

CRS Report for Congress

Indian Reserved Water Rights: An Overview

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Summary

The Western states are under severe pressure from their citizens to secure access to water. In planning to meet this goal, Western officials have had to confront the doctrine of Indian reserved water rights, also known as the *Winters* doctrine. This doctrine holds that when Congress reserves land for an Indian reservation, Congress also reserves water to fulfill the purpose of the reservation. When this doctrine is applied to the water laws of the Western states, tribal rights to water are almost always senior to other claimants. Therefore, in order for Western water officials to effectively plan for a stable allocation of water on which all parties can rely, they must find a way to satisfy the water claims of local Indian tribes. The parties originally looked to the courts to resolve these issues, only to find themselves in an endless cycle of litigation that rarely produced definitive rulings. As a result, negotiated settlements — which often require federal funding in order to be implemented — have become the norm. This report provides an overview of the legal issues surrounding Indian reserved water rights disputes.

Several settlements are being actively considered by the 110th Congress. H.R. 5293/S. 462 would approve the water rights settlement of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation in Nevada. S. 3355 would authorize the Crow Tribe water rights settlement reached between the Crow Tribe and the state of Montana. S. 3381 would provide for the Aamodt Litigation Settlement Act and the water rights settlement of the Taos Pueblo. H.R. 1970/S. 1171 would authorize the Navajo Nation Water Rights Agreement.

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Indian Reserved Water Rights: An Overview

Introduction¹

The dramatic increase of the population in the Western states over the last century has brought a rise in the demand for water.² Consequently, the drive to secure water often pits states, municipalities, and individual landowners against each other. This drive also spurs planning and innovation as officials look for new technological means to deliver water from wherever it can be found. Frequently, this drive to provide a stable allocation of water implicates the water rights of Indian tribes.

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

Satisfying these claims has proven a difficult task, largely because the *Winters* doctrine offers very little guidance regarding just how much water is reserved for the tribes. The effort started with litigation but, as this report discusses, judges have generally proven unable to fashion an effective method for balancing the literally thousands of interests in water rights adjudications. Increasingly, then, these disputes have moved from the courtroom to the negotiating table, and settlements have now become the norm.³ Congress must ratify these settlement agreements because many require federal funding in order to be implemented.

***Winters* and the Reserved Water Rights Doctrine**

The Western states determine water rights using some form of the prior appropriation doctrine, which holds that rights to water belong to the party that first

¹ This report was originally prepared by Nathan Brooks. It has now been rewritten and updated by Yule Kim, who is available to answer questions on these issues.

² Because the Western states have less available water than the Eastern states, the reserved water doctrine plays a much more important role in water management in the West than it does in the East. This report focuses on the Western states.

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

puts the water to “beneficial use.”⁴ As long as the party continues to put that water to beneficial use, its prior appropriation right remains senior to all other users.⁵ In other words: first in time, first in right.

In 1908, the Supreme Court added a twist to this system when it announced the reserved water rights doctrine in *Winters v. United States*.⁶ There, the Court ruled that when Congress set aside land for the Fort Belknap Indian Reservation, Congress also impliedly reserved water to help transform the tribe into a “pastoral and civilized people.”⁷ The Court reached this conclusion not by looking to the Constitution or explicit statutory language, but rather by *implying* a certain congressional intent. To this day, the *Winters* doctrine retains this implication.

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

While *Winters* established a reserved water right for Indian reservations, for most of the last century that right amounted to nothing more than “paper water.”¹³

⁴ Waters and Water Rights, § 57.07 (Robert E. Beck, ed., 1991).

⁵ *Id.*

⁶ 207 U.S. 564 (1908).

⁷ 207 U.S. at 576.

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

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

¹⁰ *Id.* at 600 (1963).

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

¹² The priority date can be even earlier if the water use fits under the category of aboriginal title. *See United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983) (finding that the tribe’s water rights accompanying its historical right to hunt and fish did not come into being with the reservation, but dated instead to “time immemorial.”). The court also found that this right is not consumptive in nature, but rather “consists of the right to prevent other appropriators from depleting the stream’s water below a protected level in any area where the ... right applies.” *Id.* at 1411 (citing *Cappaert*, 426 U.S. at 143).

¹³ Indian water rights literature is replete with references to the “paper water”/“wet water” distinction, which is commonly used to highlight the difference between a right to water (continued...)

This was because without either a standard for quantifying that right or the technological means to take advantage of it, Indian tribes had little hope of realizing actual (i.e., “wet”) water. To remedy this situation, the tribes were forced to seek assistance from the United States government, which holds most reservation land and related natural resources in trust for the Indian tribes. Congress has charged the Interior and Justice Departments with many of its responsibilities as trustee to advance the water rights of the Indian tribes. However, the federal government is also charged with advancing the broader national interest in water use. Therefore, there can be a conflict of interest between Indian and non-Indian interests, which, until relatively recently, appeared to Indians to weigh almost always in favor of non-Indian interests, and against the development of tribal water projects.¹⁴ While under normal fiduciary principles such a conflict would not be tolerated, the Supreme Court has recognized that the United States in its unique relationship with Indian tribes cannot be held to the same standards as a private trustee. As the Court put it in a water rights case involving a conflict in legal representation,

It may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands. But Congress chose to do this ... the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent.¹⁵

With the population increasing in the West and the resulting need to secure access to a stable supply of water, Western states have been forced to address the senior reserved water rights of the tribes. Against this backdrop, various state, local, and tribal claimants to water have filled the courts for decades in order to settle the myriad issues left open by the Supreme Court in *Winters*. In the process, the question of which courts possess the power to resolve these issues has been almost as contentious as the issues themselves.

State Adjudication: The McCarran Amendment

For most of the last century, federal courts had near-exclusive power to determine *Winters* rights because sovereign immunity shielded the federal

¹³ (...continued)

versus actually possessing both the water and the means to put it to beneficial use. *See, e.g.,* Daniel McCool, *Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era* 101 (2002).

¹⁴ For example, the Bureau of Indian Affairs and the Bureau of Reclamation are both within the Department of the Interior (DOI), which could pose a conflict of interest. In 1970, President Nixon sent a message to Congress pointing out that when such conflicts within Interior arise, “[t]here is considerable evidence that the Indians are the losers.” H.R. Doc. No. 363, 91st Cong., 2d Sess. 10 (1970), *reprinted at* 116 Cong. Rec. 23258, 23261 (1970).

¹⁵ *Nevada v. United States*, 463 U.S. 110, 128 (1983). *See also* *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 30-31 (D.D.C. 1999) (declining to hold the Secretary of the Interior to common law fiduciary duties, instead looking purely to statute in determining duties owed).

government from state water rights adjudications.¹⁶ In 1952, however, Congress passed an appropriations rider waiving the federal government's sovereign immunity and permitting the United States to be joined in suits involving the adjudication of water rights of a river system or other source.¹⁷ Known today as the McCarran Amendment, the law provides for consent to join the United States "in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) the administration of such rights, where it appears that the United States is the owner of, or is in the process of acquiring water rights under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit."¹⁸

Federal Court Dismissal of Indian Water Rights Claims. The Supreme Court has held that the McCarran Amendment allows state courts to adjudicate Indian water rights.¹⁹ "The immediate effect of the Amendment is to give consent to jurisdiction in the state courts concurrent with jurisdiction in the federal courts over controversies involving federal rights to the use of water."²⁰ Furthermore, the Court also held that the policy concern of judicial economy underlying the McCarran Amendment warranted the dismissal of Indian water rights claims filed in federal courts when there are ongoing, concurrent, and comprehensive state adjudications available to hear the claims.²¹ Specifically, the Supreme Court concluded that the McCarran Amendment's main purpose was to designate comprehensive state adjudications as the primary means to determine water rights claims; allowing concurrent federal proceedings would thwart this policy goal by creating unnecessary litigation that would lead to duplicative and possibly contradictory judgments.²² As a result of federal courts "abstaining" from hearing reserved water rights claims, state courts are generally the only fora that will hear these claims. For Indian tribes that have long considered state courts to be hostile, the prospect of having those same

¹⁶ Conference of Western Attorneys General, American Indian Law Deskbook 212 (2d ed. 1998).

¹⁷ Act of July 10, 1952, 66 Stat. 549, 560 (codified at 43 U.S.C. § 666).

¹⁸ 43 U.S.C. § 666(a).

¹⁹ *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 809-811 (1976) (addressing federal suits brought by the United States in its role as trustee to Indian tribes). *See also* *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 566-569 (1983) (addressing federal suits brought by Indian tribes).

²⁰ *Colorado River Water Conservation District*, 424 U.S. at 809.

²¹ *Id.* at 819. ("The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights."). *See also* *San Carlos Apache Tribe of Arizona*, 463 U.S. at 570.

²² *Colorado River Water Conservation District*, 424 U.S. at 819 ("[A] number of factors clearly counsel against concurrent federal proceedings.... This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property.... Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings.").

courts adjudicate Indian water rights has been one of the primary motivations for pursuing negotiated settlements.²³

Comprehensiveness Requirement. In order to join the United States as a party in a state proceeding adjudicating reserved water rights, the McCarran Amendment requires the proceedings to be “comprehensive.”²⁴ The proceedings must involve the “whole community of claims,” and not just the water rights of a few named claimants.²⁵ Factors that contribute to an adjudication’s “comprehensiveness” include the parties, the types of rights at issue, the definition of the basin to be included in the adjudication, and the time frame covered by the adjudication.²⁶

General Stream Adjudications. There are several “general stream” adjudications involving Indian tribes laying claims to water rights. General stream adjudications are consolidated actions mandated to replace individually filed lawsuits.²⁷ These adjudications have been instituted to ascertain the extent and priority of water rights among claimants in prior appropriations states.²⁸ The level of administrative involvement in these adjudications varies from state to state, but in most states fact-finding is assigned to administrative bodies, which is then followed by judicial consideration and confirmation.²⁹ Meanwhile, the geographic scope of a general stream adjudication varies as well. Some general stream adjudications, such as the one in Montana, are state-wide in scope. Others are targeted to a particular river basin, such as the Gila River adjudication in Arizona.³⁰ Since the McCarran Amendment requires that general stream adjudications be “comprehensive” in order to assert jurisdiction over the United States and Indian tribes, these adjudications invariably are complicated and lengthy.

State Administration of Indian Water Rights. While the McCarran Amendment grants state courts the right to adjudicate Indian water rights, the question of who has the power to *administer* water rights determined in a McCarran

²³ See Daniel McCool, *Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era* 75-76 (2002).

²⁴ *United States v. Oregon*, 44 F.3d 758, 763 (9th Cir. 1994). See also *Dugan v. Rank*, 372 U.S. 609, 618 (1963); *United States v. District Court of Eagle County*, 401 U.S. 520, 525 (1971).

²⁵ *District Court of Eagle County*, 401 U.S. at 525.

²⁶ See generally Peter W. Sly, *Reserved Water Rights Settlement Manual* 177-184 (1988). See also *Oregon*, 44 F.3d at 768-769 (holding that a failure to include groundwater in a state general stream adjudication does not invalidate the adjudication on “comprehensiveness” grounds).

²⁷ Lloyd Burton, *American Indian Water Rights and the Limits of Law* 27 (University Press of Kansas 1991).

²⁸ *Id.*

²⁹ See, e.g., Or. Rev. Stat. §§ 539.110, -.150 (1995); Ariz. Rev. Stat. §§ 45-251 to 45-264; Nev. Rev. Stat. § 533.010 *et seq.*

³⁰ See *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source (Gila River IV)*, 989 P.2d 739 (Ariz. 1999).

Amendment adjudication is unclear.³¹ Some argue that the language of the McCarran Amendment distinguishing between administration and adjudication of water rights is meant to limit a state's ability to administer such rights.³² The Wyoming Supreme Court, however, has held that state courts have the power to administer as well as adjudicate Indian water rights.³³ Significantly, the court also ruled that an appointed State Engineer has the power to "monitor" water use under a court's reserved rights decree, but enforcement by that same official against either the tribes or the United States would require a court injunction.³⁴

Consequences of the McCarran Amendment. The McCarran Amendment allows a state to take a more active role in allocating a resource precious to all of its citizens. However, the Supreme Court in *Winters* left many questions regarding reserved water rights to be determined by other courts. In the wake of the McCarran Amendment, state courts have become the primary fora to adjudicate water rights, with different states sometimes providing different answers. This lack of uniformity is particularly evident in these courts' attempts to develop "quantification standards" for determining the precise amount of water reserved by a water right.

Litigation and Quantification

Using the *Winters* rationale to guide them in their search for a quantification standard for Indian reservations, courts have generally focused first on each reservation's purpose, and then determined the amount of water necessary to fulfill that purpose. Traditionally, courts addressing this issue have held that the federal government intended Indians to farm reserved lands, which meant that the purpose of an Indian reservation was agricultural.³⁵ Subsequent judicial attempts to establish a quantification standard in line with this agricultural purpose have resulted in several different types of standards.³⁶ Prior to the McCarran Amendment, some federal courts followed the Supreme Court's lead in *Winters* and refused to establish a quantification standard,³⁷ while other courts tried a "reasonable needs" approach that looked to past and present water use as a benchmark for quantification.³⁸ The

³¹ What exactly the power to "administer water rights" entails is not immediately apparent. The most widely followed definition seems to be the one given by a Nevada Federal District Court: "To administer a decree is to execute it, to ensure its provisions, to resolve conflicts as to its meaning, to construe and interpret its language." *United States v. Hennen*, 300 F. Supp. 256, 263 (D. Nev. 1968).

³² See Conference of Western Attorneys General, *supra* 220-221.

³³ In re General Adjudication of All Rights to Use Water in the Big Horn River System (*Big Horn D*), 753 P.2d 76, 114-115 (Wyo. 1988).

³⁴ *Id.*

³⁵ Conference of Western Attorneys General, *supra* 194.

³⁶ See, e.g., Note, *Indian Reserved Water Rights: the Winters of Our Discontent*, 88 Yale L.J. 1689, 1695 (1979).

³⁷ *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956); *Conrad Investment Company v. United States*, 161 F. 829 (9th Cir. 1908).

³⁸ See, e.g., *United States v. Walker Irrigation District*, 104 F.2d 334, 340 (9th Cir. 1939).

Supreme Court, however, would later approve a specific quantification standard, which would later be adopted by many state courts.

Practicably Irrigable Acreage (PIA). In *Arizona v. California*, the Supreme Court expressed its approval of a Special Master’s use of a fixed calculation of water needs based on the physical capacity of the reservation land, rather than the number of Indians on the reservation.³⁹ The Special Master based this “practicably irrigable acreage” (PIA) standard on the assumption that the purpose of an Indian reservation is agricultural. Starting from that assumption, the Special Master reasoned, and the Court agreed, that “the only feasible and fair way by which reserved water for the reservation can be measured is irrigable acreage.”⁴⁰ Interestingly, while the Supreme Court endorsed the Special Master’s use of the PIA standard in *Arizona*, the Court did not technically adopt it. As the Court put it, “While we have in the main agreed with the Master, there are some places we have disagreed and some questions on which we have not ruled. Rather than adopt the Master’s decree ... we will allow the parties, or any of them, if they wish, to submit ... the form of decree to carry this opinion into effect.”⁴¹ Because the Supreme Court did not formally adopt the Special Master’s quantification approach in its opinion, many question whether *Arizona* mandates the use of the PIA standard.⁴²

Notwithstanding this debate, the PIA standard is today by far the favorite judicial method for quantifying Indian reserved water rights,⁴³ and lower courts have fashioned a three-step process for determining a reservation’s practicably irrigable acreage.⁴⁴ First, soil scientists determine the largest area of arable land that can reasonably be considered for an irrigation project.⁴⁵ Second, engineers develop an irrigation system based on the available water supply and the arable land base.⁴⁶ Third, economists evaluate the crop patterns, yields, pricing, and the net returns for crops that the irrigation project might support.⁴⁷

³⁹ *Arizona v. California*, 373 U.S. 546, 601 (1963).

⁴⁰ *Id.* at 601.

⁴¹ *Id.* at 602.

⁴² See, e.g., Jennele Morris O’Hair, *The Federal Reserved Rights Doctrine and Practicably Irrigable Acreage: Past, Present, and Future*, 10 BYU J. Pub. L. 263, 273 (1996). The Supreme Court had an opportunity to clarify its position regarding the PIA standard in *Wyoming v. United States*, but an evenly split Court (made possible by Justice O’Connor’s recusal) merely affirmed the Wyoming Supreme Court’s judgment without opinion. *Wyoming v. United States*, 492 U.S. 406 (1989).

⁴³ See Barbara A. Cosens, *The Measure of Indian Water Rights: The Arizona Homeland Standard, Gila River Adjudication*, 42 Nat. Resources J. 835, 842-844 (Fall 2002).

⁴⁴ See, e.g., *Fort Mojave Indian Tribe v. United States*, 32 Fed. Cl. 29, 35 (1994).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* The *Fort Mojave* court went on to say that “In general, the PIA analysis is grounded upon project development with the overall goal of maximizing the income from the project and not maximizing the water claim.”

Other Proposed Quantification Standards. While the widespread judicial adoption of the PIA standard provides parties with some degree of certainty as to how Indian water rights will be quantified by courts, that standard has been subjected to criticism. First, non-Indian appropriators argue that agricultural water use is highly consumptive, and therefore the PIA standard favors Indians and is insensitive to state and private appropriators.⁴⁸

On the other side of the argument, some assert that the PIA standard is unfair to Indians, in that linking water rights to agriculture is anachronistic given the modern agricultural economy.⁴⁹ Others contend that the PIA standard does not take into account the realities of modern-day life and the diversity of reservations' geographies and purposes.⁵⁰ Agreeing with both sides of the PIA debate in some respects, the Arizona Supreme Court in its 2002 *Gila River* ruling abandoned agriculture as the sole purpose for Indian reservations and found instead that the essential purpose of an Indian reservation is to establish a "permanent home and abiding place."⁵¹ Citing various water settlements, the court found its construction necessary "to achieve the twin goals of Indian self-determination and economic self-sufficiency."⁵² In quantifying water rights in line with that purpose, the court held as proper a reservation-by-reservation analysis of, among other things, (1) the tribe's history and culture; (2) the reservation's geography and natural resources, including groundwater availability; (3) the reservation's physical infrastructure, human resources, technology, and capital; (4) past water use; and (5) a tribe's present and projected population.⁵³

While the Arizona Supreme Court's approach addresses many of the criticisms leveled at the PIA standard, its "reservation-by-reservation" focus does not lend itself to a specific formula, and so could lead to more uncertainty for authorities trying to account for Indian reserved water rights when planning large water projects. Of course, the *Gila River* decision has no precedential value in other states, and it does not appear that the Arizona Supreme Court's *Gila River* ruling has affected the other Western states' use of the PIA standard.

⁴⁸ See Peter W. Sly, *Reserved Water Rights Settlement Manual* 104 (1988).

⁴⁹ See, e.g., Peter W. Sly, *Reserved Water Rights Settlement Manual* 104 (1988).

⁵⁰ See, e.g., Barbara A. Cosens, *The Measure of Indian Water Rights: The Arizona Homeland Standard, Gila River Adjudication*, 42 Nat. Resources J. 835, 837 (Fall 2002) ("Whereas southern tribes located in alluvial valleys near a large surface water source [e.g. the Colorado River] are entitled under an agricultural purpose quantified by the PIA method to ample water, tribes in more northern climes or mountainous terrain are left with insufficient rights to meet basic drinking water needs").

⁵¹ In re General Adjudication of All Rights to Use of Water in the Gila River System and Source (*Gila River V*), 35 P.3d 68, 74 (Ariz. 2002) (quoting *Winters*, 207 U.S. at 565).

⁵² *Id.* at 76.

⁵³ *Id.* at 79-80.

***Winters* and Allotment Rights**

While the task of quantifying *Winters* water often frustrates judges, adjudications involving *Winters* rights become even more confusing when allotments are involved. In an effort to assimilate Indians into mainstream American culture, Congress in 1887 passed the General Allotment Act⁵⁴ — also known as the Dawes Act — authorizing the President to allot portions of reservation lands to individual Indians. Title would then remain in the United States in trust for 25 years, after which it would pass to the individual Indian allottees free from all encumbrances.⁵⁵ The act also authorized the Secretary of the Interior to distribute surplus reservation land for the purpose of non-Indian settlement. After the 25-year trust period was over, many allottees lost their lands either through direct sales, foreclosures, or tax sales.⁵⁶ These losses combined with the Secretary’s sale of surplus lands to non-Indians produced a “checkerboard” pattern of tribal trust/individual Indian trust/non-trust land ownership within reservations.⁵⁷

While many reservations escaped allotment and its consequences, this “checkerboard” pattern of ownership on some reservations persists and presents serious complications in reserved water rights disputes. The Supreme Court ruled in 1939 that when tribal land is converted into allotments, the trust allottees succeed to *some portion* of tribal waters needed for agriculture.⁵⁸ A subsequent Ninth Circuit case, *Colville Confederated Tribes v. Walton*, built on that reasoning and held that a trust allottee’s share of a tribe’s reserved water is equal to the percentage of the entire reservation’s irrigable acreage that is located on the trust allottee’s land.⁵⁹ The *Walton* court also found that a non-Indian successor in interest to a trust allottee acquires that allotment’s reserved water right, but loses that right if the non-Indian successor does not put the water to beneficial use.⁶⁰ The federal cases addressing this issue have considered allotment rights only for irrigation purposes. It is not clear how these holdings relate to reservations of land for non-agricultural purposes.

⁵⁴ Act of February 8, 1887, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354, 381). *See also* Felix S. Cohen, Handbook of Federal Indian Law 75-84 (Nell Jessup Newton, ed., LexisNexis 2005); Kent Carter, The Dawes Commission (Ancestry, Incorporated 1999).

⁵⁵ Act of February 8, 1887, 24 Stat. 388. *See also* Felix S. Cohen, *supra* 1041. There are several other allotment acts and treaties specific to particular tribes, some with longer or shorter trust periods than that of the Dawes Act.

⁵⁶ William C. Canby, American Indian Law in a Nutshell 22 (3d ed. 1998).

⁵⁷ *See* Cohen, *supra* 78 (“Reservations became checkerboards as the sale of surplus lands to whites isolated individual Indian allotments.”).

⁵⁸ *United States v. Powers*, 305 U.S. 527, 532 (1939). Generally, under the Nonintercourse Act (25 U.S.C. § 177), Indians are forbidden from transferring tribal land without federal government approval, and this prohibition likely applies to the transfer of non-allotted reserved water rights also. *See* Conference of Western Attorneys General, *supra* 207-209.

⁵⁹ *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981).

⁶⁰ *Id.*

Tribal Use of Its Reserved Water Right

As the *Gila River* decision discussed earlier illustrates, a court's answer to the threshold question of purpose can have far-reaching effects. The Arizona Supreme Court's finding of a "permanent homeland" purpose not only led the court to a new method of quantification, but also allowed the court to put a premium on flexibility in how tribes use their *Winters* water. As the court put it, "Just as [the U.S.] economy has evolved, nothing should prevent tribes from diversifying their economies if they so choose and are reasonably able to do so. The permanent homeland concept allows for this flexibility and practicality."⁶¹ This is consistent with the opinion of the Special Master in *Arizona v. California*, who stated that, even though he found the reservation's purpose to be agricultural, that did not mean that the reserved water had to be put to agricultural use.⁶²

The *Gila River* court specifically rejected the approach taken by the Wyoming Supreme Court ten years earlier in the *Big Horn* adjudication.⁶³ In *Big Horn III*, the court found that because agriculture was the primary purpose for the reservation of land for the Indians, if the tribe wanted to use the water for some other purpose, such as instream flow, the tribe must do so according to state prior appropriation doctrine.⁶⁴ In reaching its conclusion, the Wyoming Supreme Court relied on the primary-secondary purpose test used in *United States v. New Mexico*,⁶⁵ a Supreme Court case dealing with a non-Indian federal reservation, specifically a national forest. The Court in *New Mexico* found that the United States, in setting aside federal lands for the Gila National Forest, reserved use of the Rio Mimbres River only where necessary to preserve timber and to secure favorable water flows, and therefore did not have the reserved right for aesthetic, recreational, wildlife preservation, or stock watering purposes.⁶⁶ As the Court stated, "Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only necessary for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator."⁶⁷ The *Big Horn* court applied the *New Mexico* rationale to Indian reservations and greatly constrained the ability of the tribe to adjust its water use according to modern day realities.

⁶¹ *Gila River V*, 35 P.3d 68, 76 (Ariz. 2001).

⁶² S. Rifkind, Report of the Special Master - *Arizona v. California* 265 (1962).

⁶³ In re the General Adjudication of All Rights to Use Water in the Big Horn River System (*Big Horn III*), 835 P.2d 273 (Wyo. 1992).

⁶⁴ *Id.* at 278-279.

⁶⁵ 438 U.S. 696 (1978).

⁶⁶ *Id.* at 718.

⁶⁷ *Id.* at 702.

The Arizona Supreme Court in the *Gila River* adjudication rejected the *Big Horn* approach on two grounds. First, the Arizona Supreme Court said there are enough significant differences between Indian and non-Indian reservations to preclude applying *New Mexico*'s primary-secondary purpose test to Indian water rights cases. The court found that the underlying federal policy of Indian self-sufficiency, necessitates an interpretation of Indian reserved rights that is broader than that of non-Indian reserved rights.⁶⁸ Secondly, the court said, even if the *New Mexico* test applied, the "permanent homeland" purpose would be primary, not secondary.⁶⁹

The debate over what a tribe can do with its *Winters* water gets even more contentious when the issue of off-reservation water marketing is broached. The geography of Indian and non-Indian settlement that emerged from the era of westward expansion is such that today many tribes control or claim large amounts of water upstream from major metropolitan areas.⁷⁰ In theory, then, certain tribes could divert water for their own uses and leave little for the downstream cities. Given this situation, such tribes stand to make a good deal of money by agreeing not to use their water in deference to downstream interests. Marketing water is especially attractive to tribes that possess the rights to reservation water, but lack the infrastructure and resources necessary to exploit it.⁷¹ Under the Nonintercourse Act, tribes are restricted from alienating trust property without statutory authorization. There is a limited exception to the Nonintercourse Act, however, which authorizes tribes, with the approval of the Secretary of the Interior, to lease trust land for "public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases."⁷² The use of the term "natural resources" seems to suggest that tribes need only seek the Secretary's approval to market their water.

Even so, difficult questions persist regarding the legality and policy of marketing *Winters* water. First, because most tribes have not had their *Winters* rights quantified, many individuals who live downstream from reservations may already have developed substantial reliance interests on the free use of the reservation's reserved waters. The prospect of having to pay for water that has long been free predictably sparks vehement opposition.⁷³ Secondly, the threshold question in water rights cases is often, *what is the purpose of the reservation?* As the Wyoming Supreme Court held, it is very difficult to link the off-reservation marketing of water to the reservation's original purpose, especially if that purpose is an agricultural

⁶⁸ *Gila River V*, 35 P.3d at 77.

⁶⁹ *Id.*

⁷⁰ For a discussion of the different causes of this state of affairs, see Daniel McCool, *Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era* 161-163 (2002).

⁷¹ See, e.g., Edmund J. Goodman, *Indian Tribal Sovereignty and Water Resources: Watersheds, Ecosystems, and Tribal Co-management*, 20 J. Land Resources & Envtl. L. 185, 208 (2000).

⁷² 25 U.S.C. § 415.

⁷³ For this reason, all of the marketing provisions approved so far in water settlement acts specify water delivered from federal projects rather than reserved water.

one.⁷⁴ If courts move toward the Arizona Supreme Court’s “permanent homeland” approach, water marketing might rest on a stronger foundation.

Tribal Regulation of Water

The Supreme Court has held that Indian tribes, as limited sovereigns, have the right to regulate the conduct of their members,⁷⁵ a right that presumably extends to the regulation of members’ use of tribal water. States must respect a tribe’s right to order its own affairs,⁷⁶ and even those states that have assumed criminal and civil jurisdiction over Indian tribes pursuant to Public Law 280⁷⁷ are expressly prohibited from regulating Indian trust water rights.⁷⁸

The real controversy with tribal regulation of water arises when tribes attempt to extend their authority to nonmembers. Nonmember water rights arise in two ways: first, as mentioned above, a trust allottee holds rights to a portion of reservation water; second, and even more complicated, homesteaders have rights to reservation water. In the late 1800s and early 1900s some reservations were opened up to the public, and homesteaders moved in to purchase portions of reservation land.⁷⁹ These homesteaders hold state appropriative water rights,⁸⁰ which must be reconciled with the federal reserved water rights of the tribe.

In *Montana v. United States*, the Supreme Court held that a tribe may only regulate the on-reservation activities of *nonmembers* on non-Indian land within the reservation if (1) the nonmembers have entered into consensual relationships (e.g., contracts, leases, etc.) with the tribe; or (2) nonmember conduct on the reservation “threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe.”⁸¹ Citing their inherent sovereign powers over tribal land and resources, as well as the second *Montana* exception, tribes have enacted

⁷⁴ *Big Horn III*, 753 P.2d 76, 100 (1988).

⁷⁵ *United States v. Wheeler*, 435 U.S. 313, 322 (1978). The Court went on to clarify that the power to punish tribal offenders is an exercise of retained tribal sovereignty. As such, the power “exists only at the sufferance of Congress and is subject to complete defeasance. But, until Congress acts, the tribes retain their sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.” *Id.* at 323.

⁷⁶ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

⁷⁷ Public Law 280 gave several states, and provided a means for all other states to obtain, extensive criminal and civil jurisdiction over Indians residing within Indian Country. *See* P.L. 83-280, 67 Stat. 588 (1953).

⁷⁸ 25 U.S.C. § 1322.

⁷⁹ *See* Peter W. Sly, *Reserved Water Rights Settlement Manual* 138 (1988).

⁸⁰ *United States v. Anderson*, 736 F.2d 1358, 1363-1365 (9th Cir. 1984).

⁸¹ *United States v. Montana*, 450 U.S. 544, 565 (1981). For a discussion of the *Montana* doctrine, *see* CRS Report RS22820, *Indian Tribal Civil Jurisdiction’s Reach Over Non-Indians: Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, by Yule Kim.

water codes purporting to regulate all who use reservation water, sometimes including nonmembers.

The law governing tribal authority to enact water codes regulating nonmembers is unclear, engendering a great deal of confusion among tribes and private water appropriators.⁸² The Department of the Interior (DOI) was sufficiently worried about the potential for conflict inherent in such codes that in 1975 the Secretary imposed a moratorium⁸³ on all DOI approvals of such water codes submitted by tribes subject to the Indian Reorganization Act (IRA).⁸⁴ The moratorium is still in effect, although DOI made one exception in 1985 when it approved the tribal water code included in the water rights compact between the State of Montana and the Assiniboine and Sioux Tribes of the Fort Peck Reservation.⁸⁵

The status of codes enacted by tribes not subject to the IRA is yet to be determined. The available case law, however, suggests that tribal sovereignty alone would not be enough to support application of tribal water codes to nonmembers. In *Holly v. Yakima Indian Nation*, a tribe enacted a water code that purported to regulate all use of excess waters on fee lands within the reservation. The court held that nonmember use of excess water on such lands did not implicate the concerns of the second *Montana* exception, and so the exception does not apply.⁸⁶ In addition, in *Strate v. A-1 Contractors*, the Supreme Court seemed to limit the second *Montana* exception to those situations where state regulation would impinge on “the right of reservation Indians to make their own laws and be ruled by them.”⁸⁷ It does not appear that tribal water codes regulating nonmembers would satisfy that requirement.

Groundwater

Though the Supreme Court has never directly determined whether a reservation’s groundwater is included in its reserved water right, the Court has held that when the pumping of groundwater causes surface water to drop, the federal

⁸² See generally Thomas W. Clayton, *The Policy Choices Tribes Face When Deciding Whether to Enact a Water Code*, 17 Am. Indian L. Rev. 523 (1992).

⁸³ DOI has told tribes that the department will not approve their water codes until DOI promulgates regulations pursuant to 25 U.S.C. § 381, which DOI has yet to do. See *Holly v. Totus*, 655 F. Supp. 548, 551-552 (E.D. Wash. 1983). See also Conference of Western Attorneys General, *supra* 224, n. 250; Thomas W. Clayton, *The Policy Choices Tribes Face When Deciding Whether to Enact a Water Code*, 17 Am. Indian L. Rev. 523, 548 (1992); Peter W. Sly, *Reserved Water Rights Settlement Manual* 72 (1988).

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

⁸⁵ Memorandum from Ross Swimmer to Secretary of the Interior requesting approval of Fort Peck Water Code, October 7, 1986.

⁸⁶ *Holly v. Confederated Tribes and Bands of the Yakima Indian Nation*, 655 F. Supp. 557, 559 (E.D. Wash. 1985).

⁸⁷ *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (*quoting* *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

government “can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.”⁸⁸ However, most Western states handle groundwater and surface water under separate regulatory and judicial controls,⁸⁹ and a determination of rights to groundwater is not required for a McCarran Amendment adjudication to meet its comprehensiveness requirement.⁹⁰ The Wyoming Supreme Court, while acknowledging that “the logic that supports a reservation of water to fulfill the purpose of the reservation also supports the reservation of groundwater,” refused to extend the *Winters* doctrine to include groundwater because no other court had explicitly done so.⁹¹ Several courts, however, have implicitly recognized a reserved groundwater right.⁹² In 1999, the Arizona Supreme Court took the position that the *Winters* doctrine applies to groundwater only when “other waters are inadequate to accomplish the purpose of a reservation.”⁹³ This analysis, the court recognized, essentially dissolves the distinction between surface and groundwater: “The significant question for the reserved rights doctrine is not whether water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.”⁹⁴ This issue is by no means settled.

Conclusion

In the century since the Supreme Court promulgated the reserved rights doctrine, the judiciary have had difficulties in their attempts to resolve the myriad issues that the Court in *Winters* left unresolved. This is not surprising, given that federal, state, and tribal governments and tens of thousands of people have significant stakes in the outcomes.

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

⁸⁸ *Cappaert*, 426 U.S. at 142-143.

⁸⁹ See Peter W. Sly, *Reserved Water Rights Settlement Manual* 181-182 (1988).

⁹⁰ See *United States v. Oregon*, 44 F.3d 758, 768-769 (9th Cir. 1994).

⁹¹ *Big Horn I*, 753 P.2d 76, 99 (Wyo. 1988). In addition, a federal appeals court has held that a failure to include groundwater in a state general stream adjudication does not invalidate the adjudication on “comprehensiveness” grounds. *Oregon*, 44 F.3d at 768-769.

⁹² See *Gila River Pima-Maricopa Indian Community v. United States*, 695 F.2d 559 (D.C. Cir. 1982); *Nevada v. United States*, 279 F.2d 699 (9th Cir. 1960); *In re Determination of Conflicting Rights*, 484 F. Supp. 778 (D. Ariz. 1980); *Tweedy v. Texas Co.*, 286 F.Supp. 383, 385 (D. Mont. 1968).

⁹³ *Gila River IV*, 989 P.2d at 748.

⁹⁴ *Id.*, at 747.

Pending Settlements. Congress has approved a number of Indian water rights settlements.⁹⁵ In addition, various tribes have negotiated settlement agreements with states that have not been approved by Congress. The Fort Peck Indian Reservation in Montana, for example, has only been approved by the Department of the Interior, and does not require congressional approval. On the other hand, the Fort Belknap Indian Reservation, also in Montana, calls for congressional approval.

Several other settlements are being actively considered by the 110th Congress.

- H.R. 5293/S. 462 would approve the water rights settlement of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation in Nevada.⁹⁶
- S. 3355 would authorize the Crow Tribe water rights settlement reached between the Crow Tribe and the state of Montana.⁹⁷
- H.R. 1970/S. 1171 would authorize the Navajo Nation Water Rights Agreement.
- S. 3381 would provide several water right settlements. Title I of the act would authorize the Aamodt Litigation Settlement Act by creating the Pojoaque Basin Water Regional Water System, and would also approve the water rights settlements of the Nambe Pueblo, Pojoaque Pueblo, San Ildefonso Pueblo, and Tesuque Pueblo. Title II of the act would approve the water rights settlement of the Taos Pueblo.⁹⁸

⁹⁵ Soboba Band of Luiseno Indians Settlement Act (P.L. 110-297); Gila River Indian Community Water Rights Settlement Act (Title II of P.L. 108-451); Southern Arizona Water Rights Settlement (Tohono O'odham Nation) (Title III of P.L. 108-451); Nez Perce/Snake River Water Rights Act (P.L. 108-447, Division J, Title X); Zuni Indian Tribe Water Rights Settlement Act (P.L. 108-34); Shivwits Band of the Paiute Tribe of Utah Water Rights Settlement Act (P.L. 106-263); Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement Act (P.L. 106-163); Yavapai-Prescott Indian Tribe Water Rights Settlement Act (Title I of P.L. 103-434); San Carlos Apache Water Rights Settlement Act (Title XXXVII of P.L. 102-575); Jicarilla Apache Tribe Indian Water Rights Settlement Act (P.L. 102-441); Northern Cheyenne Indian Reserved Water Rights Settlement Act (P.L. 102-374); Fort McDowell Indian Community Water Rights Settlement Act (P.L. 101-628); Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act and the Pyramid Lake/Truckee-Carlson Water Rights Settlement Act (Titles I and II, respectively, of P.L. 101-618); Colorado Ute Indian Water Rights Settlement Act (P.L. 100-585); San Luis Rey Indian Water Rights Settlement Act (Title I of P.L. 100-675); Salt River Pima-Maricopa Indian Community Water Rights Settlement Act (P.L. 100-512); Ak-Chin Indian Water Rights Settlement Act (P.L. 98-530); Southern Arizona Water Rights Settlement Act (P.L. 97-293).

⁹⁶ H.R. 5293, 110th Cong. (2008); S. 462, 110th Cong. (2007).

⁹⁷ S. 3355, 110th Cong. (2008).

⁹⁸ S. 3381, 110th Cong. (2008).