American culture, Congress in 1887 passed the General Allotment Act[49] - also known as the Dawes Act - authorizing the President to allot portions of reservation lands to individual Indians. Title would then remain in the United States in trust for 25 years, after which it would pass to the individual Indian allottees free from all encumbrances.[50] The Act also authorized the Secretary of the Interior to distribute surplus reservation land for the purpose of non-Indian settlement. After the 25-year trust period was over, many allottees found themselves unable to pay the state taxes to which their lands became subject, resulting in widespread forced sales.[51] These forced sales combined with the Secretary's distribution of surplus lands to non-Indians to produce a "checkerboard"

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[46] *In re General Adjudication of All Rights to Use of Water in the Gila River System and Source*, 35 P.3d 68, 74 (Ariz. 2002) (*quoting Winters*, 207 U.S. at 565).

[47] *Id.* at 76.

[48] *Id.* at 79-80.

[49] Act of Feb. 8, 1887, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354, 381). For a brief discussion of the history of and policy behind the Act, as well as its consequences, *see* F. Cohen, Handbook of Federal Indian Law 127-143 (1982 ed.); *see also* William C. Canby, American Indian Law in a Nutshell 20-23 (3d ed. 1988).

[50] There are several other allotment acts specific to particular tribes, some with longer or shorter trust periods than that of the Dawes Act, but the underlying policy issues from a reserved water rights perspective are the same.

[51] William C. Canby, American Indian Law in a Nutshell 22 (3d ed. 1998).

pattern of Indian/non-Indian land ownership far different from what Congress intended in passing the Dawes Act.[52]

While many reservations escaped allotment and its consequences, this "checkerboard" pattern of ownership on some reservations persists and today presents serious problems in reserved water rights disputes. The Supreme Court ruled somewhat confusingly in the only allottee water rights case to come before it that when tribal land is converted into allotments, the allottees succeed to *some portion* of tribal waters needed for agriculture.[53] A subsequent Ninth Circuit case, *Colville Confederated Tribes v. Walton*, built on that reasoning and held that an allottee's share of a tribe's reserved water is equal to the percentage of the entire reservation's irrigable acreage that is located on the allottee's land.[54] The *Walton* court also found that a non-Indian successor in interest to an Indian allottee acquires that allotment's reserved water right, but loses that right if the non-Indian successor does not put the water to beneficial use.[55] The Supreme Court's ruling and the later lower court cases expanding on it considered allotment rights only for irrigation purposes. It is not clear how these holdings relate to reservations of land for non-agricultural purposes.

Tribal Use of Its Reserved Water Right

As the *Gila River* decision discussed earlier illustrates, a court's answer to the threshold question of purpose can have far-reaching effects. The Arizona Supreme Court's finding of a "permanent homeland" purpose not only led the court to a new method of quantification, but also allowed the court to put a premium on flexibility in how tribes use their *Winters* water. As the court put it, "Just as [the U.S.] economy has evolved, nothing should prevent tribes from diversifying their economies if they so choose and are reasonably able to do so. The permanent homeland concept allows for this flexibility and practicality."[56] This is consistent with the opinion of the Special Master in *Arizona v. California,* who stated that, even

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[52] *See* F. Cohen, Handbook of Federal Indian Law 138 (1982 ed.) ("The majority of Indian lands passed from native ownership under the allotment policy...about 27 million acres, or two-thirds of the total land allotted, passed from Indian allottees by sale between 1887 and 1934. An additional 60 million acres were either ceded outright or sold to non-Indian homesteaders and corporations as 'surplus' lands").

[53] *United States v. Powers*, 305 U.S. 527, 532 (1939). Generally, under the Nonintercourse Act (25 U.S.C. § 177), Indians are forbidden from transferring tribal land without federal government approval, and this prohibition likely applies to the transfer of non-allotted reserved water rights also. *See* Conference of Western Attorneys General, American Indian Law Deskbook 207-209 (2d ed. 1998).

[54] *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981).

[55] *Id.*

[56] *In re General Adjudication of All Rights to Use of Water in the Gila River System and Source*, 35 P.3d 68, 76 (Ariz. 2002).

though he found the reservation's purpose to be agricultural, that did not mean that the reserved water had to be put to agricultural use.[57]

The *Gila River* court specifically rejected the approach taken by the Wyoming Supreme Court ten years earlier in the *Big Horn* adjudication.[58] There, the court found that because agriculture was the primary purpose for the reservation of land for the Indians, if the tribe wanted to use the water for some other purpose, such as instream flow, the tribe must do so according to state prior appropriation doctrine.[59] In reaching its conclusion, the Wyoming Supreme Court relied on the primary-secondary purpose test used in *United States v. New Mexico*,[60] a Supreme Court case dealing with a non-Indian federal reservation, specifically a national forest. The Court in *New Mexico* found that the United States, in setting aside federal lands for the Gila National Forest, reserved use of the Rio Mimbre River only where necessary to preserve timber and to secure favorable water flows, and therefore did not have the reserved right for aesthetic, recreational, wildlife preservation, or stock watering purposes.[61] As the Court stated, "Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only necessary for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator."[62] The *Big Horn* court applied the *New Mexico* rationale to Indian reservations and greatly constrained the ability of the tribe to adjust its water use according to modern day realities.

The Arizona Supreme Court in the *Gila River* adjudication rejected the *Big Horn* approach on two grounds. First, the Arizona Supreme Court said there are enough significant differences between Indian and non-Indian reservations to preclude applying *New Mexico*'s primary-secondary purpose test to Indian water rights cases. The court found chief among these the underlying federal policy of Indian self-sufficiency, which necessitates an interpretation of Indian reserved rights that is broader than that of non-Indian reserved rights.[63] Secondly, the court said,

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[57] S. Rifkind, Report of the Special Master - *Arizona v. California* 265 (1962).

[58] *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 835 P.2d 273 (Wyo. 1992).

[59] *Id.* at 278-279.

[60] 438 U.S. 696 (1978).

[61] *Id.* at 718.

[62] *Id.* at 702.

[63] *In re General Adjudication of All Rights to Use of Water in the Gila River System and Source*, 35 P.3d 68, 77 (Ariz. 2002).

even if the *New Mexico* test applied, the "permanent homeland" purpose would be primary, not secondary.[64]

The debate over what a tribe can do with its *Winters* water gets even more contentious when the issue of off-reservation water marketing is broached. The geography of Indian and non-Indian settlement that emerged from the era of westward expansion is such that today many tribes control large amounts of water upstream from major metropolitan areas.[65] In theory, then, certain tribes could divert water for their own uses and leave little for the already-parched downstream cities. Given this situation, such tribes stand to make a good deal of money by agreeing to not use their water in deference to downstream interests. Marketing water is especially attractive to tribes which possess the rights to reservation water, but lack the infrastructure and resources necessary to exploit it.[66] Under the Nonintercourse Act, tribes are restricted from alienating trust property without specific statutory authorization.[67] There is a limited exception to the Nonintercourse Act, however, which authorizes tribes, with the approval of the Secretary of the Interior, to lease trust land for "public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases."[68] The use of the term "natural resources" seems to suggest that tribes need only seek the Secretary's approval to market their water.

Even so, difficult questions persist regarding the legality and policy of marketing *Winters* water. First, because most tribes have not had their *Winters* rights quantified, in many situations a reservation's reserved water is already being used for free downstream by those who have consequently built up a substantial reliance interest on this state of affairs. The prospect of suddenly having to pay for water that has for so long been free predictably sparks vehement opposition.[69] Secondly, as discussed throughout this memorandum, the threshold question in water rights cases is often, *what is the purpose of the reservation*? As the Wyoming Supreme Court held, it is very difficult to link the off-reservation marketing of water to the reservation's original purpose, especially if that purpose is an agricultural one.[70] If

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[64] *Id.*

[65] For a discussion of the different causes of this state of affairs, see Daniel McCool, Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era 161-163 (2002).

[66] *See, e.g.,* Edmund J. Goodman, *Indian Tribal Sovereignty and Water Resources: Watersheds, Ecosystems, and Tribal Co-management*, 20 J. Land Resources & Envtl. L. 185, 208 (2000).

[67] 25 U.S.C. § 177. Given the disastrous consequences of the Allotment Act era, discussed earlier, proponents of marketing must overcome some very strong arguments against granting such congressional approval.

[68] 25 U.S.C. § 415.

[69] For this reason, all of the marketing provisions approved so far in water settlement acts specify water delivered from federal projects rather than reserved water.

[70] *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 100 (1988).

courts move toward the Arizona Supreme Court's "permanent homeland" approach, water marketing might rest on a much stronger foundation.

Tribal Regulation of Water

The Supreme Court has held that Indian tribes, as limited sovereigns, have the right to regulate the conduct of their members,[71] a right which presumably extends to the regulation of members' use of tribal water. States must respect a tribe's right to order its own affairs,[72] and even those states that have assumed criminal and civil jurisdiction over Indian tribes pursuant to Public Law 280 are expressly prohibited from regulating Indian trust water rights.[73]

The real problem with tribal regulation of water arises when tribes attempt to extend their authority to nonmembers. Nonmember water rights arise in two ways: first as mentioned above, an allottee holds rights to a portion of reservation water; second, and even more complicated, homesteaders have rights to reservation water. In the late 1800's and early 1900's some reservations were opened up to the public, and homesteaders moved in to claim portions of reservation land.[74] These homesteaders hold state appropriative water rights,[75] which must be reconciled with the federal reserved water rights of the tribe.

In *Montana v. United States*, the Supreme Court held that a tribe may only regulate the on-reservation activities of *nonmembers* on non-Indian land within the reservation if (1) the nonmembers have entered into consensual relationships (e.g., contracts, leases, etc.) with the tribe; or (2) nonmember conduct on the reservation "threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe."[76] Citing their inherent sovereign powers over tribal land and resources, as well as the second *Montana* exception, tribes have enacted water codes purporting to regulate all who use reservation water, sometimes including nonmembers.

The law governing tribal authority to enact water codes regulating nonmembers is not very clear, engendering a great deal of confusion among tribes and private

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[71] *United States v. Wheeler*, 435 U.S. 313, 322 (1978). The Court went on to clarify that the power to punish tribal offenders is an exercise of retained tribal sovereignty. As such, the power "[E]xists only at the sufferance of Congress and is subject to complete defeasance. But, until Congress acts, the tribes retain their sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Id.* at 323.

[72] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

[73] 25 U.S.C § 1322.

[74] *See* Peter W. Sly, Reserved Water Rights Settlement Manual 138 (1988).

[75] *United States v. Anderson*, 736 F.2d 1358, 1363-1365 (9th Cir. 1984).

[76] *United States v. Montana*, 450 U.S. 544, 565 (1981).

water appropriators.[77] The Department of the Interior (DOI) was sufficiently worried about the potential for conflict inherent in such codes that in 1975 the Secretary imposed a moratorium[78] on all DOI approvals of such water codes submitted by tribes subject to the Indian Reorganization Act (IRA).[79] The moratorium is still in effect, although DOI made one exception in 1985 when it approved the tribal water code included in the water rights compact between the State of Montana and the Assiniboine and Sioux Tribes of the Fort Peck Reservation.[80]

The status of codes enacted by tribes not subject to the IRA is yet to be determined. The available case law, however, suggests that tribal water codes could not be upheld on tribal sovereignty grounds. In *Holly v. Yakima Indian Nation*, a tribe enacted a water code that purported to regulate all use of excess waters on fee lands within the reservation. The court held that nonmember use of excess water on such lands does not implicate the concerns of the second *Montana* exception, and so the exception does not apply.[81] In addition, in *Strate v. A-1 Contractors*, the Supreme Court seemed to limit the second *Montana* exception to those situations where state regulation would impede on "the right of reservation Indians to make their own laws and be ruled by them."[82] It does not appear that tribal water codes regulating nonmembers would satisfy that requirement.

Groundwater

The Supreme Court has never addressed whether a reservation's groundwater is included in its reserved water right. Most states handle groundwater and surface water under separate regulatory and judicial controls,[83] and a determination of rights to groundwater is not required for a McCarran Amendment adjudication to meet its

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[77] *See generally* Thomas W. Clayton, *The Policy Choices Tribes Face When Deciding Whether to Enact a Water Code*, 17 Am. Indian L. Rev. 523 (1992).

[78] This moratorium is informal and is not codified anywhere, but is commonly known. DOI has told tribes that the Department will not approve their water codes until DOI promulgates regulations pursuant to 25 U.S.C. § 381, which DOI has yet to do. *See Holly v. Totus*, 655 F. Supp. 548, 551-552 (E.D. Wash. 1983). *See also* Conference of Western Attorneys General, American Indian Law Deskbook 224, n. 250 (2d ed. 1998); Thomas W. Clayton, *The Policy Choices Tribes Face When Deciding Whether to Enact a Water Code*, 17 Am. Indian L. Rev. 523, 548 (1992); Peter W. Sly, Reserved Water Rights Settlement Manual 72 (1988).

[79] 25 U.S.C. § 461 et seq. Congress passed the IRA in an effort to encourage tribal self-government, authorizing tribes to adopt constitutions and by-laws to be ratified by members of the tribe. In order to be effective under the IRA, these constitutions and by-laws must be approved by the Secretary of the Interior.

[80] Memorandum from Ross Swimmer to Secretary of the Interior requesting approval of Fort Peck Water Code, Oct. 7, 1986.

[81] *Holly v. Confederated Tribes and Banks of the Yakima Indian Nation*, 655 F. Supp. 557, 559 (E.D. Wash. 1985).

[82] *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (*quoting Williams v. Lee*, 358 U.S. 217, 220 (1959)).

[83] *See* Peter W. Sly, Reserved Water Rights Settlement Manual 181-182 (1988).

comprehensiveness requirement.[84] The Wyoming Supreme Court, while acknowledging that "the logic that supports a reservation of water to fulfill the purpose of the reservation also supports the reservation of groundwater," refused to extend the *Winters* doctrine to include groundwater because no other court had explicitly done so.[85] Several courts, however, have implicitly recognized a reserved groundwater right.[86] In 1999, the Arizona Supreme Court took the position that the *Winters* doctrine applies to groundwater only when "other waters are inadequate to accomplish the purpose of a reservation."[87] This analysis, the court recognized, essentially dissolves the distinction between surface and groundwater: "The significant question for the reserved rights doctrine is not whether water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation."[88] This issue is by no means settled.

Conclusion

In the century since the Supreme Court promulgated the reserved rights doctrine, the judiciary has often shown itself to be an inadequate body for resolving the myriad of issues that the Court in *Winters* left unresolved, with litigation dragging on endlessly. This is not surprising, given that three governments and tens of thousands of people have significant stakes in the outcomes. The situation in the courts promises to get even more complicated in the wake of the Arizona Supreme Court's *Gila River* ruling.

Many parties have started to realize that issues as complex and important as those outlined in this report are best resolved by settlement, with each party compromising in order to achieve its most important goals. As the drive for a dependable water supply in the Western has grown stronger, so has the desire to quickly settle tribal water claims in order that Western water officials can effectively and accurately plan for the future. In addition, tribes have begun to understand the negotiating power that comes with a reserved water right - power that can be leveraged to address other tribal needs. This transition from courtroom to negotiating table brings with it a larger role for Congress, which must approve each settlement.

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[84] *See United States v. Oregon*, 44 F.3d 758, 768-769 (9th Cir. 1994).

[85] *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 99 (Wyo. 1988). In addition, a Federal Appeals Court has held that a failure to include groundwater in a state general stream adjudication does not invalidate the adjudication on "comprehensiveness" grounds. *United States v. Oregon*, 44 F.3d 758, 768-769 (9th Cir. 1994).

[86] *See Gila River Pima-Maricopa Indian Community v. United States*, 695 F.2d 559 (D.C. Cir. 1982); *Nevada v. United States*, 279 F.2d 699 (9th Cir. 1960); *In re Determination of Conflicting Rights*, 484 F. Supp. 778 (D. Ariz. 1980); *Tweedy v. Texas Co.*, 286 F.Supp. 383, 385 (D. Mont. 1968).

[87] *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739, 748 (Ariz. 1999).

[88] *Id.*, at 747.

Ongoing Adjudications. Presently, there are at least 19 ongoing adjudications involving at least 52 tribes laying claims to water rights on the Gila River, Virgin River, Walker River, Little Colorado River, Milk River, Missouri River, Big Horn River, Tongue River, Rosebud River, Flathead River, Blackfoot River, Bitterroot River, Marias River, Wind River, Klamath River, Snake River, and Yakima River. Initiated in 1977, the Big Horn adjudication, referred to numerous times in this memorandum, reached the Supreme Court once and is currently before the Wyoming Supreme Court for the fifth time.

Pending Settlements. To date, Congress has approved fourteen Indian water rights settlements.[89] Various tribes have negotiated settlement agreements still awaiting Congressional approval, including the Gila River Indian Community,[90] the Fort Peck Indian Reservation, and the Fort Belknap Indian Reservation. The Nez Perce Tribe, the Aamodt Pueblo Tribes, and the Crow Indian Reservation are all in the negotiation process and may have settlements ready to present to Congress within the next few years.

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[89] The Zuni Indian Tribe Water Rights Settlement Act (P.L. 108-34); The Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement Act (P.L. 106-163); The Yavapai-Prescott Indian Tribe Water Rights Settlement Act (Title I of P.L. 103-434); The San Carlos Apache Water Rights Settlement Act (Title XXXVII of P.L. 102-575); The Jicarilla Apache Tribe Indian Water Rights Settlement Act (P.L. 102-441); The Northern Cheyenne Indian Reserved Water Rights Settlement Act (P.L. 102-374); The Fort McDowell Indian Community Water Rights Settlement Act (P.L. 101-628); The Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act and the Pyramid Lake/Truckee-Carlson Water Rights Settlement Act (Titles I and II, respectively, of P.L. 101-618); The Colorado Ute Indian Water Rights Settlement Act (P.L. 100-585); The San Luis Rey Indian Water Rights Settlement Act (Title I of P.L. 100-675); The Salt River Pima-Maricopa Indian Community Water Rights Settlement Act (P.L. 100-512); The Ak-Chin Indian Water Rights Settlement Act (P.L. 98-530); The Southern Arizona Water Rights Settlement Act (P.L. 97-293).

[90] The 108th Congress is currently considering approval of this agreement as part of S. 437 and H.R. 885.