Land & Water Law Review

Volume 22
Issue 2 *Symposium: Western Water Rights*

Article 25

1987

One River, Three Sovereigns: Indian and Interstate Water Rights

A. Dan Tarlock

University of Wyoming
College of Law

LAND AND WATER
LAW REVIEW

VOLUME XXII 1987 NUMBER 2

One River, Three Sovereigns: Indian and Interstate Water Rights

*A. Dan Tarlock**

Federal Indian reserved waters apply to intra and interstate streams and aquifers. Many interstate streams have been allocated among riparian states by Supreme Court decree, interstate compact or congressional apportionment, but Indian water rights are seldom well integrated into these mass allocations. In Arizona v. California, *the Supreme Court held that in the case of a congressional apportionment Indian water rights are charged against the share of the state in which the reservation is located. States on over-appropriated rivers resist the general application of this principle, but states with surplus waters view the recognition of generous water rights as a way to protect base flows against the claims of other states. This article argues that it is fair to charge the satisfaction of reserved water rights against the state or states in which the reservation is located because Indian tribes are quasi-sovereign. This is the practice of Western states in negotiating reserve rights agreements and is leaning to fairer treatment of the tribes.*

* Professor of Law, IIT Chicago-Kent College of Law. A.B. 1962, LL.B. 1965 Stanford University. Support for the research and writing of this article was provided by the Marshall T. Ewell Fund of the Chicago-Kent College of Law. I thank Professors David Getches of the University of Colorado and Helen Ingram of the University of Arizona for their help in appreciating the role of water in contemporary Indian law and culture. Mr. Peter Sly, Director, Conference of Western Attorneys General, read an earlier draft and corrected many errors. The final version benefited greatly from his careful reading, but all dubious arguments and conclusions are mine alone.

I. INTRODUCTION

In the 19th century, we stripped the Indians of much of the natural resource base, which had sustained them for centuries.[1] We converted their commons into exclusive property rights[2] or excluded them from the remaining commons by checkerboard allotments.[3] United States Indian policy was originally based on alliance and co-existence, but the westward expansion of settlement made it impossible to maintain tribal enclaves in the East. The election of Andrew Jackson in 1828 committed the nation to a firm policy of Indian removal.[4] Federal Indian policies based on subjugation and removal were initially justified because it was assumed that Indians were destined to perish in the face of the advancing superior European civilization.[5] When the Indians did not become extinct as rapidly as expected, they were herded onto reservations in the West, which were initially viewed as hospices.[6]

After the Civil War, attitudes toward the Indians began to change as part of a general effort to promote moral uplift through manipulation of the social environment.[7] Indians were once again recognized as individuals capable of redemption through the adoption of white values.[8] Communal resources, however, had no part in this redemption. The late-nineteenth and early-twentieth century policy of assimilation demanded that existing reservations be quickly alloted in severalty and surplus lands be distributed to non-Indians. Before all reservations were broken up, Indian policy again changed. During the New Deal, a vision of tribal sovereignty based on both native and non-native cultures[9] became the foun-

---

1. C. MARTIN, KEEPERS OF THE GAME: INDIAN-ANIMAL RELATIONSHIPS AND THE FUR TRADE (1978) traces this destruction to the seventeenth century. Martin's provocative thesis is that contact with the Europeans destroyed the traditional Indian relationship with nature and eliminated the previously existing taboos against over-exploitation of game.

2. *See* W. CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND (1983). There is a vast literature that argues that Indians were superior resource managers because of their concepts of communal and intergenerational obligations to the land. Recent archaeological evidence, however, suggests that the Indian civilizations such as the Anasazi perished because of overuse of the lands that they occupied. Browne, *New Findings Reveal Ancient Abuse of Lands,* New York Times, Jan. 13, 1987, at 14, col. 1. For a perceptive argument that Indian relationships to nature cannot be a model for the environmental movement, see C. MARTIN, *supra* note 1, at 157 (chapter entitled *Epilogue: The Indian and the Ecology Movement*).

3. Getches, *Water Rights on Indian Allotments,* 26 S.D. L. REV. 405, 412-15 (1981).

4. A. DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 69-149 (1970) is a good introduction to the history of removal.

5. For a splendid history of this tragic conceit, see B. DIPPIE, THE VANISHING AMERICAN (1983).

6. "Early in December 1875 the government ordered all the [Sioux] Indians to the reservations. . . . Evidently this was planned to further the extermination. . . . 'It is planned that many shall die,' the older ones said." M. SANDOZ, LOVE SONG TO THE PLAINS 198 (1961).

7. The grand sweep of nineteenth century Indian policy is recounted in 1 F. PURCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS (1984).

8. "During the early years of American history the white community . . . believed that over a period of time the Indians would be assimilated into white culture and become Christianized in the European tradition." V. DELORIA, JR. & C. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 6 (1983).

9. *See* Washburn, *The Historical Context of American Indian Legal Problems,* 40 LAW & CONTEMP. PROBS. 12 (1976), for an overview of federal Indian policy.

dation of federal policy, and protection of tribal rather than individual rights remains the cornerstone of Indian policy.[10] This shift preserved the shrunken reservations of the removal and assimilation eras with an unanticipated modern benefit: these previously undesirable lands on the frontier sometimes contained natural resources valuable to both Indians and non-Indians.[11] Many tribes were left in the position of undeveloped protectorates with a considerable natural resource base.[12] The law is still working out the consequences of this late 19th century shift in Indian policy, which has survived renewed vigorous attempts in the 1950s to terminate the reservations.[13]

Indian law is often a partial reflection of prevailing Indian policy, and the law of Indian water rights is a classic example of this relationship. In 1908, the Supreme Court recognized a new source of water rights for Indian tribes to complement the then prevailing policy of assimilation through allotment. *Winters v. United States*[14] created federal reserved water rights for the benefit of Indian reservations. Reserved rights were theoretically superior to most state-created rights. Although *Winters* was probably only intended to support Indian Office subsistence irrigation projects,[15] over time the "*Winters*" doctrine gave the tribes the legal capability to assert claims to vast quantities of Western water, although the tribes seldom had the financial capability to put their potential reserved rights to actual beneficial use, even with subsidies.[16] Non-Indian lessees have been the primary beneficiaries of *Winters* because non-Indian irrigation projects were funded at a much higher rate than Indian

---

10. 2 F. PRUCHA, *supra* note 7, at 940-1086, recounts the New Deal policy of self-determination, the bitter opposition to it that produced the post-World War II termination policy and the return of the Kennedy Administration to self-determination. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV., 979, 984-91 (1981) traces the historical origins of the Indian laws reliance on the tribal unit and presents a powerful case for the continued recognition of tribal sovereignty.

11. Berthrong, *Legacies of the Dawes Act: Bureaucrats and Land Thieves at the Cheyenne-Arapaho Agencies of Oklahoma*, in THE PLAINS INDIANS OF THE TWENTIETH CENTURY 31 (P. Iverson ed. 1985) [hereinafter PLAINS INDIANS].

12. U.S. DEP'T OF THE INTERIOR, REPORT OF THE TASK FORCE ON INDIAN ECONOMIC DEVELOPMENT 30 (1986) [hereinafter TASK FORCE REPORT]; *see also* U.S. COMM'N ON CIVIL RIGHTS, THE NAVAJO NATION: AN AMERICAN COLONY (1975).

13. *See* 2 F. PURCHA, *supra* note 7, at 1041-59.

14. 207 U.S. 564 (1908).

15. Collins, *The Future Course of the* Winters *Doctrine*, 56 U. COLO. L. REV. 481 (1985).

16. There are eighty-three Indian irrigation projects that range in size from over 100,000 acres to scattered units of a few acres each. The Bureau of Indian Affairs (BIA) operates and maintains fifteen major projects, including those whose water delivery systems serve both Indian and non-Indian land. Tribes are assisted in the maintenance of smaller systems, especially when heavy equipment is required. The estimated cost of operation and maintenance in 1982 was 18.2 million dollars, of which eleven million dollars was to be collected from water users. Non-Indian users pay their full pro rata share of the operation and maintenance costs, but certain Indian users are subsidized: (1) those financially unable to pay their assessments, (2) those relieved of charges because of law or court decree, and (3) owners of small garden tracts. This subsidy covers about ninety-four percent of the operation and maintenance costs attributable to Indian lands. T. TAYLOR, THE BUREAU OF INDIAN AFFAIRS 65 (1984).

ones.[17] Indians have always been almost totally dependent on federal largess and remain largely so today. As a result, Indian water rights remained on the fringes of state and federal water law and were long ignored or denigrated by states and private users.

Most *Winters* claims are on interstate rivers or on their tributaries. These rivers are subject to state-created rights based on existing or potential equitable apportionment decrees, interstate compacts or statutory apportionments. Until the 1963 Supreme Court decision in *Arizona v. California*,[18] states were able to allocate interstate rivers with little regard to Indian water rights.[19] This is no longer possible. Indian tribes can effectively veto or delay many potential water development projects and "cloud" state water titles by the assertion of *Winters* or aboriginal water rights.[20] Conversely, some states see the recognition and protection of Indian water rights as a way to gain a competitive advantage over other states in the future allocation of interstate streams by piggybacking state onto Indian claims.

This article examines the relationship between Indian reserved rights and the law of the allocation of interstate streams and aquifers through equitable, compact or congressional apportionments. It addresses the questions of who must bear the responsibility for the satisfaction of Indian water rights and how Indian claims have been and should be integrated into the assignment of state shares to interstate streams. My argument is that although Indian water rights are federal water rights, tribal rights should be satisfied out of the share, however defined, of the state or states in which the reservation lies. This is the current law and practice of the Western states, but there are counter arguments, and the principle is fraught with legal and political problems for both Indians and non-Indians. On over-appropriated streams, such a simple rule could be unfair to the state or states in which the reservation lies, as well as to up

17. "There is no question that during the early twentieth century . . . Congress and the Bureau of Reclamation consciously chose to subsidize heavily non-Indian water development at the expense of treaty-based Indian reserved water rights." Wilkinson, *Perspectives on Water and Energy in the American West and in Indian Country*, 26 S.D. L. REV. 393, 397 (1981).

18. 373 U.S. 546 (1963).

19. A recent example can be found in a statement by an official of the Bureau of Reclamation to the South Dakota Board of Water Management on the issue of the use of water stored behind Oahe Reservoir on the Missouri for a coal slurry pipeline.

> Indian water rights are an issue on which we do not have a ready solution. . . . At this time, we can only agree that the Bureau will do everything it can to assist the Indian people to develop their resources on the reservations. . . . Our current policy for industrial water service contracts recognizes as a provision of such contracts that Indian water claims are pending and that once adjudicated to finality the contract would be subject to such final legal determination. We cannot stop all water development projects until Indian water rights are quantified.

1 BUREAU OF LAND MGMT., FINAL ENVTL. IMPACT STATEMENT— ENERGY TRANSP. SYSTEMS, INC., 3-4 (1981) (Statement of James A. Rawlings, Regional Supervisor of Water and Land, Upper Missouri Region Bureau of Reclamation).

20. The New Mexico Pueblo Indians have water rights based not on *Winters* but on rights recognized by the Spanish colonizers and protected by subsequent treaties. *See infra* note 90.

and downstream states. Indian claims can, for example, exceed either a state's entire allocated share of a stream or the annual flow of a river as they do in Arizona.[21] And, in the long run, Indian tribes are exposed to the risk that such powerful leverage against the states will produce sufficient political pressure for the federal government to exercise its plenary power[22] to deprive tribes of the opportunities to use (on or off the reservation) their *Winters* entitlements.

The root of the problem of the integration of Indian and interstate water rights is the *Winters* doctrine. *Winters* rights, as developed by the courts, do not serve the interests of state water right holders because of the uncertainty they create. Indian water entitlements can be unresponsive to real tribal needs. In the past, Indians have sought to extend *Winters* to allow tribes to control large quantities of water to regain their lost heritage. The states, in addition, have searched for blanket formulas or methods to confine sharply Indian water entitlements. Both approaches are futile. Each tribal-state conflict is different, and each calls for a separate negotiated settlement.[23] States have long negotiated with tribes to waive or defer *Winters* rights, but the settlements have not always been

21. DEPARTMENT OF INTERIOR, REPORT OF THE TASK FORCE ON INDIAN ECONOMIC DEVELOPMENT 124 (1986). Copy on file in the Law and Water Law Review Office.

22. Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 104 S. Ct. 2105 (1984); National Farmers Union Ins. Co. v. Crow Tribe of Indians, 105 S. Ct. 2447 (1985). The Supreme Court's current sweeping characterization of federal authority belies the long political and doctrinal struggle to define the relationship among Indians, the federal government and the states. Federal power over Indians rests primarily on the treaty and commerce powers, but the Court has used a mix of inconsistent and changing theories to justify federal regulation of Indians. The Supreme Court initially viewed Indian tribes as foreign nations. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Federal-Indian treaties remain an important source of Indian law, but during the assimilation era, the Court based federal power on the idea of federal trusteeship over its Indian wards. United States v. Kagama, 118 U.S. 375 (1886). Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), carried the new basis of federal power to its logical conclusion and held that Congress could abrogate a treaty. *See generally* Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 CALIF. L. REV. 601 (1975). Federal power is now described as plenary. This idea was originally suggested by Felix Cohen in his HANDBOOK OF FEDERAL INDIAN LAW (1942) as a theory of tribal immunity from state regulation, but in Williams v. Lee, 358 U.S. 217 (1958), Justice Black applied the theory as a source of congressional supremacy as well. Federal power is now a combination of all theories of the relationship between the tribes and the United States because the issue is framed as solely one of federal preemption. However, *Worcester* retains its vitality because the Supreme Court has said that the tribes retain pre-existing sovereignty to make and administer laws. The power is now recognized to inform the analysis of federal preemption of state law, especially in cases of the assertion of state jurisdiction over non-Indian activities on a reservation. White Mountain Apache Tribe v. Brocher, 448 U.S. 136 (1980); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Indian tribes now have considerable immunity from state regulation, but the question of protection from federal regulation remains very much open. *See* Clinton, *supra* note 10, at 991-1018, for an examination of possible sources of limitations on federal plenary power. R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY (1980) is a thoughtful, extended argument for a theory of tribal federalism.

23. Professor David Getches makes essentially the same argument in Management and Marketing of Indian Water Rights: From Conflict to Pragmatism, Paper presented at the First Annual Frank J. Trelease Western Water Rights Symposium, Jackson, Wyo. (Feb. 27-28, 1987) (to be revised and published in *Symposium: Western Water Rights (Part II)*, XXIII LAND & WATER L. REV. (1987) (Issue No. 1)).

fair to the tribes. In recent years, the tribes have been able to negotiate better settlements with the states, due in large part to the the threat of *Winters,* and states have begun to move beyond trying to deny the legitimacy of *Winters.* These settlements promise the hope of better state-tribal water relations.[24] The assignment of the responsibility for the satisfaction of *Winters* rights to the states can provide the necessary incentive for fairer state-Indian bargains.

Most Indian claims remain unquantified, but have been estimated as high as forty-five million acre feet. Potential *Winters* rights claims in Arizona stand at 31.3 million acre feet, many times the state's share of the Colorado River. These claims will take on more significance to some tribes as the promise of economic salvation through mineral royalties fades. The actual use of Indian water rights is small because the tribes lack either the financial capacity to use substantial amounts of water or clear legal authority to market water for off-reservation uses.[25] Of the 50.2 million acres of tribal and Indian owned lands under the jurisdiction of the Bureau of Indian Affairs, 2,026,531 are devoted to dry farming and only 917,580 to irrigation.[26] American agriculture is declining generally so it is unlikely that Indian agriculture will be significantly expanded. If tribal agriculture is expanded, it is unlikely that such a policy would further Indian economic development. The future of Indian water, as many have long recognized, lies in off-reservation uses. A recent Department of the Interior Task Force on Indian Economic Development concluded that leasing Indian water rights has "the potential to become a significant new source of revenue for some tribes."[27] The range of new revenue was speculatively estimated at between one-hundred million and one billion dollars per year. This recommendation is consistent with the current Indian policy of tribal economic self-sufficiency, but now and for the foreseeable future there are not enough prospective lessees to carry out the policy.

II. INDIAN AND INTERSTATE CLAIMS: INCONSISTENT EXPECTATIONS, DIFFERENT RULES

A. State and Federal Claims: The Expectation of Exclusive State Allocation

Indian and state interstate water rights are difficult to integrate because they rest on inconsistent assumptions. Western interstate streams are subject to the competing claims of three sovereigns—the federal gov-

24. *Id.*

25. Arizona v. California, 373 U.S. 546 (1963), recognized substantial reserved rights for Indians. After the late 1970s, about sixty percent of the eligible lands were in agricultural production, but Indians farmed only eight percent of these lands. Hundley, *The West Against Itself: The Colorado River—An Institutional History,* in NEW COURSES FOR THE COLORADO: MAJOR ISSUES FOR THE NEXT CENTURY 9, 33-34 (G. Weatherford & F.L. Brown eds. 1986).

26. TASK FORCE REPORT, *supra* note 12, at 116.

27. *Id.* at 124.

ernment, states, and the Indian tribes.[28] Different legal principles apply to each claim. The modern commerce clause gives the federal government the plenary power to apportion interstate streams, subject only to the fifth and fourteenth amendments. This power exists more in theory than in practice because the history of Western water allocation is one of federal deference to state water law.[29] At the height of the post-New Deal era of federal supremacy, in *Arizona v. California*,[30] the Supreme Court confirmed the congressional decision to allocate interstate streams that earlier cases upholding federal multiple-purpose projects had suggested.[31] The Boulder Canyon Project Act was found to be an exercise of the power, although the Court's reading of the legislative history has been vigorously challenged.[32] More recently, South Dakota has filed an original action for a declaration that congressional adoption of the Pick-Sloan plan for the impoundment[33] of the Missouri River is a partial congressional apportionment.[34] These rare instances aside, the states' quasi-sovereign interests in resources located within their borders[35] give them a paramount interest in the allocation of interstate waters.

In the absence of pervasive federal allocation, states have been left to fight it out among themselves for the division of shared streams through equitable apportionment actions, interstate compacts or less formal agreements.[36] The Supreme Court originally created the expectation that the Western states had exclusive rights to Western interstate waters; dictum in *Kansas v. Colorado*[37] and *Nebraska v. Wyoming*[38] suggested that the federal government had no power to allocate interstate waters. This analysis was later repudiated to accommodate the federal government's New Deal commitment to the conservation era idea of multiple-purpose river basin development. But, during this century, the federal government

28. They are also sometimes subject to a fourth category of claims—those of Canada and Mexico. A discussion of the allocation of water between nations is beyond the scope of this article. *See generally* H. Garretson, The Law of International Drainage Basins (1967).

29. California v. United States, 438 U.S. 645 (1978), *on remand*, 509 F. Supp. 867 (E.D. Cal. 1981), *aff'd in part, rev'd in part*, 694 F.2d 1171 (9th Cir. 1982).

30. 373 U.S. 546 (1963).

31. *E.g.*, United States v. Grand River Dam Auth., 363 U.S. 229 (1960).

32. N. HUNDLEY, WATER AND THE WEST: THE COLORADO RIVER COMPACT AND THE POLITICS OF WATER IN THE AMERICAN WEST 266-70 (1975). The Supreme Court has recently said that congressional ratification of an interstate compact is an exercise of the federal power to apportion interstate waters, and thus the Court lacks the equitable jurisdiction to reform a compact. Texas v. New Mexico, 462 U.S. 554 (1983).

33. The Pick-Sloan plan is a 1944 forced congressional marriage of rival proposals by the Bureau of Reclamation and the Army Corps of Engineers to develop the Missouri River. The plan envisioned a series of multiple-purpose dams and irrigation projects, but only the flood control and navigation enhancement portions of the plan have been fully implemented. The plan is the subject of current litigation over the respective authority of the Bureau and the Corps to market water from Pick-Sloan reservoirs on the mainstem of the Missouri. Missouri v. Andrews, 787 F.2d 270 (8th Cir. 1986), *U.S. appeal pending* (1986).

34. South Dakota v. Missouri, Orig. No. 103 (U.S. Sup. Ct. 1985). Copy on file in the Land and Water Law Review Office.

35. Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907).

36. *See* Tarlock, *The Law of Equitable Apportionment Revisited, Updated, Restated*, 56 U. COLO. L. REV. 381 (1985).

37. 206 U.S. 46, 85-92 (1907).

38. 325 U.S. 589, 611-16 (1945).

primarily supported state allocation choices by providing the money to construct the necessary works to put the waters of interstate streams to beneficial uses as the states defined them.[39]

Western states were allowed to pursue their interstate water interests with slight concern for the claims of Indian tribes. Indian water rights were often noted, but they did not deter many proposed or executed projects. The need to maintain good relations with Canada and Mexico has forced the federal government to share by treaties international rivers which bind the states.[40] But, until relatively recently, no such powerful political dynamic benefited Indian tribes,[41] although the tribes are sovereign entities of comparable dignity to the states.[42] The Supreme Court recognized that Indian tribes could obtain superior claims to state appropriation rights junior to the date of the creation of the reservation, but during a good part of this century Indian claims have seldom been an immediate threat to the enjoyment of state-created water rights because tribal development lagged far behind non-Indian uses. As a result, Indian water rights are not well integrated into state water law and the law of equitable apportionment. Recently, a more consistent law and practice is emerging from the ad hoc deals that have been struck with tribes to remove projects or to settle long standing disputes. Many Western states have begun to recognize that continued indifference to Indian claims is not a sensible water strategy and that state and tribal interests may complement each other. As a result, more balanced and integrated state-Indian settlements are emerging.

B. States Rights, Indian Rights: Separate Paths

Indian and state equitable apportionment claims arose almost simultaneously between 1907-1908 during the conservation and reclamation

---

39. The Reclamation era is now over. Two recent important studies of the abuses of the Bureau of Reclamation are R. REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER (1986) and D. WORSTER, RIVERS OF EMPIRE: WATER, ARIDITY AND THE AMERICAN WEST (1985).

40. *See, e.g.*, Meyers & Noble, *The Colorado River: The Treaty With Mexico*, 19 STAN. L. REV. 367 (1967).

41. Ingram, Scaff & Silko, *Replacing Confusion With Equity: Alternatives for Water Policy in the Colorado River Basin*, in NEW COURSES, *supra* note 25, at 177, 178.

42. Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, 106 S. Ct. 2305, 2313 (1986) (citations recast in bluebook form) described tribal sovereignty:

> The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance. [*See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).] Of course, because of the peculiar "quasi-sovereign" status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy. [United States v. United Fidelity & Guaranty Co., 309 U.S. 506, 513 (1940); *cf.* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1972).] And this aspect of tribal sovereignty, like all others, is subject to plenary federal control and definition. [*See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).] Nonetheless, in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.

States, of course, deny this characterization of Indian tribes. Constitutional guarantees of federalism give the state greater protection against the federal government compared to Indian tribes. But, the protections are primarily political after Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

eras. However, the law of these claims developed separately. Equitable apportionment carried Western water law forward; the law of *Winters* threatened to undermine the doctrine of prior appropriation. The law of equitable apportionment, despite stray dictum in the cases, has remained constant since 1922. Indian water rights in contrast, can be divided into three periods, 1908-1963, 1963-1976 and 1976 to the present.

1. State's Rights

Kansas v. Colorado,[43] decided in 1907, held that the Supreme Court had original jurisdiction to adjudicate the competing claims of riparian states to interstate streams, but the source of the doctrine and the standards to be applied were left vague.[44] It is widely assumed that equitable apportionment applies both to surface and groundwater,[45] but there has been no equitable apportionment of an interstate aquifer. State water law was soon adopted as the principal source of federal common law.

Three aspects of the doctrine of equitable apportionment are most relevant to the integration of Indian and state claims because they illuminate the sources of tension between those claims. First, among the Western states, priority of use is the presumed rule of allocation.[46] The Court has departed from the strict enforcement of priorities only when established economies based on junior uses could be protected at comparatively little increase in risk to senior uses or a senior call was likely to be futile.[47] Language in more recent opinions appears to downplay the role of priority, but the Court has not seriously departed from it. In *Colorado v. New Mexico I,*[48] the Court suggested that an existing use could be bumped in favor of a more efficient new one, and remanded the case for further findings on the comparative efficiencies of the two competing uses. On remand, the Court retreated from equating beneficial use with efficiency and protected the existing, low-valued use.[49] *Colorado v. New Mexico I* and *II* cast some doubt on the future of priority *uber alles,* but predictions about the imposition of a strict duty to conserve, or more open-ended balancing, are highly speculative.[50] In theory, Indian water rights fare well under the rule of priority determined by the generous relation-back theory of *Winters* because reservations generally pre-dated white settlement, but the tribes would suffer if protection of existing beneficial uses were the sole rule because their actual uses are small.

The second relevant rule is that states must sue *parens patriae* in original jurisdiction. The *parens patriae* rule requires that the state assert

43. 206 U.S. 46 (1907).

44. *See generally* Tarlock, *supra* note 36, at 394-95.

45. Fisher, *Equitable Apportionment of Interstate Ground Waters,* 21 ROCKY MTN. MIN. L. INST. 721, 735 (1974).

46. Wyoming v. Colorado, 260 U.S. 393 (1922).

47. Nebraska v. Wyoming, 325 U.S. 589 (1945).

48. 459 U.S. 176 (1982).

49. Colorado v. New Mexico II, 467 U.S. 310 (1984).

50. Grant, *The Future of Interstate Allocation of Water,* 29 ROCKY MTN. MIN. L. INST. 977 (1985), is a careful examination of this argument.

a quasi-sovereign interest above the interest of individual water users.[51] States must represent the interests of their citizens and this limitation has been construed by the Supreme Court to exclude state representation of Indian water claims, although Indians are citizens of the state in which they reside.[52] Indian representation must either come from the federal government or directly from the tribe. The third barrier is the rule that original jurisdiction will, in theory, be accepted only to redress non-speculative threats of injury. A mere tribal assertion of a *Winters* right, without proof of a substantial immediate injury will not be sufficient to convince the Court to take original jurisdiction.

2. Indian Rights.

Indian water rights were first recognized in *Winters v. United States*,[53] but the impact of Winters was not fully appreciated because the destablizing theory of the case was never clearly articulated. The Fort Belknap project was one of the first experiments with Indian irrigation and *Winters* was a product of two forces. Federal Indian policy had shifted from removal and eradication to the hope of Indian salvation through assimilation. Recently created reservations were to be alloted in severalty and the surplus lands opened to white settlement; both Indians and non-Indians were to develop these lands through irrigation. Assimilation was complemented by the conservation movement which sought to develop the West through irrigation. Both assimilation and reclamation of water sought to promote Western settlement by increasing the land available to white settlement,[54] but both policies supported modest Indian irrigation to give Indians a chance to compete with white settlers.

The Fort Belknap reservation was created in 1888 by an agreement, ratified by Congress, which reduced substantially land that had been set aside for five tribes in 1874 by Congress. A year later the federal government began to divert small amounts of water (not involved in the litigation) from the Milk River for an Indian irrigation project, but substantial use did not start until 1898-99. Within a year, 30,000 reservation acres were under cultivation. In 1898, before these substantial federal diversions, upstream non-Indian irrigators, brought to the area by the completion of the Great Northern Railroad in 1890, recorded entries on the public domain under the Homestead and Desert Land Acts, posted notices of an intent to appropriate and immediately commenced construction of the necessary, simple diversion works. These rights were superior to the Indians under Montana law. In 1905, extensive upstream uses combined with a severe drought deprived the reservation of needed irrigation water, and the federal government as trustee sued to enjoin interferences with the Fort Belknap project.

---

51. North Dakota v. Minnesota, 263 U.S. 365 (1923).
52. *See, e.g.*, United States v. Nevada, 412 U.S. 534 (1971).
53. 207 U.S. 564 (1908).
54. 2 F. PURCHA, *supra* note 7, at 894.

The United States Attorney initially argued that the Indians were prior appropriators, but to his great surprise, this assumption proved false. He then asserted that the reservation had riparian rights and, in the time honored tradition of litigators, threw in a vague reference to possible treaty rights.[55] The settlers relied, of course, on state law. It was the district judge, however, who took the government's riparian argument a step further and issued an injunction based on water rights reserved in the treaty that initially led to the creation of the reservation.[56] The Supreme Court agreed and held that the 1888 agreement reserved sufficient water to turn the Indians into "a pastoral and civilized people,"[57] a use that the tribes continue to enjoy.[58] Only Justice Brewer, the author of *Kansas v. Colorado,* dissented.

---

55. Norris Hundley, Jr., has examined the history of the creation of the reservation and of the decision. The federal government initially asserted that the Indian's had been the first to put the water to use under state law, but to protect the tribes should it lose on this issue, the complaint alleged that the reservation had "riparian and other rights." After the federal district judge issued a temporary restraining order, the settlers established prior rights. The United States Attorney then switched to a riparian theory, but in a decision "that took all parties by surprise," the district judge issued an injunction against the settlers because the Indians reserved sufficient water for irrigation in the treaty creating the reservation. Hundley, *The* Winters *Decision and Indian Water Rights: A Mystery Reexamined,* in PLAINS INDIANS, *supra* note 25, 77, 85.

56. Although no treaty existed because the reservation was a post-treaty era reservation created by agreement. *Id.* at 85.

57. Winters v. United States, 207 U.S. 564, 576 (1908). There is little in Justice McKenna's background to predict the decision. McKenna replaced his fellow Californian and architect of the pivotal theories that legitimated private use of the public domain—Justice Stephen Field. Justice McKenna was a self-educated California lawyer who rose through dutiful service to the Republican party and, particularly, Senator Leland Stanford. Ironically, McKenna was not named President McKinley's Secretary of the Interior because Protestant missionaries feared having a Catholic administer Indian education. *Winters* is, however, consistent with Justice McKenna's expansive views of federal authority under the Commerce Clause which distinguished him from similar conservative justices with whom he served. Watts, *Justice McKenna,* in 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 1719 (1969).

58. After *Winters* a 10,425 acre irrigation project was constructed on the Fort Belknap reservation to allow the tribes to enjoy their water right, which amounts to the approximate annual natural flow of the Milk. The Milk is an international river that originates in Glacier National Park. As part of the Boundary Waters Treaty of 1909, the United States was awarded seventy-five percent of the Milk's flow, and Canada received similar rights to the Saint Mary's River, which also originates in the Park and flows almost due north into Alberta. In 1946, the Bureau of Reclamation (BOR) built Fresno Dam and Reservoir on the Milk some fifty miles upstream from the reservation. The Tribe's natural flow *Winters'* right was recognized in a BOR-BIA operating agreement; the agreement gave the tribes an additional 1/7 interest in the waters of the Milk stored behind Fresno Dam near Havre, Montana. The right does not include waters of the Saint Mary's River diverted into the Milk. Between 1983 and 1985, there was a severe drought in Montana, and by July 1985 the entire natural flow of the Milk had dried up and the tribes had used up their full 1/7 interest in the Fresno Reservoir. The Bureau of Indian Affairs acceded to the Bureau of Reclamation's request to close the Fort Belknap Irrigation Project diversion. In August of that same year, "[d]ue to insufficient water and fear of 'water pirates' who might divert the water before the Tribes could receive it, BOR and BIA decided not to release any water and the Fort Belknap Irrigation Project remained closed." Defendant's Motion to Dismiss at 10, Gros Ventre & Assisiboine Tribes of Fort Belknap Indian Comm'y of the Fort Belknap Indian Reservation, Montana v. Hodel, No. CV-85-213-GF (D. Mont. Aug. 22, 1985). The tribes immediately filed suit to protect their senior *Winters* rights, but August rains made it possible for BOR and BIA to agree to a temporary schedule of reservoir releases. The suit was dismissed without prejudice in July, 1986.

The majority's reading of the agreement represented a major implication of treaty rights. To support his expansive reading of the agreement, Justice McKenna seems to have analogized it to a treaty so as to apply the already familar rule that treaties should be construed for the benefit of the Indians as wards of the federal government. He dealt with the problem of implied water rights simply by asking rhetorically: "Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?"[59] Because of the brevity of the opinion, scholars have long viewed *Winters* as an aberration and difficult to justify[60] although cases involving the Treaty[61] and Property[62] powers were cited as justification for the "undeniable" power to reserve waters. Scholars continue to debate the basis for the decision. The debate centers around whether the Indians had the water before a treaty or agreement or were given it by the federal government,[63] an issue that took on some significance in the 1970s as Indians asserted sweeping aboriginal rights.[64]

Winters is best understood as both a product of, and a counter to, then prevailing Indian policy. Irrigation complemented allotment, and it was widely assumed that Indians and non-Indians would be subject to the same water law. Indian irrigation was a small Indian Office program until 1901 when it became more formalized. A modern historian of assimilation concludes that the common assumption was that both Indians and non-Indians would compete for available water under the doctrine of prior appropriation:

> Every law providing for the irrigation of reservation lands stipulated that local regulations would govern the Indians' access to water. Beneficial use was sure to control water assignments on the new projects. Thus, reluctant allottees or those unable to farm could lose their water to their "energetic" white neighbors who would begin farming later than the Indians but who would stand ready to make beneficial use of their water. In addition, all of the projects were constructed with appropriations from tribal accounts. When a group's treasury was inadequate, the Indian Office would advance the money in anticipation of a reimbursement. To ensure the repayment, it was essential that the surplus lands within them—the lands not assigned to allottees—be sold. When water rights were in danger, the value of those surplus lands was nil.[65]

---

59. *Id.*

60. Bloom, *"Paramount" Rights To Water Use*, 16 ROCKY MTN. MIN. L. FOUND. 669 (1971) summarizes the different readings of *Winters*.

61. United States v. Winans, 198 U.S. 37 (1905).

62. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899).

63. *See* Ranquist, *The* Winters *Doctrine and How It Grew: Federal Reservation Of Rights To The Use of Water*, 3 B.Y.U. L. REV. 639, 652-54 (1975).

64. The celebrated "Globe Equity Decree," United States v. Gila Valley Irrigation Dist., Globe Equity No. 59 (D. Ariz., June 29, 1935), first recognized aboriginal rights for the Pima Indians. *See* Merrill, *Aboriginal Water Rights*, 20 NAT. RESOURCES J. 465 (1980).

65. F. HOXIE, THE FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 162-163 (1984).

If Indian water rights were based on state law, the Indians would have been frozen into a permanent position of resource inferiority. This may have been what assimilation intended and thus *Winters* is wrong. But, *Winters* identified the fundamental problem with assimilation—Indians would not be able to compete effectively with the rush of white settlement—and countered it by basing Indian rights on the long-term needs of the tribal community. The theory that the property clause allows Congress to claim federal proprietary rights is an adequate formal justification for Indian water rights. But, it fails to give adequate weight to the federal common law nature of *Winters* rights because Justice McKenna treated congressional intent as close to a fiction.

Winters stated a broader principle which has allowed Indian water law to adapt to changed perceptions of Indian welfare because it is based on the core idea, which has seen fruit in much recent hunting and fishing treaty litigation:[66] Indians are entitled to some measure of resource security as an attribute of tribal sovereignty.[67] Natural resources—streams, lakes, mountains—are often central to native American cultural traditions.[68] In contrast, the Judeo-Christian heritage focuses on the relationship between man and a single God who is not part of nature and views natural resources as given for human exploitation.[69] The recognition of Indian rights to the use and enjoyment of water is a way to enhance the dignity of tribal members similar to the role that due process plays in our constitutional system.[70] This argument is also consistent with the Indian

---

66. *E.g.*, United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); Washington v. Fishing Vessel Ass'n, 443 U.S. 1086 (1979); *see also* F. COHEN, *supra* note 22, at 441-70.

67. Sovereignty and proprietary claims are said to be analytically different. The distinction stems from the Roman concepts of *imperium* and *dominimum*. Sovereign and proprietary claims to natural resources are, however, connected, although the connection is both complex and limited. In his last piece of scholarship, the late Dean Frank J. Trelease found a link between sovereignty and state control over its natural resources in the equal footing doctrine that the Supreme Court has read into the constitution. Trelease, *Interstate Use of Water*—"Sporhase v. El Paso, Pike & Vermejo", XXII LAND & WATER L. REV. 315 (1987). Some measure of access to natural resources is essential to sovereignty, but there are substantial limitations on state proprietary claims based on sovereignty. The Ninth Circuit rightly refused to legalize the Sagebrush Rebellion and impose a duty on the federal government to divest itself of the public domain. Nevada *ex rel.* Nevada State Bd. of Agriculture v. United States, 512 F. Supp. 166 (D. Nev. 1981), *aff'd*, 699 F.2d 486 (9th Cir. 1983). Further, the tenth amendment does not preclude federal resource allocation choices that are inconsistent with state choices. Garcia v. San Antonia Metropolitan Transit Authority, 469 U.S. 528 (1985). *Cf.* Granite Rock Co. v. California Coastal Comm'n, 107 Sup. Ct. 1419 (1987).

68. V. DELORIA, JR. & C. LYTLE, *supra* note 8, at 238 (1983). F.L. BROWN & H. INGRAM, WATER AND POVERTY IN THE SOUTHWEST: CONFLICT, OPPORTUNITY AND CHALLENGE (manuscript 1986) [hereinafter WATER AND POVERTY] is an extended examination of the role of Indian and Hispanic community values in water allocation.

69. J. PASSMORE, MAN'S RESPONSIBILITY FOR NATURE 3-27 (1974) remains the most lucid exposition of the Judaic and Hellenistic roots of this central idea of Western values.

70. For a recent anthropological justification for this argument, see M. KNACK & O. STEWART, AS LONG AS THE RIVER SHALL RUN: AN ETHNOHISTORY OF PYRAMID LAKE RESERVATION (1984). This reasoning played a role in a seminal case recognizing the trust responsibility of the federal government to protect Pyramid Lake. *See* Pyramid Lake Piute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1973).

Freedom of Religion Act of 1978 which requires that Indian use of natural resources for religious purposes must be considered in federal land management decisions.[71]

This argument cannot be pressed to extremes because it lends itself to ready abuse by both the tribes and the states. This theory both supports Indians' claims to vast quantities of waters that bear no relationship to modern Indian culture and to current reservation needs, and state arguments that tribes with a nomadic history have no claims to water.[72] The first use of the theory is unfair to the legitimate expectations of non-Indian users that state-created rights will be protected. The second use makes a parody of the use of enthnography as a source of Indian policy and law[73] and denies the fact that Indian culture has changed in response to contact with non-Indians.[74] Finally, as the Supreme Court has observed "[t]he availability of water determines the character of life and culture"[75] for all in the West. Linking Indian water rights to tribal rather than non-Indian culture, as the Court did in *Winters,* is intended only to establish the legitimacy of Indian claims and the need to move beyond the discredited Indian policy that produced the decision. Indian water rights are tied to the idea of a tribal community, and the tribal community should be able to define the relationship between water use and community welfare. *Winters* rights should not, for example, be limited to irrigation. But, because Indians and non-Indians now share the same landscape, Indian

---

71. Pub. L. No. 95-341, § 1, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (1982)). Protection of Indian religious freedom requires protection of specific sacred sites. *See* Note, *Indian Religious Freedom and Governmental Development of Public Lands,* 94 YALE L.J. 1447 (1985); Stambor, *Manifest Destiny and American Indian Religious Freedom: Sequoyah, Badoni, and The Drowned Gods,* 10 AM. INDIAN L. REV. 59 (1982). Courts have been hostile to this application of the first amendment to federal land management decisions, *e.g.,* Wilson v. Block, 708 F.2d 735 (D.C. Cir.), *cert. denied,* 464 U.S. 956 (1983); Baldoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied,* 452 U.S. 454 (1981) (refusal to require modification of the operation of Glen Canyon Dam to protect a sacred site in Rainbow Bridge National Monument), but Northwest Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581 (9th Cir. 1985), upheld an injunction against a proposed Forest Service road and timber harvesting plan in an area considered sacred to surrounding Indians because the actions would burden the free exercise of religion. The court set a high standard because the entire area was alleged to be sacred: "The Indians have to show that the area at issue is indispensable and central to their religious practices and beliefs and that the governmental actions would seriously interfere or impair those religious practices." 764 F.2d at 585.

72. In Holly v. Totus, 812 F.2d 714 (9th Cir. 1987) (invalidated a portion of the Yakima Nation tribal water code that regulated the use of excess waters by non-Indians living on the reservation). The court followed the analysis it developed in United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984). The Yakima Nation argued that tribal regulation of "excess water" was critical to the life-style of the Tribe, but the Ninth Circuit found no facts to support this contention.

73. For example, President Franklin D. Roosevelt's head of the BIA, John Collier, was accused of over-emphasizing "the value of traditional tribal governments instead of laying the conceptual foundation for the tribe's right to govern themselves by any means they chose." R. BARSH & J. HENDERSON, *supra* note 22, 118 (1980).

74. *See* E. SPICER, CYCLES OF CONQUEST (1962). The Northern Plains Buffalo culture can never be reproduced because of fundamental environmental and cultural changes.

75. United States v. Nevada, 463 U.S. 110, 145 (1983) (Brennan J. concurring).

water rights must be limited by the conservation and sharing principles that apply to all natural resources.[76]

Winters can also be explained by less philosophical reasons. Since Chief Justice Marshall's opinion in *Worcester,* the Court has long exercised the role of protecting the Indian minority from a hostile majoritarian political process. Under the idea of plenary federal power—developed to allow the Department of the Interior to intervene to benefit the tribes—the Court has sometimes simply validated prevailing Indian policy.[77] But the Court has continued to protect the Indian minority[78] despite the twists and turns of Supreme Court Indian jurisprudence.[79] *Winters* built on *Worcester's* foundation because the Court counter-balanced the inherent disadvantages of the federal policy of assimilation through allotment in severalty by giving Indians the needed measure of resource security to compete with the superior surrounding civilization.[80] Under this analysis, *Winters* rests on the need to differentiate between the future water needs of Indians and non-Indians. Most major water allocation conflicts in the West are not about absolute scarcity, but about the margin of safety the right holder should enjoy. The federal government has built carry-over storage reservoirs to guarantee large quantities of municipal and irrigation rights, but few Indians enjoy such protection. Indians too are entitled to a margin of safety, and *Winters* recognizes this by reserving water for the future needs of the reservation because Indians need a greater time horizon in which to decide what to do about their water resources.

C. *Answered and Unanswered* Winters *Questions*

Winters raises a number of questions that determine how much the tribes may benefit from *Winters* rights. The major ones are (1) the standard for the quantification of the right, (2) whether Indian rights extend to uses other than irrigation, (3) whether the *Winters* right is limited to the original purposes of the reservation or extends to the changing needs of the tribe, (4) whether *Winters* rights can be transferred on and, more

---

76. *Cf.* Northern Arapahoe Tribe v. Hodel, 808 F.2d 741 (8th Cir. 1986) (Secretary may enact hunting regulations to prevent the endangerment or extinction of a species, at least to prevent overuse by one tribe that threatens to deprive another tribe of treaty rights). Some Indians continue to assert that the application of federal wildlife regulations law to hunting practices constitutes an abrogation of treaty rights or an infringment of Indian religious practices. Coggins & Modrcin, *Native American Indians and Federal Wildlife Law,* 31 STAN. L. REV. 375 (1979) is persuasive argument that Indians are subject to federal wildlife regulation.

77. The high water mark of judicial incorporation of federal Indian policy is Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1954), which held, during the last termination cycle of federal Indian policy, that Alaskan native lands occupied "since time immemorial," but not confirmed by Congress, could be taken without compensation.

78. *See* C. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW—NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY (1987).

79. R. BARSH & J. HENDERSON, *supra* note 22, at 205-87 (1980) is the most articulate exposition of the argument that increased recognition of tribal sovereignty is necessary to guarantee Indians political liberty.

80. *Cf.* Collins, *supra* note 15, at 482-83.

importantly off, the reservation to Indian as well as non-Indian users,[81] (5) whether *Winters* extends to groundwater and (6) whether tribes are subject to the same duty to use water efficiently to which state-created right holders are subject. This last issue has taken on some urgency as state definitions of beneficial use are tightened to require the more efficient use of water.

Cases have provided tentative answers to some of these questions, but the precedents provide limited guidance on crucial issues such as the power of Indians to transfer *Winters* rights[82] and the scope of the *Winters* right. For example, rights have been recognized to support a trout fishery,[83] and a mineral development,[84] but a district court in Montana has held that the Flathead Tribe could not dedicate water for instream flows when there is a threat that non-Indian users in an Indian irrigation system will be deprived of potential deliveries and suggested that federal law prohibits a tribe from allocating water to instream flows.[85] Litigation is not likely to provide satisfactory general answers to these questions. The proper forum for the answer to many of these questions is a negotiated settle-

---

81. The Supreme Court has only tangentially addressed the issue. United States v. Powers, 305 U.S. 527 (1939), holds that Indian water rights appurtenant to a parcel alloted to a tribal member pass to the non-Indian transferee of the land. In Arizona v. California II, 460 U.S. 605, 654 (1982) (Brennan, J., dissenting) (citations recast into bluebook form), Justice Brennan opined in dissent that "[t]he Tribes can probably lease their rights to others with the consent of the United States . . . . [*See* F. COHEN, *supra* note 22, at 592-93; Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 71 (1966); *cf.* 2 Op. Solicitor of Dep't of the Interior Relating to Indian Affairs 1917-1974, at 1930 (1964).]"

82. *See, e.g.*, Leapart, *Sale and Lease of Indian Water Rights*, 33 MONT. L. REV. 266 (1972); Boyden & Pubsley, *Use of Indian Water in Developing Mineral Properties, Water Acquisition for Mineral Development Institute*, Paper No. 5 (Rocky Mtn. Min. L. Found. 1978); Wilkinson, *Indian Control and Use of Water for Mineral Development*, Institute on Indian Land Development—Oil, Gas, Coal, and Other Minerals, Paper No. 9 (Rocky Mtn. Min. L. Found. 1976).

83. Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981); *see also* Colville Confederated Tribes v. Walton, 752 F.2d 397 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1183 (1985); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984); United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 460 U.S. 1015 (1983); Muckleshoot Indian Tribe v. Trans-Canada Enterprises, Ltd., 713 F.2d 455 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1983); *see also* Note, *Transferability of Reserved Rights from the Indian Allottee to the Non-Indian Purchaser: Are the purposes of the reservation and the interests of the tribe really served? Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981)*, petition for cert. filed, *50 U.S.L.W. 3133 (U.S. Aug. 18, 1981) (No. 81-321)*, XVII LAND & WATER L. REV. 154 (1982).

84. Report Concerning Reserved Right Claims By and On Behalf of The Tribes of the Wind River Indian Reservation, Wyoming at 67, *In re:* The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, Civil No. 4993 (Wyo. 5th Jud. Dist. 1982) (Teno Roncalio, Special Master) (copy on file in Land & Water Law Review office).

85. Joint Bd. of Control v. United States, 646 F. Supp. 410 (D. Mont. 1986). The court relied on 25 U.S.C. § 381 (1982). This pre-*Winters* statute requires the Secretary of the Interior to promulgate regulations to "secure a just and equal distribution thereof among Indians residing upon such reservations," although no such regulations have ever been published. Previous cases had applied the section to empower the Department of the Interior to ensure that all Indians on a reservation obtain some share of their inchoate water right in times of shortage. *E.g.*, United States v. Powers, 305 U.S. 527 (1938); Anderson v. Spear-Morgan Livestock Co., 107 Mont. 18, 79 P.2d 667 (1938); United States v. Alexander, 131 F.2d 359 (9th Cir. 1942).

ment, and increasingly these settlements provide ad hoc but better answers to these questions.[86]

Winters has been consistently reaffirmed by the Supreme Court,[87] but it has never amplified Justice McKenna's analysis. Subsequent cases extended *Winters* to non-treaty, executive order reservations.[88] The recognition of rights for these reservations suggests that reserved rights are *granted* by the United States instead of reserved by the Indians. Pueblo water rights in New Mexico and the aboriginal rights of the Gila Indians in Arizona[89] are the major exception to this rule because they rest on Indian irrigation practices recognized by the Spanish and the Mexican governments before the Treaty of Guadalupe Hildago.[90] These limited instances aside, this reading of *Winters* precludes aboriginal rights, but in most cases the date of the reservation will give the Indians a wide margin of priority.

Both equitable apportionment and *Winters* were developed to allocate surface waters, but it seems clear that Indian reservations have groundwater rights as well.[91] Rights can be asserted either under *Winters* or, as Dean Charles J. Meyers has suggested, based on the tribe's property interest in the overlying lands of the reservation.[92] Water would still be allocated on the basis of overlying land ownership and allocated by a sharing rule among all overlying land owners.[93] No court has so held, but recent state-Indian water settlements include both surface and groundwater resources.[94]

---

86. *E.g.*, The Southern Arizona Water Rights Settlement Act of 1982, Pub. L. No. 97-293, 96 Stat. 1274 (1982); [hereinafter Pub. L. No. 97-293] (discussed *infra* notes 184-94) allows the Papago Tribe to sell or exchange water on or off the reservation (but within the Tucson Active Management Area) subject to tribal and Secretarial approval, but disclaims an intent "to establish whether or not reserved water may be put to use, or sold for use, off any reservation to which reserved rights attach." *Id.* § 306(c); *see* Laney, *Transferability Under the Papago Water Rights Settlement*, 26 ARIZ. L. REV. 421 (1984).

87. Arizona v. California, 373 U.S. 546 (1963); Cappaert v. United States, 426 U.S. 128 (1976).

88. United States v. Walker River Irrigation Dist., 104 F.2d 334 (9th Cir. 1939).

89. *See infra* note 90.

90. New Mexico v. Aamodt, 618 F. Supp. 993 (N.M. 1985) (Pueblos have a prior right to use all the water of a stream system for domestic uses and traditional irrigation except for land and appurtenant water rights terminated by Congress.); New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977). *See generally* C. DUMARS, M. O'LEARY & A. UTTON, PUEBLO INDIAN WATER RIGHTS (1984); E. DOZIER, THE PUEBLO INDIANS OF NORTH AMERICA (1970).

91. The first case to consider the issue held that the owners of land within a reservation were not damaged by the extraction of groundwater for oil and gas operations, but assumed that *Winters* applied to groundwater. Tweedy v. Texas Co., 286 F. Supp. 383 (D. Mont. 1968).

92. Meyers, *Federal Groundwater Rights: A Note on* Cappaert v. United States, XIII LAND & WATER L. REV. 377 (1978). *But cf.* Gila Pima-Maricopa Indian Comm'y v. United States, 9 Ct. Cl. 660 (1986) (United States has no duty to protect all groundwater underlying reservations, only amount necessary to satisfy *Winters* rights.)

93. See Note, *Indian Claims to Groundwater: Reserved Rights or Beneficial Interest?* 33 STAN. L. REV. 103 (1980), which also argues that Indian groundwater rights should be based on Indian ownership of the overlying lands instead of reserved rights. Rights would be allocated according to the amount of land owned by the Indians.

94. *See infra* note 208. The Safe Drinking Water Act of July 1, 1944, ch. 373, Title XIV, § 1401 as added Pub. L. No. 93-523, § 2(a), 88 Stat. 1661 (1974); and amended Pub. L. No.

In the Southern Arizona Water Rights Settlement Act,[95] the Papago Tribe (now the Tohono O'Oham nation) agreed to waive its groundwater claims on the San Xavier Reservation south of Tucson and Schuck Toak District of the Sells Papago Reservation.[96] The San Xavier and part of the Shuck Toak District lies within the Active Management Area designated under the state's groundwater management code and the tribe agreed to limit its pumping to 10,000 acre feet per year and to take 37,800 acre feet of the Central Arizona Project water to be put to use in improved and new irrigation projects jointly financed by the federal, state, local governments and private parties.[97] The Act disclaims an intent "to establish whether or not the Federal reserved rights doctrine applies, or does not apply, to groundwater,"[98] but the effect of this standard disclaimer on the subsequent assertion of *Winters* rights is unclear.[99]

III. *ARIZONA v. CALIFORNIA:* INDIANS WIN BIG, TOO BIG?

A. Arizona v. California

Winters rights were recognized by district and circuit courts of appeal after 1907,[100] but they were not of a sufficient actual or potential magnitude to chill private or public investment based on state water rights. *Arizona v. California I*[101] changed all this by recognizing expansive Indian reserved rights to the Colorado and rejecting theories that would limit the scope of *Winters.*[102] The federal government intervened in the litigation, after strenuous efforts by Arizona and the Upper Basin states to block the petition,[103] as trustee for the Indians and asserted rights for

---

94-317, Title III, § 301(b)(2), 90 Stat. 707 (1976); Pub. L. No. 94-484, Title IX, § 905(b)(4), 90 Stat. 2325 (1976); Pub. L. No. 95-190, § 8(b), 91 Stat. 1397 (1977); Pub. L. No. 99-339, Title III, § 302(b), 100 Stat. 666 (1986).

95. Pub. L. No. 97-293, *supra* note 84, at 1274-95. See F.L. BROWN & H. INGRAM, WATER AND POVERTY, *supra* note 66, at 135-228, for a cultural history of the dispute, the negotiation of the settlement and the issues that the nation must confront to put the water to an effective use.

96. The waiver extends to existing and future claims. Pub. L. No. 97-293, *supra* note 86, § 307(D), at 1281.

97. *Id.* § 313. The Tribe also agreed to take 28,200 acre feet of Tucson sewage effluent. 373 U.S. 546 (1963). *See generally* Meyers, *supra* note 81.

98. *Id.* § 303(e).

99. Section 306(a) allowed limited groundwater extraction, in addition to domestic and stockwatering wells, on the reservation. *Id.* § 306(a).

100. *E.g.,* United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir.), *cert. denied,* 352 U.S. 988, *rev'd on other grounds,* 330 F.2d 897 (9th Cir. 1964), *cert. denied,* 381 U.S. 988 (1956); United States v. Walker River Irrigation Dist., 104 F.2d 334 (9th Cir. 1939).

101. 373 U.S. 546 (1963). A pre-*Arizona v. California* article argued that *Winters* was limited to reservations created with Indian participation in an irrigation project. Sondheim & Alexander, *Federal Indian Water Rights: A Retrogression to Quasi-Riparian Rights,* 34 So. CAL. L. REV. 1 (1960).

102. See, for example, Pelcyger, *Indian Water Rights: Some Emerging Frontiers,* 21 ROCKY MTN. MIN. L. INST. 743, 753-64 (1976), for a discussion of state resistance to the obvious application of *Winters* to groundwater.

103. Arizona was successful in preventing William Veeder, a Department of Justice attorney knowledgeable in Western water and Indian law, from arguing the federal government's position. The story is told in P. FRADKIN, A RIVER NO MORE: THE COLORADO AND THE WEST 156-61 (1981). Veeder's long standing argument that Indian water rights are aboriginal rights that pre-date the acquisition of the West by the United States and were

five small reservations in the three states along the lower Colorado.[104] The principal holding of the case is that Congress has the power to apportion interstate streams and exercised it to guarantee Arizona 2,800,000 acre feet regardless of priorities claimed by California. But, the big winners in the litigation were Indian tribes and federal land management agencies which received extensive water entitlements as "present perfected rights." *Winters* has long been viewed as "a singular judicial effort to reclaim some measure of national self-respect out of the shambles of American policy toward American Indians."[105] As the previous section argues, this is incorrect. *Arizona v. California* was a logical extension of the Supreme Court's protection of tribal perogatives against majoritarian insensitivity.

Arizona v. California I was a surprise to the Western states in large part because Indian water rights were considered negligible at the time that the Colorado River was first apportioned by the 1922 Colorado River Compact.[106] *Winters* had benefited non-Indians more than Indians because the former ended up using Indian-alloted lands and appurtenant water rights.[107] Indian representatives were not part of the compact negotiations and the federal government did not act as trustee for effected tribes. To mollify Indian advocates, the federal representative, Herbert Hoover, insisted on including Article VII which states that "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes." Indifference to Indian claims set a powerful precedent. Hoover, however, did not think that his "Wild Indian clause" would play a significant role in the development of the river.[108] After the Colorado River Compact, eighteen more interstate compacts were negotiated on Western rivers,[109] but most compacts have either been silent on the issue of Indian rights or have exempted Indian rights from their allocation provisions.[110] Hoover was right that the clause would not become a major element in the "Law of the River," but he was dead wrong about the future impact of Indian claims.[111]

---

confirmed by subsequent acts of cession or conquest is set forth in Veeder, *Indian Prior and Paramount Rights versus State Rights*, 51 N.D. L. REV. 107 (1974); *Indian Water Rights in the Upper Missouri River Basin*, 48 N.D. L. REV. 617 (1972); *Indian Prior and Paramount Rights to the Use of Water*, 16 ROCKY MTN. MIN. L. INST. 631 (1971); and Winters *Doctrine Rights—Keystone of National Program for Western Land and Water, Conservation and Utilization*, 26 MONT. L. REV. 149 (1965).

104. The reservations are the Chemehuevi, Cocoopah, Yuma, Colorado River and Fort Mohave.

105. Bloom, *supra* note 60, at 672.

106. Hundley, *supra* note 25, at 9, 18.

107. 2 F. PURCHA, *supra* note 7, at 894.

108. Hundley, *supra* note 25, at 25.

109. *See* Loble, *Interstate Water Compacts and Mineral Development (With Emphasis on the Yellowstone River Compact)*, 21 ROCKY MTN. MIN. L. INST. 777, 779 n.5 (1974), for a list of the compacts.

110. *E.g.*, Pub. L. No. 85-222, art. 10, 71 Stat. 497, 505 (1957) (Klamath River Basin Compact); *accord*, Pub. L. No. 89-789, art. 13, 80 Stat. 1405, 1414 (1966) (Arkansas River Basin Compact); ch. 73, art. 14, 64 Stat. 29, 34 (1950) (Snake River Compact). Some compacts do, however, charge Indian rights against the state in which the reservation is located. *E.g.*, ch. 73, art. 14, 64 Stat. 29, 34 (1950) (Snake River Compact).

111. Indian water rights were given considerable attention at the 1983 Bishop's Lodge Conference to commemorate the first fifty years of the Colorado River Compact. *See* NEW COURSES, *supra* note 25 (especially the chapter written by Ingram, Scaff & Silko).

Indians won big in *Arizona v. California* because the Special Master ruled that the five reservations were entitled to an amount of water necessary "to irrigate the irrigable portions of the reserved lands"[112] and awarded the Indians approximately 1,000,000 acre feet for 135,000 acres as present perfected rights. The population of the basin was 23,658,000 in 1963 so "the Court's award to the Indians was 11,829 times greater than to non-Indians."[113] Arizona opposed this ruling and tried to limit the amount of water allocated to the tribes to protect the massive diversion project, the Central Arizona Project, that would be necessary to use its allocated share of the river. Arizona argued that either the reasonably foreseeable needs of the reservation should be the standard or that the doctrine of equitable apportionment should be applied. Under either theory, prior uses would prevail over uncertain future uses. The majority reaffirmed *Winters* and rejected Arizona's arguments. Two of the three dissenters joined this portion of the Court's opinion "though not with some misgivings regarding the amounts of water allocated to the Indian reservations."[114]

Circuit courts had previously applied the ultimate need standard, although there was some precedent for an actual use standard,[115] but all in all the Master's standard was a logical extension of prior cases. Just as *Winters* looked to the future and not to the past, *Arizona v. California* allocated Indian water rights with the Tribe's future needs in mind. Equitable apportionment was rejected because:

> The doctrine of equitable apportionment is a method of resolving disputes between States. . . . An Indian reservation is not a State. And while Congress has sometimes left Indian Reservations considerable power to manage their own affairs, we are not convinced by Arizona's argument that each reservation is so much like a state that its rights to water should be determined by the doctrine of equitable apportionment. Moreover, even were we to treat an Indian reservation like a state, equitable apportionment would still not control since, under our view, the Indian claims here are governed by the statutes and Executive Orders creating the reservations.[116]

Arizona attempted to characterize the tribes as states so the doctrine of equitable apportionment would apply. States could gain two advantages. Protection of existing uses would be the basis of equity and judicial

112. Arizona v. California, 373 U.S. 546, 596 (1963).

113. Letter from Richard Simms, Santa Fe, N.M. to author, Apr. 8, 1987 (copy on file at Land & Water Law Review office).

114. Arizona v. California, 373 U.S. at 603.

115. *Compare* Conrad Inv. Co. v. United States, 161 F. 829 (9th Cir. 1908) *with* United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, *rev'd on other grounds*, 330 F.2d 897 (9th Cir. 1964), *cert. denied*, 381 U.S. 988 (1956).

116. Arizona v. California, 373 U.S. at 597. The argument was again rejected in an adjudication of Pueblo Indian rights in New Mexico. The court characterized the state's position as not one of ownership, but "to see that the rights to use water are apportioned to the rightful owners under existing law." New Mexico *ex rel.* Reynolds v. Aamodt, 618 F. Supp. 993, 1005 (N.M. 1985).

balancing could be used to compare the utility of Indian versus non-Indian uses. These must be reciprocal sharing duties between the states and the tribes, but the Court correctly declined to apply equitable apportionment to achieve this objective. The Court recognized the possibility of treating the tribes as sovereigns of comparable dignity to the states, and Western states continue to press the equitable apportionment standard to limit *Winters*. For this purpose, the analogy to tribes as states is not apt to integrate reserved rights into interstate adjudications and compacts because it would unduly prejudice the tribes. The Supreme Court's reliance on priority of use in equitable apportionment actions has, in most cases, resulted in fair allocations among the states because all states have prior uses, and existing junior and senior uses have been protected with relatively minor modifications of the strict enforcement of priorities. This is not the case with respect to Indian rights. Equitable apportionment would be inequitable.

Indian reserved rights are analytically different from state equitable apportionment rights. Federal reserved rights are grounded in the property and treaty clauses of the constitution and not on Article III original jurisdiction. Indian reserved rights rest on federal trust duties owed the tribes, and courts have limited equitable discretion under the property and treaty clauses to balance Indian and non-Indian rights compared to the discretion that they have under Article III to develop a common law of interstate rights.[117] Indian water rights primarily look to the future needs of the tribe to provide a resource base for tribal development. Rights reserved prior to the priority date of a state right are paramount to all subsequent state rights; Indian tribes are thus entitled to have all of their rights satisfied before state priorities are distributed. This principle was applied in *Cappaert v. United States,*[118] a non-Indian reserved rights case, to preclude any balancing between federal reserved and state rights. It has also been applied to remind the Federal Regulatory Energy Commission (FERC) that when Congress requires the agency to condition a federal power license to protect Indian water rights,[119] FERC must impose the conditions recommended by the Department of the Interior.[120] It cannot simply consult with the Department of the Interior. In subsequent litigation over the Indian rights recognized in *Arizona v. California,* the two states again tried to characterize the tribes as states to preclude tribal access to the Court, but, as discussed in Section V below, this effort was rebuffed by the Supreme Court.

B. State Efforts to Limit Arizona v. California

Winters rights have long been characterized as a cloud on state-created water rights. It is not surprising, therefore, that states have sought to enhance the security of state water titles. States have sought to remove

117. *Compare* Cappaert v. United States, 426 U.S. 128 (1976) *with* Colorado v. New Mexico I, 459 U.S. 176, 190 (1982) (Burger, J., concurring).

118. 426 U.S. 128 (1976).

119. 16 U.S.C. § 797(e) (1982).

120. Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 467 U.S. 1267 (1984); *cf.* National Wildlife Fed'n v. FERC, 801 F.2d 1505 (9th Cir. 1986).

the *Winters* cloud both by limiting the scope of the doctrine and by reducing Indian entitlements through quantification. *Arizona v. California I* suggests that all Indian rights must come off the top of state shares. Not surprisingly, there has been great incentive to shift or avoid this responsibility, although the general applicability of the rule has not been confirmed. This section discusses the largely unsuccessful efforts to shift or avoid responsibility for *Winters* rights. Section IV below deals with the issue of representation of Indian tribes in water rights adjudications. Section V below describes largely the procedural relief provided by a series of Supreme Court opinions since 1975. Section VI below discusses the scope of *Winters* and quantification in the context of state-Indian water deals.

1. Shifted Responsibility for the Satisfaction of Indian Claims.

In *Arizona v. California*, the Court recognized vast potential Indian reserved rights, but did not specify how these rights are to be fulfilled in non-congressional apportionments. Effected states have sought ways to shift all or part of the responsibility to satisfy Indian claims. States have taken the position that the fulfillment of Indian rights is a federal or basin-wide responsibility. Some support for this theory can be found in the Colorado Basin Project Act which declares that the Mexican Treaty obligation is a national obligation[121] and in Justice Brennan's concurring opinion in *Nevada v. United States.*[122] But, this argument works best if there are surplus waters available to satisfy Indian claims,[123] the more efficient uses of existing allocations are possible, or if augmentation from outside a basin is a real possibility. On fully allocated streams, shifted responsibility only begs the issue because federal or basin satisfaction of Indian claims must come at the expense of state entitlements. Federal or basin-wide responsibility can only shift the duty to satisfy Indian rights among the basin states. For example, the basin-wide argument, which has been made by Montana, seeks to force all states on the Missouri to share Indian claims which are located primarily in Montana and the Dakotas. Presumably this would mean that upstream flows and reservoir releases could be withheld from downstream states to satisfy Indian claims.[124]

Other theories have been proposed to limit Indian rights. Mineral industry spokesmen have argued that the government should be estopped from asserting non-Indian reserved rights,[125] although the cases have con-

121. 43 U.S.C. § 1512 (1986). The federal assumption of the obligation is currently illusory as it depends on the augmentation of the Colorado.

122. 463 U.S. 100, 145 (1983). The issue was whether a decree could be reopened because of inadequate Indian representation. The majority held that the decree could not be reopened to promote the security of state water rights. Justice Brennan agreed but suggested that the Tribe had a breach of trust action against the federal government.

123. Justice Brennan's analysis in his concurring opinion in United States v. Nevada, 463 U.S. 110, 146 (1983) (Brennan, J., concurring), seems premised on the assumption that the federal obligation can be met through unappropriated supplies or the imposition of better management practices on existing storage and diversion projects.

124. *See* Guhin, *The Law of the Missouri*, 30 S.D. L. REV. 346, 471 (1985).

125. Meshore, *Federal Reserved Rights Litigation*, 28 ROCKY MTN. MIN. L. INST. 1283, 1292-98 (1982).

sistently rejected the application of estoppel against the federal government.[126] Even if estoppel applied against the federal government, the theory does not apply to Indian water rights because there is less surprise than the states claim. The National Water Commission implicitly rejected the estoppel theory, but the Commission did recommend as a matter of fairness that the federal government compensate water users who are injured by the subsequent exercise of Indian rights.[127]

Compensation may be appropriate in a given case, but it should not be adopted as a general policy. The federal government has induced reliance on the non-assertion of Indian water rights, but the reasonableness of the reliance can be questioned. Through its historic reluctance to fund Indian irrigation at the same rate as non-Indian irrigation and multiple-use projects, the federal government has encouraged states to risk the subsequent assertion of Indian rights on the hope that they would be marginal. *Winters* is over eighty years old and water lawyers could read in Wiel's 1911[128] edition "that the right of the reservation to water flowing through it, even in the absence of actual use thereon (if necessary for use in the future), cannot be destroyed by private appropriators who first put it to use under local law . . ., even in States following the Colorado doctrine which ignore the proprietary rights of the United States as riparian proprietor in other aspects."

The fairest solution seems to be to treat Indian claims as analogous to interstate waters allocated to another state by interstate compact. Two consequences follow. First, Indian rights are assigned to the share, choate or inchoate, of the state in which the reservation exists. Second, *Hinderlider*[129] applies and state water rights are subordinated to Indian water rights just as state-created rights are subordinated to interstate compact allocations. The water claimed pursuant to a state appropriation was never

126. Schweiker v. Hansen, 450 U.S. 785 (1981); Federal Crop Ins. Co. v. Merrill, 332 U.S. 380 (1947). *But cf.* United States v. Bell, 724 P.2d 631 (Colo. 1986) (no relation back to date of creation of reservation for non-Indian federal reserved rights when original application did not specify the point of diversion).

127. FINAL REPORT TO THE PRESIDENT AND THE CONGRESS OF THE NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 481 (1973) states:

> It has been the historic policy of the Federal Government to encourage development of water resources by others, even though the supply was subject to Indian rights. For example, the United States entered into a contract with the Metropolitan Water District of Southern California in 1933 for the construction and operation of Parker Dam as the diversion point for the Colorado River Aqueduct, which was built by the District with a capacity of 1.3 million acre-feet per year at a cost to the District in excess of $200 million. The Parker Dam Project was authorized and the delivery contract confirmed by Congress in 1935. At that time, as Congress knew well, a number of Indian Reservations had water rights in the mainstream of the Colorado River in an amount not yet quantified at approximately 1 million acre-feet in *Arizona v. California* and if the water is ever fully utilized by the Indians, the supply for the Aqueduct will be substantially diminished. The Commission believes it is unfair to deprive users of their water supply without compensation when Congress has supported investments in projects whose supply was subject to unused Indian rights.

128. 1 S. WIEL, WATER RIGHTS IN THE WESTERN STATES 239 (3d ed. 1911).

129. Hinderlider v. La Plata & Cherry Creek Ditch Co., 304 U.S. 92 (1938).

unappropriated water in the first place. It is up to the state to decide how state water rights will be adjusted to fulfill the compact obligation.

2. Congressional Ratification of Interstate Compacts As a Waiver of Winters *Rights.*

States pin some hope on the theory that interstate compacts limit this reading of *Winters*. There are two theories, but neither seems likely to succeed for good reasons. The first argues that a compact is a contract and thus the parties should be limited to Indian claims in actual use or reasonably foreseeable at the time the compact was formed. The second argues that congressional ratification of a compact estops the federal government from asserting any federal rights that might impair the state's guaranteed share.[130] *Arizona v. California* implicitly rejected the first theory by holding that Indian water rights are not limited to actual use, equitable apportionment or compact adjudications. In addition, this principle is equally applicable to many state compacts which expressly exempt Indian and federal rights from the compact. The states assumed the risk that compact allocations would be diminished.

There is some precedent for the proposition that a compact estops Congress from subsequently modifying a compact by the assertion of a federal interest, but it does not seem to be modern law. In *Pennsylvania v. Wheeling & Belmont Bridge Co.*,[131] the Court held that a compact between states could not restrict the power of Congress to regulate interstate commerce. In *Wheeling*, Congress had retroactively authorized the construction of a bridge on the Ohio River between Virginia and Ohio. Pennsylvania, representing the upstream port of Pittsburgh, argued that the legislation was inconsistent with a compact between Virginia and Kentucky that guaranteed free navigation on the Ohio. Confronted with the question of whether a compact can limit the power of Congress to regulate interstate commerce, the Court answered: "Clearly not. Otherwise Congress and two States would possess the power to modify and alter the constitution itself."[132] The principle applies to the exercise of any federal power. The compact limitation theory was urged in the recent litigation[133] to bar the federal government from using the Endangered Species Act to require minimum flow releases from a proposed reservoir on the South Platte River subject to a Section 404 dredge and fill permit.[134] The argument was rejected by the district court,[135] but the 10th circuit found that the issue was not ripe.[136]

---

130. Comment, *Federal Reserved Rights and the Interstate Allocation of Water*, XIII LAND & WATER L. REV. 813 (1978).

131. 59 U.S. 421 (1856).

132. *Id.* at 433.

133. *See generally* Tarlock, *The Endangered Species Act and Western Water Rights*, XX LAND & WATER L. REV. 1 (1985).

134. 33 U.S.C. § 1344 (Cum. Supp. 1986).

135. Riverside Irrigation Dist. v. Andrews, 568 F. Supp. 586 (D. Colo. 1983).

136. Riverside Irrigation Dist. v. Andrews, 758 F.2d 508 (10th Cir. 1985).

IV. REPRESENTATION OF INDIAN TRIBES

The effective recognition and exercise of *Winters* rights can, in part, be a function of who represents the tribe in adjudications and negotiations, especially after the revival of tribal sovereignty in the 1970's. Indian tribes may be represented by the federal government or they may sue on their own behalf. Traditionally, the federal government has acted as trustee for the tribes and asserted Indian water rights in interstate allocation conflicts in which it has consented to joinder. Department of the Interior representation of tribal interests created a conflict of interest for the Department because it had to assert the rights of non-Indian reclamation project right holders as well as those of the Indians. Increasingly, courts have recognized that Indians may intervene in water rights adjudications and be represented by their own counsel.[137] The federal government can still participate in original actions as trustee.

States have no control over how the government chooses to discharge this obligation. The major method of integration of Indian claims open to the states is to adjudicate Indian and non-Indian reserved rights in general adjudications that qualify for the McCarren Amendment waiver of sovereign immunity.[138] States cannot, however, join the United States in any capacity in equitable apportionment actions involving interstate streams because the McCarren Act excludes United States joinder in these cases.[139]

States themselves also clearly lack the power to represent tribal interests in equitable apportionments. State standing to invoke the Supreme Court's original jurisdiction to apportion interstate waters is limited to *parens patriae* suits. *Parens patriae* representation requires that the state identify a quasi-sovereign interest to avoid the eleventh amendment's prohibition against suits against a state by citizens of another state.[140] The Court has long held that state suits to protect its natural resources from harm or adverse use by others, and to claim her fair share of common resources, assert a quasi-sovereign power different from the exercise of sovereign power over individuals and territory, or the vindication of state proprietary interests.[141] An early Supreme Court case, *Louisiana v. Texas*,[142] held that states cannot sue *parens patriae* to vindicate federal

137. *E.g.*, New Mexico *ex rel.* Reynolds v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), *cert denied*, 429 U.S. 1121 (1976).

138. For a related article on this subject in this issue *see* White, *McCarran Amendment Adjudications—Problems, Solutions, Alternatives*, XXII LAND & WATER L. REV. 619 (1987).

139. 43 U.S.C. § 666(c) (1982).

140. Louisiana v. Texas, 176 U.S. 1, 16 (1900). The Court's latest reaffirmation of the doctrine is Alfred L. Snapp & Son Inc. v. Puerto Rico, 458 U.S. 592, 609 (1982).

141. Pennsylvania v. West Virginia, 262 U.S. 553 (1923); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Kansas v. Colorado, 206 U.S. 46 (1907). The Court seems to have reduced quasi-sovereignty to a fiction in equitable apportionment actions. Colorado v. New Mexico, 459 U.S. 176 (1982) (State may sue *parens patriae* to assert the claim of a single potential water user). Nonetheless, the Court continues to adhere to the position that a state must articulate an interest different from those of identified private parties. Alfred L. Snapp & Sons Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982).

142. 176 U.S. 1 (1900).

interests such as freedom of interstate commerce, and this principle would seem to preclude the representation of tribal interests. State water right holders would, of course, be bound by state-tribal negotiations as the state is representing traditional state *parens patriae* interests when it acts to protect state created rights.

Louisiana v. Texas held that Louisiana could not sue Texas *parens patriae* to contest a yellow fever quarantine alleged to interfere with commerce between the two states.[143] This limited view of state interests has been eroded by the cases that allow one state to sue another to invalidate a resource embargo[144] and might even extend to tribal representation. Concurring in a recent case holding that Puerto Rico had standing to sue Virginia apple growers for discriminating against Puerto Rican residents recruited to pick apples on the mainland pursuant to the Wagner-Peyser Act[145] nationwide employment program, Justice Brennan observed that he "can discern no basis either in the Constitution or in policy for denying a State the opportunity to vindicate the federal rights of its citizens."[146] Broadly read, this analysis would encompass suits to vindicate *Winters* rights because reservation Indians are both tribal members and citizens[147] of the state in which they reside, but this result would be contrary to federal Indian policy. The federal interest at stake in *Snapp* was better defined by Justice White as the quasi-sovereign right of a state "in not being discriminatorily denied its rightful status within the federal system."[148]

Arizona v. California II[149] confirms the inability of the states to represent tribal claims. The five tribes awarded *Winters* rights sought to intervene in proceedings for the entry of a supplemental decree to *Arizona v. California I* to claim an additional 317,000 acre-feet for excluded qualifying lands. A supplemental decree was entered by the Special Master confirming present perfected water rights on the river, and he allowed

143. Justice Fuller noted that Louisiana was not engaged in interstate commerce and alleged no special injury to her property. *Id.* at 19.

144. *E.g.*, Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

145. Pub. L. No. 73-30, 48 Stat. 113 (1933) ch. 49 § 2 as added, Pub. L. No. 97-300, 96 Stat. 1322 (1982) (codified at 29 U.S.C. §§ 49a-49L (1982 and Cum. Supp. 1986)).

146. Alfred L. Snapp & Sons Inc. v. Puerto Rico, 458 U.S. 592, 611 (1982).

147. Pub. L. No. 280, ch. 505, 67 Stat. 588 (1953) (codified at 28 U.S.C. § 1360 (1982)) does not change this analysis. Indian country was originally beyond state jurisdiction, but a confusing law of shared state, federal and tribal jurisdiction now exists. During the 1950s, Congress began to terminate tribes on the assumption that Indians should be absorbed into the states. One product of the termination era is Public Law 280, *see generally* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977), which codified a long history of piecemeal federal grants of state jurisdiction over Indian tribes. Public Law 280 is a grant of state civil and criminal jurisdiction over Indians living on reservations in a variety of circumstances, subject to state acceptance and tribal consent in some cases. F. COHEN, *supra* note 22, at 362. Clearly, Public Law 280 does not make Indians citizens of a state for all purposes and especially for environmental and resource allocation jurisdiction, Washington Dep't of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985) (states have no RCRA jurisdiction over Indian lands), nor does it permit states to speak for the tribes on water issues.

148. *Snapp*, 458 U.S. at 607.

149. 460 U.S. 605 (1982).

the tribes to intervene in subsequent hearings to determine the amount of practicably irrigable acres. The states argued that tribal intervention violated the eleventh amendment. There is some precedent for the state's position, but even Justice Rehnquist affirmed the Special Master's order. He offered two theories, one narrow and the other broad. The narrow theory is that suit was initially brought by the federal government as trustee for the tribes against the states. Suits by the federal government against a state are not barred by the eleventh amendment.[150] To counter the states' argument that the Indians were adequately represented by the federal government, the Court acknowledged more broadly that the Indians had an interest in asserting their *Winters* rights "to take their place as independent qualified members of the modern body politic."[151]

The newly affirmed right of self-representation will apply to future allocations. Not until a federal court rebuked the government for not vigilantly defending Indian rights in 1954[152] did the federal government defer to Indian definitions of *Winters* claims.[153] Thus, the tribes may be bound by prior decrees confirming the tribe's full *Winters* right, no matter how inadequate it now seems, in which the federal government represents conflicting parties. Res judicata has been applied to confirm decrees where a tribe was not a party because congressional delegation of dual responsibilities to the Department of the Interior absolves the government from following the "fastidious standards of a private fiduciary . . . ."[154] Preclusion against other parties to the decree does not, however, bar a breach-of-trust suit against the government.[155] The right of independent recognition has been circumscribed by the Department of the Interior. After *United States v. Nevada,* it stopped paying the fees of independent tribal lawyers.

The privilege of the federal government to initiate original actions to protect Indian water rights in interstate streams was substantially limited in *United States v. Nevada.*[156] Leave to file an original action to declare the rights of the Nevada and California, the Bureau of Reclamation and Paiute Indian Tribe's rights into Pyramid Lake was denied. The Court reasoned that the two states had allocated the Truckee River by proposed interstate compact (which was not approved) so there was no interstate

150. "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." *Id.* at 614.

151. Arizona v. California II, 460 U.S. at 615, quoting from Poafpybitty v. Skelly Oil, 390 U.S. 365, 369 (1968) (quoting from Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943)). The federal government's trust responsibilities, Hechman v. United States, 224 U.S. 413 (1912), have never been construed to foreclose Indians' rights to sue on their own behalf to protect tribal resources from impairment, Creek Nation v. United States, 318 U.S. 629 (1943).

152. United States v. Ahtanum Irrigation Dist., 124 F. Supp. 818 (E.D. Wash. 1954), *rev'd,* 236 F.2d 321 (9th Cir. 1956), *cert. denied,* 352 U.S. 988 (1957).

153. Bloom, *supra* note 60, at 692, regrets the failure of the United States to exercise independent judgment.

154. Nevada v. United States, 463 U.S. 110, 128 (1983).

155. *Id.* at 145 (Brennan, J., concurring).

156. 412 U.S. 534 (1972).

dispute; only a dispute between the federal government and the states existed. For this reason the Court thought it doubtful that there was a ripe dispute between California and the federal government over Pyramid Lake, and it ordered the litigation to proceed in federal district court in Nevada where all parties with an immediate interest could best be heard.[157] *United States v. Nevada*, combined with the McCarren Amendment retention of sovereign immunity for equitable apportionment actions, presents the states with limited options to quantify Indian rights in interstate conflicts.

V. INTEGRATION OF INDIAN RIGHTS BY JUDICIAL LIMITATION

The major legal problem with the rule that states are responsible for the satisfaction of Indian rights out of their share of interstate rivers and aquifers is that states have limited influence over Indian tribes. States cannot speak for Indian tribes in adjudications, compact negotiations and in other allocation forums. Federal Indian law generally precludes the states from defining Indian water rights for on-reservation use and from limiting the exercise and administration of *Winters* rights, except as to off-reservation uses. The states may negotiate with Indian tribes, but the Indians' legal position is defined by federal law so if the tribe does not validly waive its claims, states are limited to deciding how state-created rights will be reduced to satisfy Indian claims. Led by now Chief Justice Rehnquist, the Supreme Court has rendered several major decisions in the past fifteen years that reduce the risk of disruption of existing state rights, but the risk that state water right holders will be bumped at some future date remains.

Pressure for the limitations of *Winters* rights stems from *Arizona v. California* and the bold claims pushed by Indian tribes during the Indian rights movement that began in the 1970s. Indian water claims have expanded beyond their original limited purpose—irrigation—and now consist both of claims for instream uses and claims for M & I (Municipal and Industrial) uses. In the 1970s, in response, non-Indian Western water users pinned their hopes on two sources, a narrow reading of *Winters* and on quantification.

Some argued that Indian water uses were confined to on-reservation subsistence uses.[158] In the 1950s and 1960s, legislation was introduced

157. The Court did suggest that the United States would appear to have occasion to object to upstream diversions in California on the grounds of interference with its Pyramid Lake water rights only if the compact between the two states is not approved or Nevada, prior to such approval, disowns the agreed-upon division of Truckee River water. In that event, a dispute between the two states may arise, and the United States would then perhaps have some ground to participate and assert that California's share must be reduced in order to accommodate a prior, long-established use by the United States in the State of Nevada. *Id.* at 539.

158. Palma, *Considerations and Conclusions Concerning the Transferability of Indian Water Rights*, 20 NAT. RESOURCES J. 901 (1980). The limitation theories are criticized in Veeder, *Water Rights in the Coal Fields of the Yellowstone River Basin*, 40 LAW & CONTEMP. PROBS. 77, 89-91 (1976). Some support for this position can be found in the Hawaii Supreme Court's opinion in Reppun v. Board of Water Supply, 656 P.2d 57 (1983), *cert. denied*, 105 S. Ct. 216 (1985).

in Congress to limit non-Indian federal reserved rights.[159] Indian rights were not included in the various federal water rights settlement bills. In the 1970s, as the energy boom took off, proposals were made to limit Indian rights forever through quantification,[160] but understandably the tribes have not been enthusiastic.[161] Historically, water adjudication has meant only toting up existing uses. The Carter administration undertook a major quantification initiative[162] and quantification remains the Department of Justice's first priority with regard to Indian water rights. The projected costs of quantification have, however, chilled enthusiasm since 1978. Thus, Indian rights remain inchoate in many instances and may remain so in the foreseeable future. Also, Indian water rights problems increasingly will be harder to solve because the augmentation of existing waters will be more limited. The federal government is no longer going to build the massive multiple-purpose dams and inefficient irrigation projects for Indians and non-Indians that characterized the Reclamation Era. Reclamation in the future will be based on cost sharing, and this rule will make Indian use even more difficult.

Arizona v. California created the present-day *Winters* cloud on Western water titles by applying the "practicably irrigable acreage" standard. Practicable irrigated acreage gives Indians a property right and thus provides the necessary condition for an immediate water market, but the standard has not served the best interests of the tribes. Irrigable acreage as a standard for Indian water rights is an unfortunate legacy of the assimilation period. It allows the Indians to claim large amounts of water, but is has also induced the Western states to try and limit reservations to small, irrigated gardens. Irrigable acreage is often unresponsive to nonagricultural reservation development or to cultural-based water claims. It also forces the wasteful use of water as Indians—although not subject to the use it or lose it rule—have to develop irrigation projects to assert credible claims or find lessees. The Navajo Indian Irrigation project is a prime example. Indian tribes have sought to avoid the limitations of the standard by asserting aboriginal claims for instream uses such as fishing, or have used potential irrigable acreage as a bargaining chip to win a wide range of rights and concessions in specific negotiations. Unfortunately, although practicable irrigated acreage is not the only possible *Winters* standard, no satisfactory substitute has emerged. Not surprisingly, the inherently inflated nature of the standard has met with fierce resistance in the West. The resistance has taken three main forms: (1) efforts to limit the amount of qualifying acreage and (2) efforts to apply

159. Hanks, *Peace West of the 98th Meridian—A Solution to Federal-State Conflicts over Western Waters*, 23 RUTGERS L. REV. 33 (1968).

160. *See* Note, *Indian Reserved Water Rights: The* Winters *of Our Discontent*, 88 YALE L.J. 1689 (1979); Comment, *Federal Reserved Rights in Water: The Problem of Quantification*, 9 TEX. TECH. L. REV. 89 (1977); Note, *A Proposal for the Quantification of Reserved Indian Water Rights*, 74 COLUM. L. REV. 1299 (1974).

161. *See* J. FOLK-WILLIAMS, WHAT INDIAN WATER MEANS TO THE WEST (1982).

162. *See* R. FOREMAN, INDIAN WATER RIGHTS: A PUBLIC POLICY AND ADMINISTRATIVE POLICY MESS 36-47, 76-82 (1981). The author places Carter Administration Indian water policy in the context of earlier quantification efforts.

an appurtenancy standard to Indian reservations to lock tribes into marginal irrigation, and (3) efforts to deny Indians access to federal forums. The Supreme Court has addressed the first and third issues.

After a period of liberal expansion of the reserved rights doctrine, the Supreme Court began to curb both Indian and non-Indian reserved rights in a series of decisions that started in 1971 and picked up steam after 1976. *United States v. District Court for Eagle County*[163] started the limitation era. *Eagle County* grew out of efforts by Western Colorado water users to limit Denver's historic appetite for Western slope water by forcing the United States to claim sufficient reserved rights for its forests and parks to foreclose future transbasin diversions. The issue was whether the McCarran Amendment's waiver of sovereign immunity in state general adjudication suits includes claims for federal reserved Indian and non-Indian water rights. The government's argument that the McCarren Amendment applies only to rights acquired under state law was correctly rejected as "extremely technical" and the Amendment was applied to reserved rights.[164] Five years later, *Eagle County* was expressly extended to Indian water rights in *Colorado River Water Conservation District v. United States.*[165] Justice Brennan initially concluded that McCarren Amendment and state jurisdiction are concurrent and that the abstention doctrine does not preclude federal jurisdiction. But, after eliminating the usual reasons for a federal court to defer to state jurisdiction, he added a new reason. Justice Brennan stated that it is sometimes proper for a federal district court to dismiss the federal action to allow Indian reserved rights to be adjudicated in parallel proceedings for reasons of "wise judicial administration."[166]

State courts must still apply federal substantive law, but *Colorado River Water Conservation District*'s novel theory of federal deference to state proceedings[167] law has been justifiably criticized because it exposes Indians to the risk of state court bias contrary to the general thrust of federal Indian law which is to protect Indians from state regulation that threatens tribal integrity.[168] Justice Brennan fully recognized the force of these arguments, but he reaffirmed and extended *Colorado River* in *San Carlos Apache Tribe v. Arizona.*[169] The Tribe brought an action in federal court to assert its rights to the upper Salt River and the action was promptly dismissed.[170] This *Colorado River* dismissal was reversed

163. 401 U.S. 520 (1971). The same result was reached in a parallel case, United States v. District Ct. in and for Water Div. No. 5, 401 U.S. 527 (1971).

164. *Eagle County,* 401 U.S. at 525.

165. 424 U.S. 800 (1976).

166. *Id.* at 818.

167. Comment, *Federal Courts Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of Colorado River,* 44 U. CHI. L. REV. 641 (1977).

168. Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The Colorado River Decision,* 30 STAN. L. REV. 1111, 1141-46 (1978). For a recent articulation of the Court's preemption analysis, *see* Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 106 S. Ct. 2305 (1986).

169. 463 U.S. 545 (1983).

170. *In re* Determination of Conflicting Rights to Use Water from Salt River above Granite Reef Dam, 484 F. Supp. 778 (D. Ariz. 1980).

by the Ninth Circuit which held that the enabling act admitting Arizona to the union precluded state court jurisdiction over Indians.[171] Arizona's enabling act, as does those of most Western states,[172] disclaimed ownership of, and jurisdiction over, Indian reservations, but Justice Brennan found that the McCarren Amendment was a waiver of "whatever limitation"[173] the federal government placed on state jurisdiction. The Indian tribe also argued that stronger considerations of protection of Indian interests applied to suits initiated by tribes, but the policies of judicial administration and comity underlying *Colorado River* were found applicable to suits brought by the Indians on their own behalf.[174] In principle, *Colorado River* is wrong and probably is a sport in federal jurisdiction, but it operates to confine Indians to state courts in most water adjudications. In practice, the effect of *Colorado River* may be over-exaggerated as the substance of *Winters* rights are much more important than the forum of their adjudication.[175]

Still, *Colorado River* and *San Carlos Apache* place the tribes at a great disadvantage. Although they may participate in adjudications on their own behalf, they cannot shuck off the federal government's participation because only Congress can terminate the trust.[176] Thus, if the tribes fail

171. San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982). The same result was reached in a similar suit in Montana. Northern Cheyenne Tribe of Northern Cheyenne Indian Reservation v. Adsit, 668 F.2d 1080 (9th Cir. 1982).

172. Justice Brennan cited the acts for nine states, and he noted that Wyoming and Idaho, which were admitted without prior enabling acts, inserted similar disclaimers into their state constitutions. *San Carlos Apache*, 463 U.S. at 561 n.12.

173. 563 U.S. at 564.

174. The latest chapter in the litigation is United States v. White Mountain Apache Tribe, 784 F.2d 917 (9th Cir. 1986), which holds that the tribal court was without power to enjoin officials of the Department of the Interior from collecting information to act as trustee for the tribe in the state adjudication. The tribe characterized the federal government's assertion of its claim as "fraudulent." *Accord*, United States v. Yakima Tribal Ct., 806 F.2d 853 (9th Cir. 1986).

175. Some federal jurisdiction survives. *Colorado River* does not apply to original actions, Ranquist, *supra* note 63, at 709-10, and federal courts have retained jurisdiction in isolated instances where a strong state interest in a comprehensive adjudication was absent. The cases include Kittitas Reclamation Dist. v. Sunnyside Irrigation Dist., 763 F.2d 1032 (9th Cir. 1985) (federal court retained jurisdiction over tribal claim in conflict with non-Indian irrigators' rights to water from a federal reclamation project, notwithstanding pending state general adjudication because federal suit was not general adjudication but attempt to interpret 1945 federal consent decree as to the reclamation project); United States v. Adair, 723 F.2d 1394 (9th Cir.), *cert. denied*, 460 U.S. 1015 (1983) (federal court decided what Indian water rights survived termination of tribe and sale of its land, but deferred quantification and administration issues to state proceedings); Salt River Pima-Maricopa Indian Community v. United States, 12 Indian L. Rep. (Am. Indian Law. Training Program) 3009 (D. Ariz. 1985) (federal court took jurisdiction over charges of discrimination under the Administrative Procedure Act against Secretary of the Interior for excluding Indian lands from participating in federal reclamation project, but ruled that tribe's water rights claimed under *Winters* and under state law had to be resolved in state court); United States v. Bluewater-Toltec Irrigation Dist., 580 F. Supp. 1434 (D.N.M. 1984) (federal court, where Indian water adjudication was pending, refused to remove state Indian water rights adjudication).

176. The source of the modern doctrine that the federal government's plenary power over Indians gives the government the power to bind Indians regardless of whether they are represented in the litigation is Heckman v. United States, 224 U.S. 413 (1912). The trust relationship continues to give the federal government the power to bind non-represented tribal interests, but *Heckman*'s suggestion that the government's discharge of its trust duties is

to participate in state adjudications, they may forfeit their claims because state adjudications, including Indian claims, may be counted in subsequent equitable apportionment actions.[177]

Indians rights have been further limited by the zealous application of res judicata to Indian claims in two cases. *Arizona v. California II* refused to apply a section of the original decree to allow the Indians to claim additional potentially irrigable acreage. *United States v. Nevada* held that federal representation of Indians bound the tribe to a decree despite allegations that Indian rights were compromised by a conflict of interest. In *Arizona v. California I,* the Indians were given a quantification standard—practicable irrigable acreage—but in *Arizona v. California II,*[178] the Court refused to exercise its discretion, allowed in the 1964 decree, to reopen the decree to decide if more acres qualified for water rights. The 1964 decree was nonetheless made final because the fundamental principles of res judicata and collateral estoppel, although not technically applicable, demanded final water decrees. Res judicata was applied to prior decrees in *United States v. Nevada* in the face of the argument that Indian claims were not adequately represented because of a conflict of interest on the part of the federal government. Justice Rehnquist found that the conflict was congressionally sanctioned.

A non-Indian federal reserved rights opinion by Justice Rehnquist also may limit *Winter's* claims. *United States v. New Mexico*[179] held that the United States Forest Service may not claim reserved rights for instream flows because these rights serve secondary not primary purposes of the original reservation legislation.[180] Whatever its merits for public lands, the primary-secondary distinction should not be applied to Indian water rights, although at least one court has assumed that it does apply.[181]

VI. STATE-INDIAN DEALS

States have consistently assumed that Indian reserved water rights must be satisfied from state compact or equitable apportionment allocations when they have negotiated specific agreements with individual tribes.[182] States may claim that these specific agreements do not amount

unreviewable has been rejected by the Court. *See* Arizona v. California II, 460 U.S. 605, 649-52 (1982) (Brennan, J., dissenting) (discussing the current law).

177. United States v. White Mountain Apache Tribe, 784 F.2d 917 (9th Cir. 1986). This analysis is enforced in the companion case of White Mountain Apache Tribe v. Hodel, 784 F.2d 921 (9th Cir. 1986), which chastises the Tribe for continuing to assert federal court jurisdiction after *San Carlos Apache* and holds that all charges of trustee mismanagement must be raised in the state proceeding. *Accord,* Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646 (D. Mont. 1986).

178. 460 U.S. 605 (1983).

179. 438 U.S. 696 (1978).

180. "[T]he relevant inquiry is not whether a particular use is primary or secondary but whether it is completely outside the scope of the reservation's purposes." F. COHEN *supra* note 22, at 584.

181. Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), *cert denied* 106 S. Ct. 1183 (1986). The court applied the standard to expand reservation homeland uses from agriculture to hunting and fishing.

182. Clyde, *Institutional Response to Prolonged Drought,* in NEW COURSES, *supra* note 25, at 131.

to a consistent principle. The recognition of legitimate claims to state shares has been so consistent, however, that an analogy between these agreements and custom as a basis for international law is appropriate. International treaties can be evidence of customary law, although the issue is a complex one.[183]

This section examines four state-Indian agreements. Two are early agreements and illustrate the pressures that operate on Indian tribes to waive or defer their *Winters* claims. Two are recent agreements that comprehensively address tribal water needs and attempt to integrate potential Indian uses with state water rights administration.

A. Navajo-New Mexico Agreement

To gain participation in New Mexico's use of water stored behind Navajo Dam on the San Juan River, the Navajo Tribe participated in the Colorado Storage Project Act which authorized a state project,[184] the San Juan-Chama, and the Navajo Indian Irrigation Project.[185] The Tribe waived its *Winters'* rights in return for a diversion of 508,000 acre feet for a 100,630 acre project. The benefits of this 1962 bargain are still to be fully realized. Tribal relocation of some its members caused great internal bitterness. The project, which started receiving water in the late 1970s, has been funded at much slower rate than the state project. Also, the Navajo Project initially lost money, in part, because of Indian inexperience with large-scale irrigation.[186] After the construction of the initial phase of the project, the Navajos have taken a more aggressive view of their water needs and rights. The Tribe recently assumed management of the project. A major unresolved issue is whether the Navajo Irrigation Project Act is a waiver of the Tribe's full *Winters* rights.[187] If there is a waiver it may only be partial. For example, New Mexico takes the position that the Tribe waived only its rights to waters stored in the Navajo reservoir and the upstream reach and tributaries of the San Juan.[188] This leaves the Tribe free to claim non-associated groundwater, the Colorado mainstem in Arizona and Utah and the San Juan Basin in Arizona and Utah.[189] Other tribal claims, of course, remain unaffected by the act.[190]

183. M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 26 (4th ed. 1982).

184. Price & Weatherford, *Indian Water Rights in Theory and Practice: Navajo Experience in the Colorado River Basin*, 40 LAW & CONTEMP. PROBS. 97, 119-27 (1976).

185. 43 U.S.C. § 620 (1980).

186. P. FRADKIN, *supra* note 103, at 170-72.

187. The arguments pro and con are analyzed in DuMars & Ingram, *Congressional Quantification of Indian Reserved Water Rights: A Definitive Solution or Mirage?* 20 NAT. RESOURCES J. 17 (1980).

188. *Id.* at 38-39.

189. See Black & Taylor, *Navajo Water Rights: Pulling the Plug on the Colorado River*, 20 NAT. RESOURCES J. 71, 86-89 (1980), for a discussion of the subsequent agreement between the Navajo Tribe and the Salt River Project Agricultural Improvement and Power District for the use of Arizona's 50,000 acre feet share of the Colorado River above Lee's Ferry as an upper as well as lower basin state in the Navajo Generating Station near Page, Arizona on subsequent Navajo claims.

190. For example the Jicarilla Apache Tribe, which has claims adverse to the Navajos, successfully enjoined the transfer of water from a tributary of the San Juan to the Elephant Butte Reservoir on the Lower Rio Grande River for future municipal use by Albuquerque

B. Ute-Utah Agreement

In Utah, the Ute Tribe agreed to defer their *Winters* claims, which have an 1861 priority date, that threatened Utah's share of the Colorado which the state is putting to use through as much of the Central Utah Project (CUP) as the federal government and the citizens of Utah will fund. The Indians had undeveloped potentially irrigable acres but no prospect of putting much of the water to use. With Bureau of Reclamation consent,[191] the Indians promised not to develop 15,242 acres until 2005. The deferral agreement permitted construction of the Bonneville Unit of CUP which supplies existing non-Indians uses, which may eventually be displaced by ultimate Indian development, and to export water to Salt Lake City and other areas of the Great Basin. The quid pro quo for the Indians was the promise of water from the last stage of CUP.

The Indian priority was not assigned to the Central Utah Water Conservancy District; "[t]he Indians simply agreed not to develop these lands until 2005."[192] The Indians can use the CUP water for municipal and industrial purposes. According to the dean of Western water lawyers, Edward Clyde, Utah is not trying to interfere with the way the Indians will use their water, but is asserting the right to determine for itself how it will use the non-Indian part of the water apportioned to Utah under the two Colorado River Compacts.[193] This is an insufficient explanation of the agreement, however, because both congressional and tribal approval are necessary.[194] More generally, the Ute deferral agreement shows the weakness of attempts at quick *Winters* fixes. CUP lags far behind schedule and many Indian water rights issues remain unresolved.[195] A new agreement, the Ute Indian Water Compact, has been negotiated by a specially created state legislative commission, but the Indians have not yet ratified it and are seeking a new agreement.[196] The Indians were promised 480,000 acre feet to the head waters of the Green River which they are unlikely to be able to put to use on their reservation.[197]

---

through water exchanges. The trial court found that by the time that Albuquerque exchanged the water to downstream users in return for increasing upstream groundwater pumping, ninety-three percent of the water would be lost to evaporation. Thus, the proposed use was too speculative to be beneficial. Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).

191. Bureau of Reclamation Contract No. 14-06-W-194 (Sept. 20, 1965) (copy on file in Land & Water Law Review office).

192. Clyde, *Special Considerations Involving Indian Rights*, 8 NAT. RESOURCES LAW. 237, 251 (1975).

193. *Id.*

194. F. COHEN, *supra* note 22, at 594 n.122. Congress has recognized the agreement in the Colorado River Storage Project Act. 43 U.S.C. § 620 (1982) set a completion date for a planning report for the Ute Indian unit of the CUP, which was described as to "enable the United States to meet the commitment heretofore made to the Ute Indian Tribe of the Uintah and Ouray Reservation under the agreement dated September 20, 1965."

195. Boyden, *Use of Indian Water in Developing Mineral Properties, Water Acquisition For Mineral Development*, Rocky Mtn. Min. L. Found. Inst., Tucson, Ariz. (Mar. 16-17, 1978).

196. Getches, *supra* note 3. The compact does not, inter alia, offer the Indians an assurance of delivery of stored water beyond that provided by the Deferral Agreement. C. MARSEILLE, CONFLICT MANAGEMENT: NEGOTIATING INDIAN WATER RIGHTS 21-22 (Western Nat. Resources Pol'y Series No. 102 1983).

197. Clyde, *supra* note 182, at 130.

C. Fort Peck-Montana Compact

Montana has the most comprehensive state approach to Indian claims and has been the most generous to the Indians. Starting in 1973, the state has enacted a large amount of legislation to give the state the maximum leverage in the future allocation of the waters from its three headwater basins, the Clarks Fork of the Columbia, the Missouri and the Yellowstone. The grand strategy includes a statewide water right adjudications program. It also includes a water development program balanced by a water reservation program and a state mechanism to define federal and Indian water rights.[198] In 1979, the legislature created a State Reserved Water Rights Compact Commission to negotiate compacts with Montana tribes.[199]

Montana is the first Western state to enter into a "compact" with an Indian tribe for the purpose of quantifying the tribe's *Winters* right. In 1985, the State Reserved Rights Compact Commission and the Assiniboine and Sioux Tribes of the Fort Peck Reservation concluded the Fort Peck Montana Water Compact. The legal status of this state-Indian compact approach is unclear. *Texas v. New Mexico*[200] characterized congressional approval of an interstate compact as an exercise of the congressional power recognized in *Arizona v. California* to apportion an interstate river. Thus, a state cannot unilaterally enter into a compact with a tribe. Congressional consent is necessary to make the compact binding.[201] In addition, all Indian agreements must be approved by the federal government as trustee for the tribes.

Montana's state-Indian "compacts" are not in fact traditional compacts. The state has attempted to create a new species of agreement that is approved by Congress but not as a compact.[202] Because downstream Missouri states, which have to date been unable to agree on an overall allocation of the Missouri,[203] would oppose a congressionally approved com-

198. *See generally* Ladd, *Federal and Interstate Conflicts In Montana Water Law: Support For a State Water Plan*, 42 MONT. L. REV. 267 (1981).

199. MONT. CODE ANN. § 85-2-702 (1985).

200. 462 U.S. 554 (1983).

201. Edward Clyde has expressed doubt about this proposition:

> I do not think the states can obligate the Indians by an interstate compact, even though consented to by Congress. They were given the land and the water to meet the needs of those lands which were susceptible of irrigation, as of the time the reservation was created. The priority is the date the reservation was created. At that time the states had a common-law right to an equitable share of an interstate stream; and while the extent of that right only becomes quantified by a compact, by a court decision, or by congressional apportionment, the right itself predates the actual quantification.

Clyde, *supra* note 182, at 131.

202. Telephone conversation with Mr. John E. Thorson, Doney & Thorson, Helena, Mont., Apr. 16, 1987.

203. One manifestation of the suspicion among the states that has so far prevented any interstate consensus on the allocation of the river is the suit by the downstream states to invalidate a contract (now terminated) between the Bureau of Reclamation and the state of South Dakota for 20,000 acre feet of water stored behind the Oahe Reservoir near Pierre, South Dakota. South Dakota planned to market the water to the now defunct ETSI coal slurry pipeline. The Eight Circuit erroneously held that the the U.S. Army Corps of Engineers

pact. Montana has therefore proposed legislation that would authorize the BIA to permit off-reservation marketing. This would allow the state and the Department of the Interior to agree, but downstream states would seem unaffected by the compact. The deal, therefore, could be reopened in a subsequent equitable apportionment or compact negotiation. As of mid-1987, no member of Montana's congressional delegation has introduced the proposed legislation.

This unique state-Indian agreement can best be understood in the context of Montana's forward-looking water management and planning program.[204] With respect to the Missouri basin, a 1983 study commissioned by the state done by Wright Water Engineers and the late Dean Frank J. Trelease[205] recommended that the state prepare for an eventual allocation of the Missouri. However, as a headwaters state in the post-Reclamation era, Montana has wisely chosen not to base its entire water management strategy on the traditional Western theory of "use it or lose it." The grand strategy of the state seems to be to complement its state-financed water development program with the reservation of large quantities of water and to cut generous deals with the several Montana tribes to count these non-traditional uses in a future equitable apportionment action or compact negotiation.[206] The ultimate success of this strategy will depend on Montana's ability to convince the Supreme Court to defer to the state's future-oriented water management policy. Incorporation of non-consumptive uses and future reservations into the Court's equitable apportionment formula runs against the anti-speculative tradition in Western water law and will require a major expansion of current doctrine which looks almost exclusively to the past.[207]

The Montana-Fort Peck Compact purports to determine "finally and forever" all of the water rights of the Assiniboine and Sioux Tribes of the reservations. For the first time, the Compact integrates ground and surface rights and expressly allows off as well as on-reservation uses. May 1, 1888, the date of the legislative creation of the reservation, is the priority date and the Indians are allocated 1,050,476 acre feet of Missouri River water and its tributaries except the over-appropriated Milk (the site of *Winters*) to support 525,236 acre feet of consumptive uses. Consistent with *Winters,* Compact rights may not be lost by non-use. Water duty is set at 0.8 acre feet per year and 0.48 for full and partial service irrigation.

---

has the exclusive authority to market water stored behind Pick-Sloan projects. Missouri v. Andrews, 787 F.2d 270 (8th Cir. 1986), *U.S. appeal pending* (1986). South Dakota has also pursued an original action in the Supreme Court. *See supra* note 34.

204. MONTANA'S WATER PLANNING PROGRAM: A REPORT TO THE FORTY-NINTH SESSION OF THE MONTANA LEGISLATURE (Jan. 1985).

205. A Water Protection Strategy for Montana-Missouri River Basin (1983) (copy on file in Land & Water Law Review office).

206. The best explanation of Montana's current thinking about the Missouri is M. O'KEEFE, N. SLOCUM, D. SNOW, J. THORSON & P. VANDENBERG, BOUNDARIES CARVED IN WATER: AN ANALYSIS OF RIVER AND WATER MANAGEMENT IN THE UPPER MISSOURI BASIN 25-27 (Northern Lights Inst. 1986).

207. This argument rests on the suggestion in Colorado v. New Mexico II, 467 U.S. 310 (1984) that comprehensive state water planning may justify the recognition of future needs in an equitable apportionment.

Surface diversions are limited to 950,000 acre feet; the balance of 100,472 acre feet must be made up from groundwater pumping. The Compact negotiators agreed in 1982 that 487,763 acres on the reservation were potentially irrigable, although only about one half are owned by tribes or individual Indians.[208] There are six seasonable or monthly caps on the amount of water that can be withdrawn from the Missouri during that period.

Montana obtained two concessions, both of which were relatively easy for the tribes to make. First, pre-existing state and federal uses are protected by subordinating the Compact (and *Winters*) priority dates to these uses with the exception of Indian stock watering and domestic uses. The amounts of water dedicated to these uses are not great. There are approximately 19,500 acres in full service irrigation and an additional 13,000 acres are irrigated when water flows are high, with a combined consumptive use of about 41,000 acre feet a year. Most are supplied by groundwater.

The second concession deals with two related complicated issues of Indian law, whether Indian water rights can be transferred off the reservation for any use that a tribe may decide, and the power of a tribe to control off reservation uses of its waters. The Compact gives the tribes the right to sell or lease water for use outside the reservation in or out-of-state. Consistent with Indian law,[209] the tribes alone may authorize off-reservation uses, but the Compact imposes conditions on Indian resource sovereignty. At least one-hundred eighty days notice must be given to the state of any proposed off-reservation transfer, off-reservation uses are limited to beneficial uses recognized under state law, out-of-state uses are subject to state export restrictions and the state, which has water marketing authority, must be given the opportunity to participate in a joint tribal-state water marketing deal. Montana has recently embraced water marketing as a way to retain control of its water after *Sporhase v. Nebraska*,[210] and it has agreed to a reciprocal notice duty on proposed out-of-state uses. The Compact's limitations on off-reservation uses are an effort to control the use of water for coal slurry pipelines, if any state power to ban exports survives after *Sporhase*.[211]

---

208. FINAL REPORT OF TRIBAL NEGOTIATING TEAM TO FORT PECK TRIBAL EXECUTIVE BOARD 14 (Apr. 19, 1985) (copy on file in Land & Water Law Review office).

209. States are generally precluded from regulating the management of natural resources on a reservation, Montana v. United States, 450 U.S. 544 (1981), even where federal law authorizes state primacy, Washington Dep't of Ecology v. EPA, 752 F.2d 1465 (9th Cir 1985). Tribal regulation of non-Indian uses on the reservation and off is more complex. *Compare* Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) *with* United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984). For a good discussion of existing tribal water management programs, see Schupe, *Water in Indian Country: From Paper Rights to a Managed Resource*, 57 U. COLO. L. REV. 561, 579-92 (1986).

210. 458 U.S. 941 (1982); MONT. CODE ANN. § 85-2-141 (1985). For a complete analysis of the genesis of the state's water marketing program, see FORTY-NINTH LEGISLATURE, STATE OF MONTANA, REPORT OF THE SELECT COMMITTEE ON WATER MARKETING (1985).

211. MONT. CODE ANN. § 85-20-201 (1985). Article III K-4 provides:

> If otherwise authorized by federal law, the Tribes may enter into an agreement with any person who is exercising or proposing to exercise a right under the laws of the State to use surface water outside the Reservation on any tributary of the Missouri River that flows through or adjacent to the Reservation,

In addition to allocating a substantial amount of the flow of the Missouri River (just as it leaves the state) to the Indians, the state has also tried to integrate Indian uses into other state water policies. Montana can afford to do this because the Missouri has surplus flows in the state. This integration of state and Indian rights stands in marked contrast to other states which have historically viewed all Indian uses as inconsistent with state rights. However, integration is accomplished at the expense of Indian rights because tribal instream flows may foreclose other reservation uses. Thus, the success of Montana's experiment remains open. The state has yet to set reserved flows for the mainstem of the Missouri, but it intends to do so by using Indian instream flows to complement the state's instream flow maintenance policies.[212]

D. Colorado-Ute Settlement

The State of Colorado, the Ute Mountain, Ute Indian and Southern Ute tribes, the federal government, various Colorado towns, special districts and canal companies negotiated an extensive settlement agreement in 1986.[213] The purpose is to remove the major barrier to the state's long sought after Animas-La Plata Project and to settle claims in the event that the project is not funded.[214] Basically, the two tribes received a con-

except the mainstem of the Milk River, which agreement allows such person's diversion and use and protects it from any other exercise of the Tribal Water Right provided, however, that:

(a) before use of such water, the person shall have complied with all applicable state laws concerning the acquisition of a water right;

(b) subsequent to acquisition of the state water right, regulation of its use shall be subject to state law;

(c) the amount of water subject to the agreement shall be considered a consumptive use of the Tribal Water Right;

(d) the agreement shall not permanently alienate the Tribal Water Right or any part thereof.

The Tribes may transfer annually only the following amounts of water for consumptive use outside the Reservation:

(a) 50,000 acre-feet;

(b) plus 35 percent of any amount over 200,000 acre-feet but less than 300,000 acre-feet authorized by state law to be transferred annually by the State from waters within the State;

(c) plus 50 percent of any amount over 300,000 acre-feet authorized by state law to be transferred annually by the State from waters within the State.

Transfers of the Tribal Water Right shall not be considered as part of any amounts authorized by state law to be transferred annually by the State.

212. MONT. CODE ANN. § 85-20-201 (1985). Article III L-1 provides:

1. At any time within five years after the effective date of this Compact the Tribes may establish a schedule of instream flows to maintain any fish or wildlife resource in those portions of streams, excluding the mainstreams of the Milk River, which are tributaries of the Missouri River that flow through or adjacent to the Reservation. These instream flows shall be a part of the Tribal Water Right with a priority date of May 1, 1888. Water remaining in a stream to maintain instream flows pursuant to such a schedule should be counted by the Tribes as a consumptive use of surface water.

213. Colorado Ute Indian Water Rights Final Settlement Agreement (Dec. 10, 1986) (copy on file in Land & Water Law Review office).

214. This project was authorized by the Colorado River Storage Project Act, Pub. L. No. 87-483, 70 Stat. 105 (1962) (codified at 43 U.S.C. § 620 (1982), as amended by the Colorado River Basin Act, Pub. L. No. 96-375, 82 Stat. 896 (1980)).

firmed reserved right to water from two proposed projects, the Dolores and the Animas-La Plata, with an 1868 priority, but the right "shall for all time be subordinated to all water rights decreed and senior" to the projects.[215] Project priorities are shared between the tribes and other users on a pro rata basis. In return for subordination, the tribes were promised delivery systems from the project and wet water deliveries for M & I in addition to agricultural uses.[216] Federal reclamation projects now require expanded cost-sharing. The non-federal tab for the Animas-La Plata Project is $212 million out of a total cost of 572.8 million dollars, and the tribal share is 60.5 million dollars.[217] The Colorado legislature has appropriated six million dollars for the tribal development fund, and the Colorado River Water Resources Power and Development Fund will kick in another thirty million dollars.[218]

Colorado's settlement differs markedly from New Mexico and Utah's settlements because the Indians were able to secure numerous protections in the event the proposed projects are not completed as planned and in the time planned. For example, if the Animas La Plata and delivery canals are completed by 2000, the settlement becomes final and no additional reserved rights may be claimed. If project does not materialize:

> (ii) If Ridges Basin Reservoir, Long Hollow Tunnel, and the Dry Side Canal to the turnout to the Dry Side Lateral are not completed so as to enable the delivery of water to the Tribe as described in this subsection by January 1, 2000, then by January 1, 2005, the Tribe, in consultation with the United States as trustee, must elect either: (a) to retain the project reserved water right; or (b) to commence litigation or renegotiation of its pending reserved water rights claims on the Animas and La Plata Rivers. If the Tribe, in consultation with the United States as trustee, has not elected to commence litigation or renegotiation of its pending claims on the Animas and La Plata Rivers by notification to the parties by January 1, 2005, as provided below, then: (a) the Tribe shall be deemed to have elected to retain its project reserved water right; (b) the settlement of the Tribe's pending reserved and appropriative water rights claims on the Animas and La Plata Rivers contained in this Agreement shall become final; and (c) the Tribe shall not be entitled to claim any additional reserved water rights either on the Animas River or on the La Plata River. If the Tribe elects to commence litigation or renegotiation of its pending reserved water rights claims on the Animas and La Plata Rivers then the Tribe shall relinquish and forfeit the project reserved

215. Art. III A.1 (Dolores Project), A.2 (Animas-La Plata).

216. *Id.* Art. III A.2 C provides that the tribes and other users will have M & I uses satisfied first and agricultural allocation—spelled out in detail in the agreement—will be shared on a pro rata basis.

217. 1986 COLORADO DEPARTMENT OF NATURAL RESOURCES REPORT 8.

218. Art. VI.

water right from the Animas-La Plata Project as described in this subsection.[219]

VII. CONCLUSION

The major recommendation of this article is that the states stop their judicial efforts to limit Indian water rights. There is a need to limit *Winters,* but judicial attacks are counter-productive to efforts to strike a fair balance between state and Indian claims. State legal campaigns against the Indians do not encourage quantification or compromise and they have not, despite Chief Justice Rehnquist's efforts, removed the great cloud that threatens the enjoyment of existing and future rights.

In the future, the emphasis should be on cutting fair deals with the Indians. The Fort Peck Compact and the Colorado-Ute Settlement suggest some guidelines that should be applied to future settlements, although other guidelines must be added in the name of fairness. Negotiation will not be easy. States must first confront different factions within the tribes and then the different definitions of federal Indian interests that exist within the federal government. The real issue in these negotiations is generally how much it will cost to bring water to the Indians. The BIA, the Department of Justice and the Office of Management and Budget (OMB) each have a say and each have a different perspective. For example, standards for the evaluation of Indian irrigation projects have long been debated. The Department of the Interior has sometimes applied higher standards to Indian projects,[220] but in other settings the BIA has proposed more generous settlements compared to OMB.

These qualifications aside, the criteria for judging state-Indian settlements include:

First, states should assume the responsibility for the satisfaction of Indian water rights.

Second, Indian water rights should have the same margin of surplus that the state rights have long enjoyed. Indians should not be pressured to put their entitlements to immediate uses but should be guaranteed sufficient quantities of water for future tribal needs. Interim leases to non-Indian users should minimize the disruption of existing water uses.

Third, states ought to view Indian water uses as an integral element of state water policy and, whenever possible, recognize Indian claims, such as instream uses, that coincide with state allocations. Tribes may not be receptive to the integration of tribal with state water policies out of a fear that future uses or administrative options will be prejudiced. However, as states begin to confront issues such as the need for more efficient use

219. *Id.* III A.2 f. (ii):

220. *See* Burness, Cummings, Gorman & Lansford, *United States Reclamation Policy and Indian Water Rights,* 20 NAT. RESOURCES J. 807 (1980); Burness, Cummings, Gorman & Landsford, *The "New"* Arizona v. California*: Practicably Irrigable Acreage and Economic Feasibility,* 22 NAT. RESOURCES J. 517 (1982); Cummings, Gorman & Lansford, *Practicably Irrigated Acreage and Economic Feasibility: The Role of Time, Ethics, and Discounting,* 23 NAT. RESOURCES J. 289 (1983).

practices and the need for the dedication of more water to instream flow maintenance, tribes must participate in the fundamental rethinking of Western water law and policy that is now underway.

Fourth, agreements should be viewed as a pre-condition for the establishment of a market. All Indian water rights—subject to tribal and Department of Interior guidelines—should be presumed to be freely transferable for all productive uses unless there is a strong reason to restrict transfer. At the present time, there is vastly more Indian water potentially open to lease than there are lessees, but the principle should nonetheless hold.

Fifth, the focus of settlements that promise water ought to be on the development of projects or water use options that have substantial likelihood of improving the economic status of the tribe. The reservation use of any substantial amount will require federal and state subsidy. Agreements ought to be negotiated with this possibility in mind and should be subject to adjustment if federal and state funding for a particular project does not occur.

Sixth, neither states nor tribes should be wedded to the practicably irrigable acreage standard. Its chief virtue—certainty[221]—has benefited neither the Indians nor the states. Today's major justification for the standard is it allows the leasing of water to non-Indian lessees. However, this is largely a false hope for the tribes. Consideration needs to be given to solutions that may guarantee less acre feet (instream flows aside) in return for a greater possibility of tribal benefit.

221. Arizona v. California II, 460 U.S. 605, 657 (1982) (Brennan, J., dissenting).