

# Water Rights, Water Quality, and Regulatory Jurisdiction in Indian Country

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*In the seminal Indian water rights case, *Winters v. United States* (1908), the Court posed this question: “The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, ‘and grazing roving herds of stock,’ or turned to agriculture and the arts of civilization. Did they give up all this?” The Court’s answer was no, and since then a large body of law has developed around Indian water rights, although the primary focus has been on the amount of water reserved for various tribal purposes. While Indian nations use property rights theories to protect their water resources from loss to non-Indian use, they also deploy their inherent governmental authority through tribal water codes and the federal Clean Water Act to protect water quality. As competition for water resources grows and development pressures adversely affect water quality, Indian Nations and their neighbors face new challenges in defining Indian water rights for instream habitat protection and traditional consumptive uses.*

*This article reviews the nature of Indian water rights—both on and off reservations—and the use of tribal sovereignty to protect those rights in terms of quantity and quality. The case law in this arena is sparse, and the ability to predict an all-or-nothing litigated outcome is correspondingly limited. Under these circumstances, parties would be best off to default to the usual presumptions recognizing inherent tribal authority over on-reservation water resources and state authority outside of Indian country. From this jurisdictional baseline, tribes, states and the United States*

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*should cooperate to ensure that a given regulatory regime protects water quality and access to water.*

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## I. INTRODUCTION

When tribal territories were occupied primarily by Indians, and the tribal land base was a consolidated unit of communally held land, federal jurisdictional rules generally precluded any state authority over tribe members and their territory.<sup>1</sup> Due to vacillating

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1. *Worcester v. Georgia*, 31 U.S. 515, 595 (1832) (holding there was no state jurisdiction over a non-Indian present within Cherokee territory). *See* 18 U.S.C.A. § 1151 (West 2014) (Indian country is the jurisdictional term used to describe the territory in which tribal and federal law generally operate to the exclusion of state law); *Alaska v. Native Vill. of Venetie*, 522 U.S. 520, 527 n.1 (1998).

federal policies, however, non-Indians sometimes came to own land within tribal territories, which resulted in an increasingly complex web of jurisdictional rules. After surviving concerted federal efforts aimed at assimilation and termination, Indian nations today assert regulatory jurisdiction over their entire territories, which often include non-tribal citizens within their borders.<sup>2</sup> Although sharply criticized by scholars, common law rules developed by the Supreme Court since the 1980s have established a bias against tribal jurisdiction over non-members on non-Indian land.<sup>3</sup>

In the Indian water rights arena, the Supreme Court has considered only a few cases quantifying the use of waters within and passing through Indian lands.<sup>4</sup> As population increases and climate change affect the distribution of water in varying ways, the potential for conflict over water use and quality protection will rise. This article explores the mechanisms in place for the quantification and regulation of water quality and quantity in Indian country, and suggests alternatives to litigation in order to accomplish shared goals.

Part II of this article summarizes the basics of federal Indian law with respect to property rights and sovereignty on Indian reservations. Part III sets out the substantive framework of Indian water rights under federal law, including both consumptive and non-

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2. *Kerr-McGee v. Navajo Nation*, 471 U.S. 195, 198 (1985) (“In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), we held that the “power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.”).

3. See, e.g., Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1086 (2015) (“[T]he Court has concocted all manner of restrictions on Native sovereignty, grounded not in text but in problematic readings of history.”) (citation omitted); see also Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999); Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573 (1996); Joseph Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991).

4. See *Arizona v. California (Arizona II)*, 439 U.S. 419 (1979), amended by *Arizona v. California*, 466 U.S. 144 (1984); *Arizona v. California (Arizona I)*, 373 U.S. 546 (1963) (dealing primarily with the division of the waters of the Colorado River, but also quantifying the water rights of several Indian reservations along the river); *United States v. Powers*, 305 U.S. 527 (1939) (construing water rights related to Indian allotments under 25 U.S.C. § 381); *Winters v. United States*, 207 U.S. 564, 576–77 (1908) (establishing the principle of Indian reserved water rights based on federal law); see also Robert T. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 CALIF. L. REV. 1133 (2010); Judith V. Royster, *A Primer on Indian Water Rights*, 30 TULSA L.J. 61 (1994); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 19.06 (2012), available at LexisNexis.

consumptive uses. Part IV explores the law regarding tribal, state, and federal jurisdiction over water use in Indian country. Part V reviews federal administrative actions related to tribal regulatory authority along with regulatory authority under the Clean Water Act (CWA). This section includes the first analysis of a recent proposal by the Environmental Protection Agency (EPA) to interpret the CWA as a delegation of federal regulatory authority to tribes wishing to regulate water quality in Indian country. If the proposal comes to pass, it could dramatically speed up the process for Indian tribes to obtain regulatory authority under the CWA. It could also eliminate uncertainty regarding major aspects of tribal regulatory authority, and thus provide a more stable platform for decision-making regarding water use in Indian country. Part VI offers suggestions for inter-governmental cooperation to provide effective and rational processes for water management in Indian country.

## II. INDIAN PROPERTY RIGHTS AND SOVEREIGNTY

The colonizing European nations' assertion of sovereignty over "discovered" territories in the Western Hemisphere was based in substantial part on claimed superior religious beliefs and the "uncivilized" nature of indigenous peoples.<sup>5</sup> Indian nations had rights to use and occupy lands in their territories free of outside interference.<sup>6</sup> As a practical matter, the indigenous tribes also possessed superior numbers and corresponding military power over the fledgling colonies, which led to an initially conciliatory approach by the Europeans.<sup>7</sup> As the colonists grew in numbers and European disease decimated the Indian population, increased encroachment on Indian lands sometimes led to violent confrontation.<sup>8</sup> This early treaty period, which can be loosely characterized as extending into

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5. See generally ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 73–74 (1990).

6. STEWART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* 35–43 (2005) (reviewing colonial recognition of Indian property rights).

7. See Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 40 (1947) (describing a 1636 land transaction between Indians and European colonists "who were for many decades outnumbered by the Indians and unable to defeat any of the more powerful Indian tribes in battle").

8. See DANIEL R. MANDELL, *KING PHILIP'S WAR* 3–4 (2010) (describing how English property concepts led to conflicts between Indians and colonists); see also VINE DELORIA, JR., *INDIANS OF THE PACIFIC NORTHWEST* 64–68 (1977) (describing how land encroachment by white settlers led to military conflict between tribes and the United States in the mid-1850s).

the 1850s, was marked by agreements reflecting the treatment of Indian nations in a fashion similar to international relations among European Nations.<sup>9</sup> In the initial HANDBOOK OF FEDERAL INDIAN LAW, Felix Cohen noted that for all but the last decade of the treaty-making period, “terms familiar to modern international diplomacy were used in the Indian treaties. . . Many provisions show the international status of the Indian tribes, through clauses relating to war, boundaries, passports, extradition, and foreign relations.”<sup>10</sup>

Chief Justice Marshall, in the 1823 landmark decision, *Johnson v. M'Intosh*, summarized the rights of the Native nations as follows:

They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.<sup>11</sup>

While *Johnson v. M'Intosh* considered property rights of Indian nations vis-à-vis the colonizing nations, the Court in 1831 addressed a controversy over Georgia's imprisonment of a missionary, Sam Worcester, who had entered Cherokee territory with tribal consent, but allegedly in violation of state law. The Supreme Court rejected Georgia's claim to legislative power over the Cherokee territory and those within it—both Indian and non-Indian.<sup>12</sup> The Court's analysis did not depend on property ownership; instead, the Court reasoned that Georgia's efforts violated the “pre-existing power of the nation to govern itself.”<sup>13</sup> Because that right was protected under federal law, Georgia's laws could not operate upon the non-Indians present within the Cherokee territory.<sup>14</sup>

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9. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, at § 1.03.

10. FELIX S. COHEN, U.S. DEP'T OF INTERIOR, HANDBOOK OF FEDERAL INDIAN LAW 39 (1942); *see also* ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE 1600-1800 (1997).

11. *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823). This tribal property interest is commonly known as aboriginal title, or Indian title.

12. *Worcester v. Georgia*, 31 U.S. 515, 552 (1832).

13. *Id.* at 562.

14. While the United States eventually asserted power to adjust the jurisdictional arrangements of Indian nations, the courts developed an interpretive rule that tribal auton-

That treatment declined as the United States subdued Indian tribes through disease, steadily increasing population, and increasing military might. The result was the cession of vast tribal territory to the United States in exchange for various payments, services, and the retention of smaller reservations.<sup>15</sup> The tribes did obtain meaningful concessions in the form of reserved lands and important off-reservation hunting and fishing rights in treaty negotiations, but the exchange of value was mostly one-sided.<sup>16</sup> In the late 19th Century, pressure increased to diminish the Indian land base even further to aid non-Indian exploitation of natural resources and settlement. In 1887, Congress passed the Dawes Act, or General Allotment Act, beginning the process to allow for the large-scale transfer of communally held tribal lands to individual tribal members and outright transfers of so-called “surplus lands” to the federal government.<sup>17</sup> This had two effects. First, the Dawes Act allowed Indian-owned allotments within reservation boundaries, which were originally restricted from alienation for a twenty-five year period, to be transferred to non-Indians.<sup>18</sup> Second, the surplus lands within reservation boundaries were opened to homesteading and other forms of use under the laws encouraging settlement of the public domain.<sup>19</sup> This resulted in “checkerboard” patterns of landownership within many Indian reservations in the western United States.<sup>20</sup> The Indian land base was reduced from nearly 140 million acres to 48 million acres.<sup>21</sup> The transfers set the stage for a long series of jurisdictional conflicts between Indian tribes, the states, and non-Indians residing in “Indian country,” which had no twentieth-century statutory definition until 1948.<sup>22</sup>

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omy, sovereignty, and property rights remain intact until explicitly altered by Congress. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, § 2.02; *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (“[U]ntil Congress acts, the tribes retain’ their historic sovereign authority.”).

15. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, § 1.03.

16. See Robert T. Anderson, *Treaty Substitutes in the Modern Era*, ch. 11, in *THE POWER OF PROMISES, RETHINKING INDIAN TREATIES IN THE PACIFIC NORTHWEST*, (Alexandra Harmon ed. 2008); see also CHARLES F. WILKINSON, *MESSAGES FROM FRANK’S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY* 11, 14 (2000); FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 134 (abr. ed. Uni. of Nebraska Press 1986).

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

18. *Id.* at 10-12.

19. *Id.* at 13-14.

20. See *Solem v. Bartlett*, 465 U.S. 463 (1984).

21. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, § 1.04.

22. *Id.* § 1.06. The phrase was defined in the early Trade and Intercourse Acts, but

The modern definition of “Indian country” is found in 18 U.S.C. § 1151, and includes reservations, allotments, and dependent Indian communities. The 1948 statute decoupled land ownership from jurisdiction within reservations by defining Indian country as including “all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.”<sup>23</sup> The apparent effect of the statute was to reverse several Supreme Court cases holding that land owned in unrestricted fee simple within Indian reservation boundaries was not considered Indian country, absent a particular statutory or treaty exception.<sup>24</sup> But this provision was not construed by the Supreme Court until 1962 in *Seymour v. Superintendent*, when the Court confirmed that Congress intended to avoid review of the ownership of particular parcels of land in order to determine which government would have jurisdiction over crimes within reservation boundaries.<sup>25</sup> Thus, after 1948, the nature of the title to an individual parcel of land inside reservations had no bearing on its jurisdictional treatment as Indian country.<sup>26</sup>

The extent of tribal authority over non-members on non-member owned land steadily declined after 1981, as the Court resurrected the importance of property ownership within reservations in the civil jurisdiction context.<sup>27</sup> In that year, the Court decided *Montana v. United States*, which effectively reversed the presumption that tribes had full civil regulatory authority over all people within Indian country.<sup>28</sup> Instead, the Court developed an approach that narrows tribal jurisdiction over non-members on non-member land.<sup>29</sup> In 2008, the Court went even further, stating that the presumption against tribal authority over non-members “is particularly

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the definition was dropped from the Revised Statutes in 1874. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, § 3.04 (discussing R.S. § 5596 (effective June 22, 1874)).

23. 18 U.S.C. § 1151(a) (2014).

24. See, e.g., *Clairmont v. United States*, 225 U.S. 551, 560 (1912) (concluding that “the right of way had been completely withdrawn from the reservation by the surrender of the Indian title and that in accordance with the repeated rulings of this court it was not Indian country.”); *Dick v. United States*, 208 U.S. 340 (1908) (finding allotment transferred to non-Indian ceased to be subject to federal Indian liquor laws).

25. *Seymour v. Superintendent*, 368 U.S. 351 (1962).

26. *Id.* at 358.

27. See sources cited *supra* note 3.

28. *Montana v. United States*, 450 U.S. 544 (1981).

29. *Id.* at 565-66. See *supra* note 3 for criticism of the Court’s approach.

strong when the nonmember's activity occurs on land owned in fee simple by non-Indians—what we have called non-Indian fee land."<sup>30</sup> Despite widespread academic criticism of the development of this modern presumption, it seems that it is here to stay unless there is a drastic change in the prevailing view of the Court.<sup>31</sup> The importance of this line of authority to Indian water rights is explored in Part III, after this article discusses the nature of property rights in water.

### III. INDIAN WATER RIGHTS ESTABLISHED UNDER FEDERAL LAW ARE GENERALLY DISTINCT FROM AND SUPERIOR TO STATE WATER RIGHTS

This section compares state rights under the prior appropriation doctrine with tribal reserved rights established under federal law. While federal law regarding water has significant aspects that at times incorporate and also preempt state law, Congress has often deferred to state law when Indian rights are not at issue.<sup>32</sup> However, Indian water rights generally have superior legal standing in relation to state rights based on original tribal ownership of what is now the United States. This legal standing is further supported with treaties, statutes and Executive Orders that preempt state law. Legal superiority notwithstanding, the fact that non-Indians have enjoyed the use of waters previously reserved by and for Indian tribes under federal law creates a powerful incentive for policy-makers and courts to sometimes minimize senior tribal rights. Many state rights were established during times when federal policy was geared toward assimilating Indian peoples. Non-Indian users were often aided by federal programs operated by the Bureau of Reclamation to develop large irrigation projects in derogation of tribal rights. These inconsistent policies and legal interpretations have since fueled sharp and protracted conflicts.

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30. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 328 (2008) (internal quotation marks omitted).

31. For a comprehensive review of relevant cases and commentary, see Sarah Krakoff, *Tribal Civil Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187 (2010).

32. See L. OF WATER RIGHTS AND RESOURCES, § 5.9 (West 2014) (discussing *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935)).

### A. State Water Law in the Western States

Water law in the western states is governed chiefly by the law of “prior appropriation,”<sup>33</sup> which developed to deal with arid conditions unfamiliar to the common law of England and the moist climate of the eastern states.<sup>34</sup> While some states have constitutions or code provisions that declare water the property of the state,<sup>35</sup> the reality is that water in situ is not really “owned” by anyone. Rather, any so-called state ownership reflects the public nature of water in the sense that it is available for all to use, subject to governmental regulation.<sup>36</sup> The question inevitably becomes who or what has the right to use water for some purpose considered useful by society. This notion of providing legal protection only for “beneficial uses” of water remains the touchstone of western water law, but the definition of beneficial use has changed over time. Before the late twentieth century, instream flow values of water were largely ignored—aside from the need to maintain navigability.

The prior appropriation doctrine developed as a method of allocating surface water, but in many states it is applied to groundwater as well.<sup>37</sup> In general, prior appropriation regimes reward the first party who physically removes water from a stream for beneficial use by granting that party a senior right to divert that amount of water—first in time is thus first in right.<sup>38</sup> In periods of shortage, the date of initial diversion determines priority among competing

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33. The states are Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington and Wyoming. *See generally* 1-11 WATERS AND WATER RIGHTS § 11.04(a) (LexisNexis 2009). Three of these states—California, Nebraska, and Oklahoma—also recognize some measure of riparian rights. *See* L. OF WATER RIGHTS AND RESOURCES, *supra* note 32, § 5:13. Most of the remaining states follow some form of the riparian water rights system, which is premised on shared use rights by property owners adjacent to water bodies. Most litigation regarding Indian water rights occurs in the western states, although the issues have come up in at least one riparian jurisdiction. *See* Judith V. Royster, *Winters in the East: Tribal Reserved Rights to Water in the Riparian States*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 169 (2000).

34. *See* WATERS AND WATER RIGHTS, *supra* note 33, § 11.01; *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 449 (1882) (“The doctrine of priority of right by priority of appropriation for agriculture is evoked, as we have seen, by the imperative necessity for artificial irrigation of the soil.”).

35. *Waters and Water Rights*, *supra* note 33, § 30.04.

36. *Cf. Ickes v. Fox*, 300 U.S. 82 (1937) (holding Bureau of Reclamation’s use of water at a reclamation project does not vest the government with water rights, instead such rights remain for use by landowners).

37. *See* WATERS AND WATER RIGHTS, *supra* note 32, § 11.06(c), § 12.02(d).

38. *See* L. OF WATER RIGHTS AND RESOURCES, *supra* note 32, § 5:30.

use rights. A water right holder may lose her right by abandonment, or by forfeiture, which is the unexcused failure to use the water for a specified period of time under state law.<sup>39</sup> In short, states generally require continuous beneficial use of the water to maintain the right.

Western water users and politicians zealously defend state prior appropriation systems and rights, although practical adherence to the doctrine is suspect<sup>40</sup> The same reluctance to embrace change, or enforce the doctrine strictly, operates as a powerful incentive to prevent the use of senior Indian rights ignored or deliberately neglected by the United States government. Historically non-Indian users have readily used Indian water—both on and off reservations—creating a situation where superior Indian legal rights and moral claims must overcome powerful countervailing interests.<sup>41</sup>

For a variety of reasons, Indian reserved rights do not depend on putting water to beneficial use—but are recognized as part of a tribe's original ownership of reservation territory, or as established by federal actions setting aside tribal territory. In either case, tribal water rights generally are senior in priority to non-Indian uses established under state prior appropriation law as such rights are ranked by date of first use.

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39. *Id.* §§ 5:88-5:90.

40. John D. Leshy, *Notes on a Progressive National Water Policy*, 3 HARV. L. & POL'Y REV. 133, 139 (2009). See also Reed D. Benson, *Maintaining the Status Quo: Protecting Established Water Uses in the Pacific Northwest, Despite the Rules of Prior Appropriation*, 28 ENVTL. L. 881, 890 (1998) ("With rare exceptions, states abide by the following basic precepts: 1) enforce the law only when necessary, 2) change the law where needed to protect existing uses, 3) avoid the position of having to curtail established water uses, and 4) prevent instream demands from threatening existing out-of-stream uses."); A. Dan Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric?*, 76 N.D. L. REV. 881 (2000); Charles F. Wilkinson, *In Memoriam: Prior Appropriation 1848-1991*, 21 ENVTL. L. xxix, xxxiv (1991) ("State law really is no law."); John Leshy, *The Prior Appropriation Doctrine of Water Law in the West: An Emperor with Few Clothes*, 29 J. OF THE WEST 5 (1990) ("[C]lassic prior-appropriation doctrine has become so riddled with exceptions and limitations as to lose its descriptive utility."); Michael V. McIntire, *The Disparity Between State Water Rights Records and Actual Water Use Patterns: "I Wonder Where the Water Went?"*, 5 LAND & WATER L. REV. 23, 26 ("Most of the western states experienced significant deviations between the actual practices of water users in the field and the information recorded in the office of the water administration officials.").

41. See DANIEL MCCOOL, NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA 36 (2002) (noting the "stark contrast between the federal government's abject parsimony when funding Indian water development and its gratuitous generosity when funding non-Indian development").

B. *Indian Reserved Water Rights Include Consumptive and Non-Consumptive Uses Created by Original Indian Ownership, or Implication*

This section sets out the legal and moral arguments accepted by the courts as the foundation of the Indian reserved rights doctrine, and consequent conflicts with state water law. Indian aboriginal title includes the right of indigenous peoples to use and occupy their land, and is valid against all parties but the United States.<sup>42</sup> But what about Indian water rights? The Indian tribes existed before the establishment of the United States, or of any state for that matter. Did their aboriginal property rights include water? If so, how much? And was there acknowledgement of rights to water as a matter of federal law? As shown below, Indian water rights have a strong pedigree, and are recognized as arising: 1) out of original Indian ownership of their territories; and 2) from federal actions in the form of treaties, statutes, and Executive Orders setting aside Indian reservations. In marked contrast to early state law, these reservations of land included implied promises of sufficient water for myriad uses—including irrigation, fish and wildlife habitat protection, and the development of permanent homelands.

In the late nineteenth and early twentieth centuries, the federal government commenced a policy of assimilating Indians into the general population with an expectation that traditional modes of life and decision-making would fall by the wayside.<sup>43</sup> Establishing reservation homelands as a base for agricultural economies was one important part of the federal assimilation policy.<sup>44</sup> In order to obtain tribal consent to land cessions to the United States, many tribes secured treaty guarantees of off-reservation hunting and fishing rights. In *United States v. Winans*, the Supreme Court considered the rights of Yakama Nation members to cross privately owned land in order to exercise off-reservation treaty rights.<sup>45</sup> The Confederated Tribes of the Yakama Reservation had ceded most of their aboriginal land to the United States in 1855 in exchange for exclusive rights to occupy a smaller reservation, in addition to “the

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42. *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823).

43. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, § 1.04. At the same time, Indians and their lands generally remained beyond the reach of state law—including state water law. *Id.* § 6.01(2).

44. See REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, S. EXEC. DOC. NO. 31-1, at 35-45 (Nov. 27, 1850) (extolling the virtues of agricultural labor).

45. *United States v. Winans*, 198 U.S. 371 (1905).

right of taking fish at all usual and accustomed places, in common with the citizens of the Territory."<sup>46</sup> Private landowners argued that since their patents from the United States government said nothing about an easement for access to Indian fishing sites on the now-private land, one should not be implied. The Court rejected the argument because a reserved right to fish would be meaningless without access to fishing sites. The Court found that the treaty "imposed a servitude upon every piece of land as though described therein."<sup>47</sup> This followed from the principle that Indian treaties are "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."<sup>48</sup> This implied reservation theory quickly ran up against the state-based rights of non-Indian water users.

In *Winters v. United States*, the Supreme Court held that when the federal government set aside land for the Fort Belknap Indian Reservation in Montana, it impliedly reserved sufficient water from the Milk River to fulfill its purpose for creating the reservation, which was to provide a permanent tribal homeland with an agricultural economy.<sup>49</sup> Nonetheless, non-Indians who had settled upstream of the reservation claimed paramount rights to use water from the Milk River based on the state law of prior appropriation. If the state law of prior appropriation applied, the Fort Belknap Indian water rights would apparently be junior to the rights of the non-Indian settlers. The United States—as trustee to the tribes—sued the non-Indians, arguing that Congress, in 1888, had reserved rights to sufficient water under prior appropriation, riparian, or "other law," to fulfill the purpose of establishing the reservation.<sup>50</sup>

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46. Treaty with the Yakamas, art. 3, 1855, 12 Stat. 951. The phrase "usual and accustomed grounds and stations" was used in a number of treaties entered into between the United States and Pacific Northwest tribes. It simply refers to the locations at which tribal members customarily fished. FAY G. COHEN, TREATIES ON TRIAL: THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS 37-38 (1986).

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

48. *Id.*

49. *Winters v. United States*, 207 U.S. at 577. For a comprehensive review of the Indian reserved rights doctrine, see COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, § 19.03.

50. The Complaint alleged that "notwithstanding the riparian and other rights of [the United States] and of the said Indians to the uninterrupted flow of the waters of all the waters of said Milk river," the defendants, in 1900, wrongfully built dams and reservoirs and diverted the waters of the river from its channel, and thus deprived the United States

The non-Indian irrigators forcefully argued that their uses began prior to the Indian uses (except for a small uncontested amount), and that their investments and rights would be rendered valueless. The argument as constructed by the court of appeals was simple and logical: if the Indians were to become farmers as contemplated by the 1888 agreement creating the reservation, they would need water, and that water was reserved by the agreement.<sup>51</sup> The Supreme Court affirmed by holding that the federal government had the power to exempt waters from appropriation under state water law, and that the United States intended to reserve the waters of the Milk River to fulfill the purposes of the agreement between the Indians and the United States.<sup>52</sup> The Court accordingly upheld an injunction limiting non-Indian use to the extent it interfered with the current needs of the tribes.

The ruling in *Winters* was a departure from the federal government's general deference to state water law in the arid West.<sup>53</sup> However, the open-ended nature of the tribes' reserved water rights became a source of discontent among the western states and non-Indian water users, because Indian reserved rights could effectively get to the front of the line ahead of state water rights.<sup>54</sup> Thus, state-law appropriators could establish rights relative to one another but never be certain if an up- or downstream Indian tribe might have a senior reserved right, and if so, of its quantity. The fear

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and the Indians of the use of water from the river. Bill of Complaint ¶ 14, *Winters v. United States*, 143 F. 740 (9th Cir. 1906) (No. 1336). See JOHN SHURTS, INDIAN RESERVED WATER RIGHTS: THE WINTERS DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT, 1880S-1930S 69-75 (2000) (characterizing the United States' Complaint as encompassing facts to support prior appropriation, riparian, or reserved rights theories).

51. *Winters*, 143 F. at 749.

52. *Winters*, 207 U.S. at 576-77. See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, § 19.02.

53. See David H. Getches, *The Unsettling of the West: How Indians Got the Best Water Rights*, 99 MICH. L. REV. 1473, 1481-83 (2001) (book review) (explaining that despite remnants of riparianism in the West, the prior appropriation doctrine was the overwhelming rule in the western states by 1908); see also William H. Hunt, *Law of Water Rights*, 17 YALE L. J. 585, 586 (1908) ("Furthermore, the courts have steadily held that the right to the use of running water may be had only for beneficial uses, and can be acquired only by actual appropriation. This tendency on the part of judicial decision has become more pronounced as the settlement of the country has advanced; and as it has become more apparent that the actual user of water is the person who should be favored, as against one who would hold or appropriate without actual use.").

54. This is because the Indian rights are established by operation of law and do not depend on withdrawing water from a source and applying it to a beneficial use as under state prior appropriation law. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, § 19.03(3).

among these users was that the exercise of Indian reserved rights might destroy or undermine their investments in infrastructure to utilize water.<sup>55</sup> Some early to mid-twentieth century cases in lower federal courts also recognized implied Indian reserved water rights but did not quantify the amount reserved with any finality.<sup>56</sup> While *Winters* set out the basic parameters of the Indian reserved water rights doctrine, there have been few other Supreme Court cases dealing with the nature of the rights.<sup>57</sup> It was not until 1963 in *Arizona v. California* that the Supreme Court devised a methodology for fully quantifying Indian reserved rights to deal with the open-ended decree problem.

The *Arizona v. California* decision primarily involved the division of the water among the Colorado River Basin states, but the Supreme Court also used the case as a vehicle to weigh in on the preferred method of quantification of Indian reserved water rights.<sup>58</sup> The United States intervened on behalf of several Colorado River Indian tribes and asserted claims for full and permanent allocations of water rights to the tribes.<sup>59</sup> The claims went a step beyond the ruling of *Winters*, which had resulted in an injunction against certain uses but had left the tribes with an open-ended decree. The Supreme Court agreed that a final quantification was desirable and endorsed the practicably irrigable acreage (PIA) meth-

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55. There was in fact little interference with state law rights due to the general lack of development of Indian water rights on the ground. The National Water Commission in 1973 concluded that “[i]n the history of the United States Government’s treatment of Indian tribes, its failure to protect Indian water rights for use on the reservations it set aside for them is one of the sorrier chapters.” NAT’L WATER COMM’N, WATER POLICIES FOR THE FUTURE—FINAL REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES 475 (1973). See also Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 NAT. RESOURCES J. 399, 414-18 (2006) (describing historical federal treatment of Indian water rights).

56. See *Conrad Inv. Co. v. United States*, 161 F. 829 (9th Cir. 1908); *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321 (9th Cir. 1956) (both cases recognizing reserved rights that could increase as tribal needs expanded).

57. *United States v. Powers*, 305 U.S. 527, 532 (1939) (finding that successors to allotment owners acquired right to use a portion of the water right originally reserved by a tribe under the *Winters* doctrine). The only other Supreme Court cases on the merits of Indian water rights are *Winters* and *Arizona v. California*, discussed in note 4, *supra*. See *supra* text accompanying notes 15-22 (discussing allotment policy).

58. *Arizona v. California* (*Arizona I*), 373 U.S. 546, 600-01 (1963).

59. *Id.* See *Arizona v. California*, 460 U.S. 605, 608-09, (1983) (“[The] United States intervened, seeking water rights on behalf of various federal establishments, including the reservations of five Indian tribes—the Colorado River Indian Tribes, Fort Mojave Indian Tribe, Chemehuevi Indian Tribe, Cocopah Indian Tribe, and Fort Yuma (Quechan) Indian Tribe.”).

od<sup>60</sup> which allowed a quantification of reserved water rights for the present and future needs of the Indian reservations adjacent to or near the river. In general, the PIA test evaluates tribal lands for their irrigation potential in an economically feasible manner to arrive at a final quantification for reservations with an agricultural purpose.<sup>61</sup> In a later phase of the case, the Court also approved the use of agricultural water for non-agricultural uses if the tribes wished.<sup>62</sup> The only other Indian water rights case to reach the Court on the merits was *Wyoming v. United States*, which involved Wyoming's general adjudication of water rights to the Big Horn River, including the rights of the Shoshone and Arapahoe Tribes.<sup>63</sup> Although review was granted to consider the Wyoming Supreme Court's application of the PIA standard, the equally divided Court did not issue an opinion on the matter.<sup>64</sup> Several lower federal courts and state courts, however, have considered uses beyond agriculture.

In litigation involving the Confederated Tribes of the Colville Indian Reservation in the early 1980s, the Ninth Circuit held that

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60. *Id.* ("We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.")

61. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, § 19.03[5].

62. *Arizona v. California (Arizona II)*, 439 U.S. 419, 422-23 (1979), *amended by Arizona v. California*, 466 U.S. 144 (1984) ("The foregoing reference to a quantity of water necessary to supply consumptive use required for irrigation . . . shall constitute the means of determining quantity of adjudicated water rights . . . but shall not constitute a restriction of the usage of them to irrigation or other agricultural application."); see *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 49 (9th Cir. 1981) ("use of reserved water is not limited to fulfilling the original purposes of the reservation"); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, at 1225 (discussing principles behind change in use rule).

63. *Wyoming v. United States*, 492 U.S. 406 (1989); see Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. Colo. L. Rev. 683, 703 (1997) ("On January 23, 1989, the Supreme Court granted certiorari to review whether the Wyoming Supreme Court had erred in applying the PIA standard to calculate the Indian reserved water rights"). The Wyoming state courts assumed jurisdiction pursuant to the McCarran Amendment. 43 U.S.C. § 666 (1952). That statute waives the United States' sovereign immunity in state general stream adjudications such that state courts obtain jurisdiction to quantify federal and Indian water rights. See *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 548-49 (1983). The grant of jurisdiction to adjudicate federal and Indian reserved rights does not include state administrative authority to regulate Indian use of the reserved right. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, at 1238-39.

64. *Wyoming*, 492 U.S. at 407. The Wyoming Supreme Court had awarded what the irrigation community considered a generous amount of water for present and future use under the PIA standard. See Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. COLO. L. REV. 683, 696, 702 n.133 (1997).

the Tribes reserved water for both agricultural and fisheries purposes.<sup>65</sup> The court stated that the “[t]he general purpose [of the reservation], to provide a home for the Indians, is a broad one and must be liberally construed. We are mindful that the reservation was created for the Indians, not for the benefit of the government.”<sup>66</sup> The court concluded that the Colville reservation, like most reservations in the West, had been set aside for agricultural purposes. But due to the tribe’s demonstrated traditional reliance on fisheries resources, the court also found that water needed to support tribal fisheries was reserved.<sup>67</sup> Just two years later, in *United States v. Adair*, the Ninth Circuit considered claims by the United States and the Klamath Tribes to water needed to maintain in-stream flows and lake levels to protect treaty rights to fish, wildlife, and plants.<sup>68</sup> The court applied the *Winans* rationale in evaluating the Klamath Tribe’s water rights:

[T]he 1864 Treaty [with the Klamaths] is a recognition of the Tribe’s aboriginal water rights and a confirmation to the Tribe of a continued water right to support its hunting and fishing life-style on the Klamath Reservation. Such water rights necessarily carry a priority date of time immemorial. The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights.<sup>69</sup>

The Klamath Tribes also claimed reserved water to provide irrigation for individual Indians who had received allotments of tribal land. The court stated that “*New Mexico and Cappaert*, while not directly applicable to *Winters* doctrine rights on Indian reservations [because they involve only federal lands], establish[ed] several useful guidelines.”<sup>70</sup> The court explained, “[w]hile the pur-

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65. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47-49 (9th Cir. 1981). The Executive Order creating the reservation provided: “It is hereby ordered that . . . the country bounded on the east and south by the Columbia River, on the west by the Okanagan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.” Executive Order of July 2, 1872, reprinted in 1 CHARLES J. KAPPLER, *INDIAN AFFAIRS AND TREATIES*, 916 (2d ed. 1924).

66. *Walton*, 647 F.2d at 47 (citations omitted).

67. *Id.* at 48.

68. *United States v. Adair*, 723 F.2d 1394, 1397 (9th Cir. 1984).

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

70. *Id.* (citation omitted).

pose for which the federal government reserves other types of lands may be strictly construed, . . . the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained.”<sup>71</sup> On remand to the state court system for quantification, there were years of litigation regarding the state system’s merit under the McCarran Amendment, culminating in a decision permitting the Oregon courts to proceed with the adjudication of the Klamath River Basin.<sup>72</sup> State courts exercising their jurisdiction under the McCarran Amendment<sup>73</sup> have also applied the reserved rights doctrine in a number of cases involving water for fisheries. In *State Department of Ecology v. Yakima Reservation Irrigation District*, the Washington Supreme Court recognized Indian reserved rights to instream flows for fisheries habitat protection,<sup>74</sup> and later affirmed a trial court ruling that the Yakima reserved right to instream flows extends to off-reservation waters necessary to provide fisheries habitat.<sup>75</sup>

Decisions from the Arizona Supreme Court and the Wyoming Supreme Court present an interesting contrast to each other, and take approaches that vary from the Ninth Circuit decisions in *Col-*

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71. *Id.* at 1408 n. 13, (quoting WILLIAM C. CANBY, *AMERICAN INDIAN LAW* 245-46 (1981)).

72. *See* *United States v. Oregon*, 44 F.3d 758, 767-69 (9th Cir. 1994) (upholding state jurisdiction over litigation effected pursuant to initial administrative adjudication scheme despite exclusion of groundwater and being limited to pre-1908 water rights); Brief of United States in Opposition to Petition for Cert. at 10, *Klamath Tribe v. State of Oregon*, Dep’t of Water Res., 1995 WL 17047729.

73. *See* 43 U.S.C. § 666 (1952).

74. *State Dep’t of Ecology v. Yakima Reservation Irrigation Dist.*, 850 P.2d 1306, 1317 (Wash. 1993) (en banc) (“All of the parties to this litigation agree that the Yakima Indians are entitled to water for irrigation purposes and, at least at one time, were entitled to water for the preservation of fishing rights. The disagreement here is the extent of the treaty rights remaining.”); *see, e.g.*, *Joint Board of Control of Flathead Irrigation Dist. v. United States*, 832 F.2d 1127, 1132 (9th Cir. 1987) (reversing trial court’s refusal to issue injunction to protect tribal water rights for fish); *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032 (9th Cir. 1985) (holding district court acted appropriately in ordering release of water to protect habitat for the fishery); *United States v. Anderson*, 591 F. Supp. 1, 5 (E.D. Wash. 1982), *aff’d in part & rev’d in part*, 736 F.2d 1358 (9th Cir. 1984) (recognizing a reserved tribal water right for water needed to maintain favorable temperature conditions to support the fishery); *State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 712 P.2d 754, 764-66 (Mont. 1985) (recognizing that tribal reserved rights may include water for fisheries as well as agriculture and other purposes).

75. *In re Yakima River Drainage Basin*, 296 P.3d 835, 840 (Wash. 2013) (en banc) (“[The] nation also has a right that dates from time immemorial to adequate water to sustain fish and other aquatic life in Ahtanum Creek [which extends beyond reservation lands].”)

*ville* and *Adair*. In the general stream adjudication of the Gila River, the Arizona Supreme Court endorsed a “homeland” theory that used a broad interpretive approach looking to the general purpose behind the establishment of Indian reservations.<sup>76</sup> The court concluded that the essential purpose of Indian reservations is to provide Indian tribes with a permanent home and abiding place with a “livable” environment, and prescribed a multi-factor test for ascertaining the amount of water reserved.<sup>77</sup> It expressed concern, however, that awarding “too much water” to tribes under the PIA analysis would be inconsistent with a “minimal need” approach it borrowed from the non-Indian federal reserved water cases.<sup>78</sup> Relegating the PIA measure to a matter merely for consideration as part of a total award focused on “minimal need” seems to invite state trial courts to balance reserved rights against non-Indian uses to avoid adverse effects on state water rights<sup>79</sup>—an approach rejected by the Supreme Court in *Cappaert v. United States*.<sup>80</sup> Leading

76. *In re* the General Adjudication of All Rights to Use Water in the Gila River System, 35 P.3d 68, 74, 77-79 (Ariz. 2001) [hereinafter *Gila River*]. The *Gila River* decision involved several reservations in Arizona that had been established in part by treaty and in part by Executive Orders. *Id.* at 74. For identification of the tribes involved see *In re* Determination of Conflicting Rights to Use of Water from Salt River Above Granite Reef Dam, 484 F. Supp. 778, 784 (D. Ariz. 1980), *rev'd sub nom.*; *San Carlos Apache Tribe of Ariz. v. State of Ariz.*, 668 F.2d 1093 (9th Cir. 1982), *rev'd sub nom. Ariz. v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545 (1983) (holding that the federal court should abstain from exercising jurisdiction and that Indian water rights could be determined in state court proceedings under the McCarran Amendment).

77. *Gila River*, 35 P.3d at 79-81.

78. *Id.* at 78 (“Another concern with PIA is that it forces tribes to pretend to be farmers in an era when ‘large agricultural projects . . . are risky, marginal enterprises.’”) (quoting Martha C. Franks, *The Uses of the Practicably Irrigable Acreage Standard in the Quantification of Reserved Water Rights*, 31 NAT. RESOURCES J. 549, 578 (1991)).

79. The Arizona Supreme Court stated:

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

*Gila River*, 35 P.3d at 79, 81.

80. *Cappaert v. United States*, 426 U.S. 128, 138-39 (1976) (“Nevada argues that the cases establishing the doctrine of federally reserved water rights articulate an equitable

commentators also share pessimism regarding the wisdom of the Arizona approach,<sup>81</sup> and it remains to be seen whether it will ever be implemented.<sup>82</sup>

The Wyoming Supreme Court, on the other hand, adhered strictly to the PIA standard in its *Big Horn* decision. It rejected claims for other uses such as instream flows for fisheries or mineral and industrial development.<sup>83</sup> The court's approach, however, seems incorrect in its narrow construction of the purposes of a reservation by excluding water for fisheries, industrial, and other purposes.<sup>84</sup> While the court did hold that municipal, domestic, and commercial uses were subsumed within the agricultural right,<sup>85</sup> it later compounded its erroneously narrow treaty construction by refusing to permit the tribe to change the use of a portion of its agricultural water to instream flows to enhance fisheries habitat.<sup>86</sup> As I have noted elsewhere, this climate of uncertainty in litigation outcomes can lead tribes and states to forge settlements that may be approved by Congress.<sup>87</sup>

Quantification of Indian reserved water rights can be a gargantuan task. Most of the cases discussed above were brought by the United States as trustee on behalf of tribes, or initiated as general stream adjudications by states in their own court systems. It often takes decades for litigation to run its course—a course that may be interrupted by failed attempts to negotiate a settlement. Even when the parties *can* reach a settlement, Congress may not be willing to take action to ratify the agreement or provide funds needed

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doctrine calling for a balancing of competing interests. However, an examination of those cases shows they do not analyze the doctrine in terms of a balancing test.”).

81. WILLIAM C. CANBY, *AMERICAN INDIAN LAW* 500-01 (6th ed. 2015); COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW*, *supra* note 4, § 19.03[5](b) (“Although the Arizona court's approach avoids the problems inherent in PIA, its focus on minimal needs ultimately may leave some tribes with less water than the imperfect PIA standard.”).

82. In 2004, the claims of several Arizona tribes involved in the litigation were settled. Arizona Water Settlements Act of 2004, Pub. L. No. 108-451, 118 Stat. 3478. *See In re the General Adjudication of All Rights to Use Water in the Gila River System*, 224 P.3d 178 (Ariz. 2010) (en banc) (approving Gila River Indian Community Settlement).

83. *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 98-99 (Wyo. 1988) (applying the primary purpose test strictly), *aff'd by an equally divided court sub nom.*, *Wyoming v. United States*, 492 U.S. 406 (1989) [hereinafter *Big Horn*].

84. *See* COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW*, *supra* note 4, § 19.03[4].

85. *Big Horn*, 753 P.2d at 99.

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

87. *See* Anderson, *supra* note 4, at 1153-54.

to make the deal work.<sup>88</sup> The tribes and the United States as trustee have focused on litigation and settlements to quantify tribal rights. There are twenty-seven settlements confirmed by Congress,<sup>89</sup> and there are another thirty-two tribes with federal settlement teams appointed to participate in negotiations that take place in a litigation context.<sup>90</sup> Leaving aside the 226 Alaska tribes, there are roughly 250 tribes with unquantified water rights.<sup>91</sup> State law water users, states, Indian tribes, and the United States may not always engage in further litigation to resolve quantification issues, but if they do, it is always a daunting task.

The next Part adds to the complexity with a review of tribal regulatory power over reservation water resources—an area that has received almost no attention from the courts and little from the commentators.

#### IV. TRIBAL JURISDICTION OVER NON-MEMBERS IN THE WATER USE CONTEXT—THE *WALTON* AND *ANDERSON* CASES.

Although Indian nations have expansive, inherent authority over their own members within Indian country<sup>92</sup> and over non-members on Indian lands, civil jurisdiction over non-members has been curtailed in recent years.<sup>93</sup> Since 1981, tribal jurisdiction over non-members has been determined, in part, by the tribal member status of the party involved and the nature of the title to the land within Indian country.<sup>94</sup> In *Montana v. United States*, the Supreme

88. *See id.* at 1153-59.

89. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, §19.05.

90. Federal Indian Water Rights Negotiation Teams for Indian Water Rights Settlements (February 2015), (on file with Secretary's Indian Water Rights Office, Department of the Interior, 1849 C Street, Washington D.C.). There are thirty-two tribes whose claims were involved at least in part in the settlements. *See* Anderson, *supra* note 4, at 1161-63.

91. This calculation is based on the fact that there are 329 tribes in the lower 48 states and the author's calculation of thirty-two tribes that are parties to settlements and no more than ten others with fully litigated rights.

92. *United States v. Wheeler*, 435 U.S. 313, 323-24 (1978).

93. *See* *Montana v. United States*, 450 U.S. 544 (1981); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, § 6.02[2].

94. *See also* *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 465 (1989) (affirming and rejecting, in plurality opinions, tribal zoning authority over non-Indian fee land based on the "Indian" character of the land). *Compare* *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 152-54 (1980) (holding tribe may tax non-member purchasers of cigarettes from tribal members on tribal lands), *and* *Montana v. United States*, 450 U.S. 544, 566-67 (1981) (finding tribe may regulate non-member hunting and fishing on tribal land), *and* *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 136 (1982) (holding tribe may tax oil company doing business on

Court established a presumption that tribes lack regulatory jurisdiction over non-members on non-member fee land.<sup>95</sup> Exceptions to this federal common law rule may be invoked when there is: 1) consent from the non-member; or 2) non-member conduct that has a significant effect on the health, welfare, or economy of the tribe.<sup>96</sup>

However, application of the *Montana* rule in the on-reservation water regulatory context is uncertain because waters subject to reserved rights are not equivalent to non-member fee lands. Even if the rule were applicable, tribal interests in protecting on-reservation water resources would seem to satisfy even the most stringent application of the test employed by the Supreme Court in recent years. The *Montana* test has largely been applied to regulation of non-member activity on fee simple land.<sup>97</sup> Rivers and lakes traversing reservations are different. Indian tribes have property interests in the waters of their reservations for agricultural, municipal, and domestic uses, and for instream flows to protect fish habitat.<sup>98</sup> The inchoate property right of the tribe in reservation waters provides a basis for regulatory authority over such waters.<sup>99</sup> Accord-

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tribal land), and *Kerr-McGee v. Navajo Tribe*, 471 U.S. 195, 201 (1985) (finding tribe may tax oil company doing business on tribal land), with *Montana*, 450 U.S. at 566 (1981) (tribe may not regulate non-member hunting and fishing on non-Indian fee land), and *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997) (recognizing no tribal jurisdiction to adjudicate tort claim arising on fee land between non-consenting non-members), and *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647 (2001) (finding no tribal jurisdiction to tax nonmember hotel guests), and *Nevada v. Hicks*, 533 U.S. 353, 347 (2001) (finding no tribal jurisdiction to adjudicate tort claim against state officer executing process for alleged off-reservation crime), and *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 320 (2008) (holding no jurisdiction to adjudicate discrimination claim against non-Indian over sale of fee land to another non-Indian).

95. See *Montana*, 450 U.S. at 566 (1981).

96. *Id.* The exceptions have been narrowly construed. See *Atkinson Trading Co. v. Shirley*, 532 U.S. at 656-58; Sarah Krakoff, *Tribal Civil Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1215 (2010).

97. The lone exception is *Hicks*, 533 U.S. at 358 n.2 (2001), which was limited to a situation involving an attempt to assert jurisdiction over a state police officer investigating an off-reservation crime.

98. See *supra* Part III.B.

99. Lakes and rivers subject to Indian reserved water rights are not “fee simple lands.” *Cf.* *Katie John v. United States*, 720 F.3d 1214 (9th Cir. 2013) (recognizing that federal reserved water rights in various federal conservation system units (CSUs) in Alaska were property interests in the water column within and adjacent to CSUs and, the United States accordingly possessed regulatory jurisdiction over the water, which is federal “public land” by virtue of the reserved rights), *cert. denied sub nom. Alaska v. Jewell*, 134 S. Ct. 1759 (2014). Tribes now also assert ownership and regulatory power over reservation waters as a matter of tribal law. See, e.g., Navajo Nation Code Ann. tit. 22 § 1103 (“The Navajo Nation

ingly, it is a situation more like the cases involving tribal lands than the *Montana* line of cases,<sup>100</sup> although at the same time it is not squarely consistent with the regulation of non-Indians present on tribal uplands.<sup>101</sup> The cases in which the *Montana* rule applied were those in which tribal interests in land were taken away by Congress and granted directly to non-Indians.<sup>102</sup> In contrast, tribes retain interests in reservation waters for a variety of purposes. Nevertheless, the two federal appellate court decisions considering tribal or state regulatory power over water looked in part to the *Montana* test to determine whether state permitting authority with regard to non-member water use was preempted.<sup>103</sup>

Before non-Indians acquired land within reservations, there was little doubt that federal and tribal law operated to the exclusion of state law.<sup>104</sup> That changed when the federal allotment policy

is the owner of the full equitable title to all of the waters of the Navajo Nation as defined in § 1104 of this subchapter, and that title resides undiminished in the Navajo Nation; the United States holds the legal title to those waters solely as trustee for the Navajo Nation. B. All rights to the use of the waters of the Navajo Nation are held subject to the overriding, prior and supreme rights, interests and governmental authority of the Navajo Nation, and the policy and provisions contained in this Code.”); Confederated Tribes of the Colville Reservation, *Colville Tribal Law and Order Code*, § 4-10-2(b), available at <http://www.colvilletribes.com/media/files/4-10.pdf> (“All rights to the use of the waters of the Colville Reservation are held by the Colville Tribes in perpetuity, for the use and benefit of the Colville Tribes, its members, other persons as authorized herein, and the lands and other resources of the Colville Reservation.”).

100. See *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 810 (9th Cir. 2011) (“*Montana* limited the tribe’s ability to exercise its power to exclude only as applied to the regulation of non-Indians on non-Indian land, not on tribal land.”).

101. In cases where the tribe has title to submerged lands, the analytic framework would not employ the *Montana* line of cases, because the *Montana* presumption itself was developed only after determining that Montana held title to the submerged land under the Big Horn River. *Montana*, 450 U.S. at 550–56. Cf. *Idaho v. United States*, 533 U.S. 262 (2001) (holding that tribe has ownership of submerged lands at Lake Coeur d’Alene). For a careful analysis of the submerged lands cases, see John P. LaVelle, *Beating a Path of Retreat from Treaty Rights and Tribal Sovereignty: The Story of Montana v. United States*, in *INDIAN LAW STORIES* at 535, 558-69 (Goldberg, Washburn and Frickey eds., 2011).

102. See *Solemn v. Bartlett*, 465 U.S. 463, 466–67 (1984) (“Congress passed a series of surplus land acts at the turn of the century to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement.”).

103. The question of whether states may regulate non-member activity on Indian reservations is usually viewed as calling for a preemption analysis. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). The *Montana* test applicable to tribal authority over non-members is in many respects the flip side of the coin.

104. See *supra* note 1. When Congress did authorize state criminal and some civil jurisdiction over Indian country to select states in 1953, it explicitly disclaimed the grant of any state authority over Indian treaty rights and water rights. Act of Aug. 15, 1953, Pub. L. No. 83-280, § 4(b), 67 Stat. 588, 18 U.S.C. § 11629(b) (current version at 28 U.S.C. § 1360(b)) (“Nothing in this section shall authorize the alienation, encumbrance, or taxa-

and consequent homesteading resulted in a substantial non-Indian presence within Indian reservations.<sup>105</sup> As the non-Indian presence on reservations increased throughout the late nineteenth and most of the twentieth century, non-Indians and states simply assumed the right to use reservation waters without federal or tribal approval.<sup>106</sup> The United States was often busy providing assistance to non-Indian water users through the Bureau of Reclamation.<sup>107</sup> Moreover, few treaties make any mention of water resources at all,<sup>108</sup> thus precluding most arguments that the United States confirmed by treaty tribal jurisdiction over non-Indian water use.<sup>109</sup>

The rules regarding tribal jurisdiction over non-tribal members have evolved over time, but only two published Ninth Circuit decisions have considered the scope of state jurisdiction over non-Indian water use within reservations. In *Colville Confederated Tribes v. Walton*, the Ninth Circuit rejected state jurisdiction over non-

tion of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community. . . ; or shall authorize regulation of the use of such property. . . .”). Cf. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411 (1968) (holding that Public Law 280 did not grant states any jurisdiction over treaty hunting, fishing and gathering rights).

105. See *supra* text accompanying notes 17-19; see also *United States v. McBratney*, 104 U.S. 621 (1882) (holding that the state, not the federal government, had jurisdiction over non-Indian v. non-Indian crime within Indian country).

106. See MCCOOL, *supra* note 41, at 26-29.

107. Anderson, *supra* note 55, at 430-31; see Reed D. Benson, *Federal Water Law and the “Double Whammy”: How the Bureau of Reclamation Can Help the West Adapt to Drought and Climate Change*, 39 *ECOLOGY L.Q.* 1049, 1053-55 (2012) (summarizing history of the Bureau of Reclamation).

108. See Treaty with the Nez Percés art. 8, June 9, 1863, 14 Stat. 647 (“The United States also agree to reserve all springs or fountains not adjacent to, or directly connected with, the streams or rivers within the lands hereby relinquished, and to keep back from settlement or entry so much of the surrounding land as may be necessary to prevent the said springs or fountains being enclosed; and, further, to preserve a perpetual right of way to and from the same, as watering places, for the use in common of both whites and Indians.”); Treaty with the Arapaho and Cheyenne, art. 2, Feb. 18, 1861, 112 Stat. 1163 (“Out of the lands so set apart and retained there shall be assigned to each member of said tribes, without distinction of age or sex, a tract of forty acres, to include in every case, as far as practicable, a reasonable portion of timber and water”); Treaty with the Chippewa, art. 2, Dec. 20, 1837, 7 Stat. 547 (“The United States agree to reserve a location for said tribe on the head waters of the Osage river, in the country visited by a delegation of the said tribe during the present year, to be of proper extent, agreeably to their numbers, embracing a due proportion of wood and water, and lying contiguous to tribes of kindred language.”). No Indian treaties refer explicitly to tribal regulatory authority.

109. This is not surprising given that governmental power by tribes over reservations wholly owned by a tribe carried with it the assumption that tribal law would control absent some federal intervention. Cf. *Ex Parte Crow Dog*, 109 U.S. 556 (1883) (finding no federal jurisdiction over murder of one tribal member by another absent explicit congressional action assuming jurisdiction).

Indian water use on the Colville Indian Reservation.<sup>110</sup> But in *United States v. Anderson*, the same circuit upheld state jurisdiction over on-reservation water use of “excess waters” by non-Indians on non-Indian land.<sup>111</sup> As explained more fully below, the state of Washington, after *Anderson*, now prefers not to exercise its regulatory authority even with regard to off-reservation water users interfering with Indian rights.<sup>112</sup> In a third case, an unpublished Ninth Circuit decision affirmed a lower court ruling that denied the Yakama Nation’s effort to regulate excess on-reservation water use by non-Indians.<sup>113</sup>

The Confederated Tribes of the Colville Reservation brought an action against Walton, a non-Indian who acquired land on the Reservation from an Indian allotment owner. The Tribes (later joined by the United States) alleged that Walton did not have the right to use water from No Name Creek for irrigation purposes and that state permits authorizing such uses were invalid.<sup>114</sup> While the court concluded that Walton was entitled to use a portion of the tribal reserved waters,<sup>115</sup> it also ruled that “when the Colville reservation was created, sufficient appurtenant water was reserved to permit irrigation of all practicably irrigable acreage on the reservation.”<sup>116</sup> The rights also extended to water for instream flows to protect tribal fisheries in Omak Lake.<sup>117</sup> It was in this context that

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110. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47-49 (9th Cir. 1981).

111. *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984). Articles considering tribal jurisdiction over water use in some detail include, Aaron H. Hostyk, *Who Controls the Water? The Emerging Balance among Federal, State and Indian Jurisdictional Claims and Its Impact on Energy Development in the Upper Colorado and Upper Missouri River Basins*, 18 TULSA L. REV. 1 (1982); Judith V. Royster, *Conjunctive Management of Reservation Water Resources: Legal Issues Facing Indian Tribes*, 47 IDAHO L. REV. 255 (2011); Steven J. Shupe, *Water in Indian Country: From Paper Rights to a Managed Resource*, 57 COLO. L. REV. 561 (1986); Steven V. Quesenberry, Timothy C. Seward & Adam P. Bailey, *Tribal Strategies for Protecting and Preserving Groundwater*, 41 WM. MITCHELL L. REV. 431, 468-478 (2015).

112. See *infra* text accompanying note 141.

113. *Holly v. Confederated Tribes and Bands of the Yakima Indian Nation*, 655 F. Supp. 557, 557-58 (E.D. Wash. 1985) (“This memorandum serves only to memorialize the court’s oral ruling of July 11, 1985, that the Confederated Tribes and Bands of the Yakima Indian Nation (Yakima Nation), do not have inherent power to regulate or administer non-Indian excess waters flowing through the Reservation.”), *aff’d sub nom*, *Holly v. Totus*, 812 F.2d 714 (9th Cir. 1987).

114. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 44 (9th Cir. 1981).

115. *Id.* at 51 (holding that district court on remand must “determine the number of irrigable acres Walton owns, and the amount of water he appropriated with reasonable diligence in order to determine the extent of his right to share in reserved water”).

116. *Id.* at 48.

117. *Id.*

the court next considered the validity of state water right permits issued to Walton.<sup>118</sup> Noting that water rights are a unitary resource, and that “regulation of water on a reservation is ‘critical to the life-style of its residents’ and the “lifeblood of the community,” the court held that the reservation’s creation preempted state regulation.<sup>119</sup> The rationale for deference to state water law was inapplicable “[w]here land is set aside for an Indian reservation, [and] Congress has [thus] reserved it for federal, as opposed to state needs.”<sup>120</sup> The court added that “[b]ecause the No Name System is located entirely within the reservation, state regulation of some portion of its waters would create the jurisdictional confusion Congress has sought to avoid.”<sup>121</sup> In addition, the court found it important that the *Walton* property had been an Indian allotment, and that the “only mention of water rights in the Allotment Act suggest[ed] continued federal control.”<sup>122</sup> The court noted that the tribe had substantial interests in regulating reservation waters because “in arid and semi-arid regions of the West, water is the lifeblood of the community.”<sup>123</sup> The case continued after remand, but full quantification of the Tribes’ reserved water rights for irrigation and fisheries purposes has never been determined.<sup>124</sup> In addition, the No Name Creek system was entirely within reservation boundaries—an important distinction in the other Ninth Circuit decision on the regulatory issue.

*United States v. Anderson* was brought by the United States to es-

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118. *Id.* at 51.

119. *Id.* at 52-53. The court also relied on *United States v. McIntire*, 101 F.2d 650 (9th Cir. 1934), which involved a challenge to water use by a tribal member who had not complied with state law. The challenge was denied on the grounds that “Montana statutes regarding water rights are not applicable because Congress at no time has made such statutes controlling in the reservation. In fact, the Montana enabling act specifically provided that Indian lands, within the limits of the state, ‘shall remain under the absolute jurisdiction and control of the Congress of the United States.’”

120. *Walton*, 647 F.2d at 53.

121. *Id.*

122. *Id.* The court noted that 25 U.S.C. § 381 provides that the Secretary of the Interior “is authorized to prescribe such rules and regulations” regarding water rights on reservations with respect to allotted lands and priority dates for reacquired tribal lands. *Cf.* Memorandum from John Leshy, Solicitor, Dep’t of Interior, to Bruce Babbitt, Sec’y of the Interior (March 30, 1995) (on file with author) (“Agricultural allottees have [water] rights tribes cannot wholly defeat; at the same time tribes have regulatory authority over reservation water use from which allottees are not immune.”).

123. *Walton*, 647 F.2d at 52.

124. *Cf. Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir.1985) (resolving only claims involving Walton and Omak Lake).

establish tribal rights to the waters of Chamokane Creek, which originates north of the Spokane Indian Reservation. The Creek forms the reservation's eastern boundary, and discharges into the Spokane River, which in turn flows into the Columbia River at the reservation's southwestern boundary.<sup>125</sup> Tribal rights to water for fisheries habitat and irrigation purposes were fully set forth in a judgment entered in 1979 and partially amended in 1982.<sup>126</sup> The district court ruled that the state may issue permits to withdraw "excess waters" on land owned by non-Indians inside the Reservation.<sup>127</sup> The district court reasoned that while state authority to issue permits on the reservation to non-Indians might create "false hopes" because all available water was awarded to the tribe for instream and irrigation use, it could not harm federal or tribal interests, which were fully quantified and would be protected by a federal water master.<sup>128</sup> The full quantification of tribal waters and appointment of a federal water master to protect tribal rights were also central to the Ninth Circuit decision affirming the lower court.

The facts in this case are readily distinguishable from the facts in the *Walton* decision. By weighing the competing federal, tribal and state interests involved, it is clear that the state may exercise its regulatory jurisdiction over the use of surplus, non-reserved Chamokane Basin waters by nonmembers on non-Indian fee lands within the Spokane Indian Reservation. Central to our decision is the fact that the interest of the state in exercising its jurisdiction will not infringe on the tribal right to self-government nor impact on the Tribe's economic welfare *because those rights*

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125. *United States v. Anderson*, 736 F.2d 1358, 1359 (9th Cir. 1984).

126. *United States v. Anderson*, No. 3643, Mem. Op. & J. at 2-3 (E.D. Wash. Sept. 12, 1979) (hereinafter Judgment). The early decisions appeared to assume that this was an adjudication of all water rights in the Chamokane Creek Basin. *See* Judgment at 5, para. X. The irrigation right was quantified at 25,380 acre feet of water to irrigate 8460 acres of land, although the Judgment allows the irrigation right to be utilized for instream flow purposes. *Id.* at 2, para. III. The decision reported in *United States v. Anderson*, 591 F. Supp. 1 (E.D. Wash. 1982) *aff'd in part, rev'd in part*, 736 F.2d 1358 (9th Cir. 1984), is only the decision on various motions to amend the Judgment, and cannot be understood without reviewing the underlying, but unpublished, Judgment. The judge currently assigned to this case recently stated his view that the case was not intended to be a general adjudication. Order Approving Water Master's 2014 Report; Ordering Parties to Meet and Confer at 2, *United States v. Anderson*, No. CV 2:72-03643 (E.D. Wash. Apr. 8, 2015).

127. Judgment at 11, para. XXIII. While the regulatory issue was important, most of the controversy dealt with the reservation of instream flows for fisheries habitat and the quantity and priority dates for water to irrigate tribal lands.

128. *Id.*

have been quantified and will be protected by the federal water master. Additionally, in view of the hydrology and geography of the Chamokane Creek Basin, the State of Washington's interest in developing a comprehensive water program for the allocation of surplus waters weighs heavily in favor of permitting it to extend its regulatory authority to the excess waters, if any, of the Chamokane Basin. State permits issued for any such excess water will be subject to all preexisting rights and those preexisting rights will be protected by the federal court decree and its appointed water master. We do not believe there is any realistic infringement on tribal rights and protected affairs.<sup>129</sup>

In drawing the jurisdictional line, the court of appeals was swayed by the "excess" nature of the waters. It now appears doubtful that there are any "excess" waters.<sup>130</sup> The court also noted that *all* tribal rights in the Chamokane Creek Basin were subject to a decree and would be protected by a federal water master. All of the tribe's claims to water for irrigation and instream flows from the Chamokane Creek Basin were adjudicated. The court also accepted the State's argument that it was developing a comprehensive management plan for the excess waters—a plan that apparently never came to pass.<sup>131</sup>

The *Anderson* litigation continues due in large part to adverse effects to instream flow in Chamokane Creek from new groundwater wells exempt from the state permitting process. The parties had assumed that certain groundwater uses could be excluded from the adjudication because their water withdrawals did not affect

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129. *Anderson*, 736 F.2d at 1366 (emphasis added).

130. It is important to understand that the notion of "excess" implies a clear understanding of what is necessary or sufficient to satisfy tribal needs. As explained earlier, most Indian tribes do not have a full quantification of their water rights, so it is really quite impossible to know for certain whether there is water available for allocation to users who might claim rights pursuant to state law—assuming state law is applied. See *supra* text accompanying notes 90-91; see also *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Stults*, 59 P.3d 1093, 1097 (Mont. 2002) (holding that the state "cannot issue beneficial water use permits for groundwater [or surface water] until the Tribes' federally reserved water rights have been defined and quantified").

131. In its infringement analysis, the Ninth Circuit found that unlike *Walton*, state jurisdiction on the Spokane Reservation would lead to no "jurisdictional confusion." *Anderson*, 736 F.2d at 1366 (West 2003). However, the case remains in litigation at least partly because groundwater pumping pursuant to state law is not subject to any advance permitting requirements, which would require a determination that unappropriated water is available. See Wash. Rev. Code Ann. § 90.44.050 (2003) (exempting certain groundwater wells from the permitting process); *Five Corners Family Farmers v. State*, 268 P.3d 892, 895 (Wash. 2011) ("withdrawals of groundwater for stock-watering purposes [under exempt-well statute] are not limited to any particular quantity.").

streamflow in the Creek. All parties and the court thought the upper basin groundwater lacked a hydrologic connection to the surface water in the Creek, but a commissioned United States Geological Survey study revealed a connection.<sup>132</sup> Now all parties agree that the 1982 Order must be amended to reflect the interconnect- edness of Upper, Middle and Lower Basins of the Creek, and the Tribe and State agree that certain non-parties to the earlier Judgment must now be regulated.<sup>133</sup> In an interesting twist, the State of Washington (which clearly has jurisdiction over off-reservation groundwater use) now takes the position that it should not be forced to regulate the off-reservation groundwater use by non-parties to the litigation.<sup>134</sup> There is no dispute that under state law, the off-reservation groundwater pumpers are junior to the tribe's right. But because they are exempt from the State's permitting requirements, it is difficult to ascertain their relative priorities as a matter of state law.<sup>135</sup> After fighting hard to achieve authority to regulate non-Indian water use on non-Indian fee land on the Spokane Reservation, the State of Washington now prefers to defer to the federal court to regulate off-reservation state groundwater users.<sup>136</sup> For its part, the United States continues to object to expanding the case and takes the position that "Ecology can now begin to regulate Upper Basin water uses as appropriate so that those uses do not impair the Tribe's senior adjudicated rights."<sup>137</sup> The Spokane Tribe wants the federal court and its appointed master to regulate all state water use in the basin—including the post-decree

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132. Order re: Hearing on the Annual Report of the Water Master at 2, No. CV 2:72-03643 (E.D. Wash. Nov. 5, 2014).

133. *Id.* at 3-4.

134. Ecology's Briefing in Response to Court Order at 1-2, *United States v. Anderson*, No. CV 2:72-03643 (E.D. Wash. Dec. 15, 2014) ("Ecology asks the Court to expand the orders in this case, ensure notice and due process in determining quantity and priority of users, and bring them under regulation of the [federal] water master.").

135. Order, *supra* note 132, at 3-4. As currently situated, the parties rely on a federal court appointed water master to ensure compliance with the court's decree. Regulating a large number of exempt well owners and pre-water code right claimants (those who claim water use before the state's permitting system was adopted in 1917) will be a huge task. *See* Response Brief of the United States to the Opening Briefs of the Washington Dept. of Ecology and Spokane Tribe Responding to the Factual and Legal Questions in the August 11, 2006 Order at 3, 13-14, *United States v. Anderson*, No. CV 2:72-03643 (E.D. Wash. May 10, 2013).

136. Ecology Brief, *supra* note 134, at 1-2.

137. *United States' Response to Briefs of Washington Department of Ecology and Spokane Tribe* filed on December 15, 2014 at 2, *United States v. Anderson*, No. CV 2:72-03643 (E.D. Wash. Jan. 15, 2015).

groundwater use.<sup>138</sup> The Tribe's argument that this is in effect a federal court general stream adjudication is quite convincing, although there is some ambiguity in the record. In its most recent Order, the court stated that the case was not a general stream adjudication.<sup>139</sup> The court views the "purpose of the proceeding to be the protection of the water rights of the Spokane Tribe of Indians and to give the water master clear and sufficient regulatory powers to protect those rights."<sup>140</sup>

The point here is not to suggest a resolution of the complex dispute, but to illustrate the complexity of water regulation, and some real-world reluctance to engage in regulation.<sup>141</sup> This may be part of the reason why there are not more reported decisions on the regulatory issue. Indian tribes and states have for the past forty years been embroiled in litigation over water quantity in both federal and state courts. It appears that once the litigation is concluded by a judgment or settlement, the parties are generally content to simply allow the decree to do the regulating as parties use their quantified rights.<sup>142</sup> In such cases, the court that issued the decree

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138. See Spokane Tribe of Indians' Supplemental Brief Re: Order of November 5, 2014 at 16, *United States v. Anderson*, No. CV 2:72-03643 (E.D. Wash. Dec. 15, 2015).

139. Order Approving Water Master's 2014 Report Ordering Parties to Meet and Confer at 2, *United States v. Anderson*, No. CV 2:72-03643 (E.D. Wash. Apr. 8, 2015).

140. *Id.* If there are no other users with rights senior to the tribe, which is a virtual certainty, the question will be how and who will regulate the junior rights holders who may be adversely affecting senior tribal instream flows. The court's Order does not address that issue, but contains the cryptic comments that it "does not have to determine the relative seniority of other junior water users. This is something the state can do if it chooses." *Id.* One approach would be for the junior users to be joined as parties to the case and enjoined from interfering with the senior tribal rights.

141. See *supra* note 40 and authorities cited therein. The state of Washington is undoubtedly concerned about the expense and political ramifications of limiting groundwater pumpers to protect tribal instream flows. In addition, it may have some legal worries about its authority. The Washington Department of Ecology is precluded from deciding disputes between state right holders outside of a general stream adjudication. *Rettkowski v. Dep't of Ecology*, 858 P.2d 232, 238 (Wash. 1993). Whether this would also apply to limitations resulting from a federal court decree may be doubted, but the answer is not certain. *Cf. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 695 (1979) ("State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution."), *modified sub nom.*, *Washington v. United States*, 444 U.S. 816 (1979).

142. In Wyoming's Big Horn River Adjudication, the court asserted authority to deny a tribal change in use of a quantified water right. *In re General Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 835 P.2d 273, 275 (Wyo. 1992). The court's rationale is unclear, and the ruling seems inconsistent with the notion that the McCarran Amendment does not grant regulatory jurisdiction to the states. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, §§ 19.03[6], 19.04[2].

can resolve any disputes regarding use of waters subject to it. The next Part discusses two important federal angles: 1) the Department of the Interior's forty-year moratorium on approving tribal water codes; and 2) the EPA's consistent recognition of inherent tribal authority to regulate water quality of all reservation waters.

V. THE UNITED STATES SHOULD TAKE ADMINISTRATIVE ACTION TO STRENGTHEN TRIBAL AUTHORITY TO REGULATE WATER IN INDIAN COUNTRY

A. *The Department of the Interior's Moratorium on the Approval of Tribal Water Codes Is an Impediment to Tribal Management that Should be Removed.*

A separate problem that some tribes experience is the fact that they may be literally "late to the party" in terms of regulating non-member water use on their reservations. Until the advent of the self-determination movement of the 1970s, tribes were battling termination and assimilation efforts, with only a brief respite during the New Deal years.<sup>143</sup> In the interim, states developed their regulatory systems and asserted rights to use and regulate non-Indian use on reservations. In the early 1970s tribes asserted their regulatory powers in the water context, but many confronted a "temporary moratorium" on the approval of tribal water regulations, which was imposed by Secretary of the Interior Rogers B. Morton in 1975.<sup>144</sup> This means that any tribe that needs secretarial

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143. *Id.* §§ 1.04-1.07.

144. Memorandum from Rogers C.B. Morton, Sec'y of the Interior to the Comm'r of Indian Affairs (Jan. 15, 1975) ("Our authority to regulate the use of water on Indian reservations is presently in litigation. I am informed, however, that some tribes may be considering the enactment of water use codes of their own. This could lead to confusion and a series of separate legal challenges that might lead to undesirable results. I ask, therefore, that you instruct all agency superintendents and area directors to disapprove any tribal ordinance, resolution, code, or other enactment which purports to regulate the use of water on Indian reservations and which by the terms of the tribal governing document is subject to such approval or review in order to become or to remain effective, pending ultimate determination of this matter."). See Steven J. Shupe, *Water in Indian Country: From Paper Rights to a Managed Resource*, 57 U. COLO. L. REV. 561, 579-81 (1986) (discussing moratorium). The litigation referred to involved the Colville Indian Reservation and the United States, with the latter's ultimately successful position that the state of Washington lacked jurisdiction to issue permits for water use on the Colville Indian Reservation. Letter from Kent Frizell, Asst. Att'y Gen. Land and Natural Res. Div., to U.S. Att'y Gen., Spokane, WA (March 6, 1973). The moratorium does not extend to tribal regulations governing water quality. Memorandum from Roy Sampsel, Deputy Asst. Sec'y Indian Affairs, re: BIA Policy on Concurrence with Tribal Water Quality Codes (Aug. 2, 1982) (on file with law review).

approval of a code, including most tribes organized under the Indian Reorganization Act, cannot get a water code approved.<sup>145</sup> Rules for code approval have been proposed but never consummated, and other informal efforts have similarly failed.<sup>146</sup> For the tribes required to obtain secretarial approval before implementing a tribal water code, there are a few options. First, the Secretary could simply lift the moratorium and thus act upon any pending or future tribal requests. Second, Congress could mandate approval of codes unless inconsistent with “applicable laws,” as it did when the Secretary failed to timely act upon requests for tribal constitutional revisions.<sup>147</sup> Such “applicable laws” in the tribal constitution context are defined as “any treaty, Executive order or Act of Congress or any final decision of the Federal courts which are applicable to the tribe, and any other laws which are applicable to the tribe pursuant to an Act of Congress or by any final decision of the Federal courts.”<sup>148</sup> A third approach would be to sue the Secretary under the Administrative Procedure Act under section 706 if the Secretary adhered to the moratorium after a tribal request to approve a proposed tribal code.<sup>149</sup> Because the moratorium was put in place as a temporary measure, it would seem arbitrary and capricious to adhere to a “temporary” policy issued nearly forty years ago as part of a litigation strategy.<sup>150</sup> Of course, the Secretary of the Interior could voluntarily act upon a tribal proposal in the spirit of her trust responsibility to support tribal sovereignty and control of

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145. Over 250 Indian tribes are organized under the Indian Reorganization Act. 25 U.S.C. § 476 (2014). COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, at 257 n.16, 353 n.548.

146. See Proposed Rule: Regulation of Reserved Waters on Indian Reservations, 46 Fed. Reg. 944 (proposed Jan. 5, 1981); Indian Reservations: Use of Water, 42 Fed. Reg. 14885 (proposed Mar. 17, 1977) The proposed rules would have only permitted tribal regulation of the use of quantified reserved water rights, or the estimated amount of reserved waters. The preamble also explained that state water rights would be unaffected by any code. Neither proposal spoke to the allocation of reservation waters beyond what was either quantified as reserved, or estimated to be reserved. Both proposals provided for non-member use of tribal reserved waters by tribal permit.

147. 25 U.S.C. § 476(c) (2004).

148. Act of Nov. 1, 1988, Pub. L. No. 100–581, § 102(1), 102 Stat. 2938 (1988).

149. There is no record of any challenge to the moratorium by way of litigation.

150. Although courts show deference to certain agency actions, agencies are under an obligation to at least respond to requests for action on tribal ordinance approval. *Cf.* Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004) (“[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.”).

natural resources.<sup>151</sup>

In any event, the water code moratorium stands as an obstacle to the exercise of the self-determination by at least some tribes. The best solution is for the Secretary to lift it, so that tribes wishing to assert regulatory authority may do so. This would be consistent with EPA's determination that forty-nine tribes have inherent authority to regulate water use on non-tribal lands within reservations, and its consequent approval of tribal water quality standards under the CWA.

### B. *The Clean Water Act's Treatment as a State Provision*

This section explains how the EPA administers the Clean Water Act's provisions allowing tribes to obtain treatment as a state (TAS) and thus regulate all reservation waters, and anyone who might pollute those waters, regardless of tribal membership. While the program is a success, more tribes would likely assume TAS status if the EPA follows through on a new proposal to no longer require that tribes demonstrate inherent authority over non-member fee land under the *Montana* line of cases. This would allow more tribes to unify regulation of water quality and other water management responsibilities on their reservations. Of course, comprehensive management requires a good deal of personnel and effort (and thus expense), so that a cooperative model might be desirable under some circumstances.

#### 1. *Current administration of the CWA requires a Montana analysis for each tribe applicant*

There are many environmental laws of nationwide application, and most of these laws include tribes, along with states, as eligible to administer the regulatory programs within their respective jurisdiction.<sup>152</sup> Because states generally lack regulatory authority within Indian country, EPA sometimes directly enforces federal environmental laws within Indian country.<sup>153</sup> EPA may also preclude

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151. Judith V. Royster, *Indian Water and the Federal Trust: Some Proposals for Federal Action*, 46 NAT. RESOURCES J. 375, 383-84 (2006) (urging the Department to lift the moratorium and noting that several congressionally approved Indian water settlements have provisions approving or contemplating tribal water codes).

152. See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, at 788-91; Elizabeth Ann Kronk Warner, *Examining Tribal Environmental Law*, 39 COLUM. J. ENVTL. L. 42 (2014).

153. See *Phillips Petroleum Co. v. EPA*, 803 F.2d 545 (10th Cir. 1986) (affirming

the exercise of state jurisdiction absent an express delegation to the states under applicable statutes.<sup>154</sup> EPA's 1984 Indian policy, the first announced by any federal agency, was re-affirmed in 2014 by EPA Administrator Gina McCarthy: "The EPA works with tribes on a government-to-government basis to protect the land, air and water in Indian Country."<sup>155</sup> This is especially true with respect to water quality.

Congress passed the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters through the elimination of pollutant discharge into those waters."<sup>156</sup> Section 301(a) of the CWA provides for effluent limitation guidelines, which are technology-based standards designed to restrict the quantities, rates and concentrations of specified substances discharged from point sources.<sup>157</sup> The other means to protect water quality is through water quality standards authorized in section 303(c).<sup>158</sup> Unlike the technology-based effluent limitations guidelines, water quality standards are not based on pollution control technologies, but express the desired condition or use of a particular waterway. Water quality standards supplement technology-based effluent limitations guidelines "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels."<sup>159</sup> Water quality standards may be expressed as: (1) one or more designated "uses" of each waterway (*e.g.*, public water supply, recreation, or agriculture) consistent with the goals of the Act; (2) "criteria" expressed in numerical concentration levels or narrative statements specifying the amount of various pollutants that may be present in the water and still protect the desig-

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EPA's authority under the Safe Drinking Water Act to regulate oil and gas development to protect groundwater sources in the absence of a provision authorizing tribal administration of the statute).

154. Wash. Dep't of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985) (denying state jurisdiction to regulate Indians and non-Indians within Indian Country under Resource Conservation and Recovery Act because Congress had not authorized state regulation).

155. Memorandum from Gina McCarthy to All EPA Employees (Jan. 9, 2014), *available at* <http://www.epa.gov/indian/basicinfo/1984-indian-policy-reaffirmation-memo-09JAN14.pdf>. See James M. Grijalva, *The Origins of EPA's Indian Program*, 15 KAN. J.L. & PUB POL'Y 191 (2006).

156. City of Albuquerque v. Browner, 97 F.3d 415, 422 (10th Cir. 1996) (quoting 33 U.S.C. § 1251(a)).

157. 33 U.S.C. § 1311(a) (2014).

158. 33 U.S.C. § 1313(c) (2014).

159. *Browner*, 97 F.3d at 419 n.4.

nated uses; and (3) an anti-degradation provision.<sup>160</sup>

The Act gives states<sup>161</sup> and tribes<sup>162</sup> the authority to establish water quality standards for waters within state and tribal boundaries, to certify compliance with those standards and to issue and enforce discharge permits under the supervision of the EPA.<sup>163</sup> State jurisdiction does not, however, extend into Indian country, so tribes are the primary authority for enforcing the law on Indian reservations.<sup>164</sup> Similarly, tribes do not have direct regulatory jurisdiction over off-reservation activities. When certified for treatment as a state under the CWA, a tribe may set tribal water quality standards that may be enforced off the reservation against non-tribal water polluters, but such enforcement is carried out by the EPA.<sup>165</sup>

Section 518 of the CWA allows tribes to administer most of the provisions of the Act. In pertinent part it provides:

The Administrator is authorized to treat an Indian tribe as a State . . . to the degree necessary to carry out the objectives of this section, but only if—

(1) the Indian tribe has a governing body carrying out substantial governmental duties and powers; (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by

160. *Id.* (citing 33 U.S.C. § 1313(c)(2)(A) (1995)); 40 C.F.R. § 131 (2015).

161. 33 U.S.C. § 1342 (West 2014), *discussed in* Wisconsin v. E.P.A., 266 F.3d 741, 743-44 (7th Cir. 2001).

162. 33 U.S.C. § 1377(e) (West 2014).

163. *Id.*

164. Environmental Protection Agency, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (1984), *available at* <http://www.epa.gov/indian/pdf/indian-policy-84.pdf>. “EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.” *Id.* See *Oneida Tribe of Indians of Wis. v. Vill. of Hobart, Wis.*, 732 F.3d 837, 840 (7th Cir. 2013) (“But the uniform understanding has been that states and their subdivisions are not authorized to regulate stormwater or other pollution on *Indian* lands, including Indian trust lands. Those lands are not exempt from the Clean Water Act. But it is the Indian governments of those lands . . . rather than states, that can be delegated regulatory authority under the Act.”) (citation omitted).

165. *City of Albuquerque v. Browner*, 97 F.3d 415, 423-24 (10th Cir. 1996) (“The express incorporation in § 1377(e) of §§ 1341 and 1342 gives the EPA the authority to issue NPDES permits in compliance with a tribe’s water quality standards.”). The converse is also true if a downstream state has more stringent standards than an upstream tribe. *Id.* at 424 (“Section 1341 authorizes states to establish NPDES programs with the EPA, and § 1342 authorizes the EPA to issue NPDES permits in compliance with downstream state’s water quality standards.”).

the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and (3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.<sup>166</sup>

The EPA interpreted this provision of the statute not as a direct federal delegation of authority to implement the CWA within reservations, but as a limited delegation of authority, operating only to the extent that a tribe could demonstrate inherent authority over all lands and water within reservation boundaries. The implementing regulations provide that, in order for a tribe to administer a water quality standards program, it must 1) demonstrate that it is recognized by the Secretary of the Interior; 2) demonstrate that it has a governing body currently carrying out substantial governmental duties and powers over a defined area; 3) demonstrate that it has legal authority to regulate water quality on its entire reservation, regardless of land ownership; and 4) provide a narrative statement describing its capability of administering an effective water quality standards program.<sup>167</sup> The third requirement—that the applicant tribe demonstrate its “inherent” authority over all waters within the reservation—requires that the applicant tribe pass muster under the *Montana* line of cases. EPA's response to public comments to the proposed rulemaking explains the context for EPA's evaluation of tribal inherent authority:

a tribal submission meeting the requirements of § 131.8 of this regulation will need to make a relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members, (and thus that the Tribe or tribal members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters and critical habitat are subject to protection under the Clean Water Act. The Tribe must also explicitly assert that impairment of such waters by the activities of non-Indians, would have a serious and substantial effect on the health and welfare of the Tribe. Once the Tribe meets this initial burden, EPA will, in light of the facts presented by the tribe and the generalized statutory and factual findings regarding the im-

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166. 33 U.S.C. § 1377(e) (West 2014).

167. 40 C.F.R. § 131.8.

portance of reservation water quality discussed above, presume that there has been an adequate showing of tribal jurisdiction of fee lands, unless an appropriate governmental entity (*e.g.*, an adjacent Tribe or State) demonstrates a lack of jurisdiction on the part of the Tribe.<sup>168</sup>

This inherent authority element of the regulation is the provision that has drawn the most interest, and the most criticism, over the years.<sup>169</sup> It requires a tribe to satisfy the “direct effects” excep-

168. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,878-79 (Dec. 12, 1991) (to be codified at 40 C.F.R. pt. 131). EPA also noted that “because of the mobile nature of pollutants in surface waters and the relatively small length/size of stream segments or other water bodies on reservations, it would be practically very difficult to separate out the effects of water quality impairment on non-Indian fee land within a reservation with those on tribal portions. In other words, any impairment that occurs on, or as a result of, activities on non-Indian fee lands are very likely to impair the water and critical habitat quality of the tribal lands. This also suggests that the serious and substantial effects of water quality impairment within the non-Indian portions of a reservation are very likely to affect the tribal interest in water quality.” *Id.* at 64,878. EPA provides guidance on the sort of information needed to satisfy a tribe’s burden to demonstrate inherent authority over nonmembers on its reservation. See ENVIRONMENTAL PROTECTION AGENCY, ATTACHMENT C (2013), available at <http://www.epa.gov/tp/pdf/tas-strategy-attach-c.pdf>.

169. See Alex Tallchief Skibine, *The Chevron Doctrine in Federal Indian Law and the Agencies’ Duty to Interpret Legislation in Favor of Indians: Did the EPA Reconcile the Two in Interpreting the “Tribes as States” Section of the Clean Water Act*, 11 ST. THOMAS L. REV. 15 (1998) (arguing that *Chevron* deference applies; that the Indian canons apply to the agency interpretation; that EPA unlawfully failed to apply the canons; that if the canons were applied EPA should have found congressional confirmation of inherent tribal authority over all water use on reservations; or that EPA could have interpreted the ambiguity in favor of a delegation of federal authority). See also Marren Sanders, *Clean Water in Indian Country: The Risks (and Rewards) of Being Treated in the Same Manner as a State*, 36 WM. MITCHELL L. REV. 533, 540-41 (2010) (“Joining the debate, scholars cannot seem to agree as to the source of tribal authority to set and enforce WQSS. While some argue that the TAS provision recognizes inherent tribal sovereignty over all waters within reservation boundaries, others contend that the CWA delegated federal authority to tribes to exercise this power. Still others conclude that the CWA both devolves jurisdiction and is a delegation of power to tribes to regulate WQSS.” (internal citations omitted)); Ann E. Tweedy, *Using Plenary Power as a Sword: Tribal Civil Regulatory Jurisdiction Under the Clean Water Act After United States v. Lara*, 35 ENVTL. L. 471, 486 (2005) (“[S]ection 518(e) should be read to recognize and affirm tribal sovereignty.”); Jessica Owley, *Tribal Sovereignty over Water Quality*, 20 J. LAND USE & ENVTL. L. 61, 62-63 (2004) (arguing that section 518 should be read as acknowledging tribal authority over waters and as delegating federal enforcement authority to the tribes); Regina Cutler, *To Clear the Muddy Waters: Tribal Regulatory Authority Under Section 518 of the Clean Water Act*, 29 ENVTL. L. 721, 738 (1999) (arguing that a court could conclude that “section 518 [of the CWA] and its legislative history are not ambiguous and that the section does in fact constitute a direct delegation of CWA regulatory authority to qualified tribes.”) Further, in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, a plurality opinion cited the CWA as an example of express federal delegation. 492 U.S. at 428 (citing 33 U.S.C. § 1377(e) & (h)(1)).

tion in *Montana*,<sup>170</sup> which has been said to apply only when the non-member activity “imperil[s] the subsistence of the tribal community.”<sup>171</sup> Polluting tribal water certainly could imperil tribal subsistence, and the EPA has found that tribal applicants have met this standard forty-nine times, making them eligible to promulgate water quality standards.<sup>172</sup> The appellate decisions upholding EPA’s actions are discussed next.

In *Browner*,<sup>173</sup> the challenge was not premised on the question of tribal authority on the reservation, but on the question of whether tribes could adopt more stringent water quality standards enforceable by the EPA on off-reservation parties discharging from a point source. The question was answered in the affirmative. In *Montana v. EPA*,<sup>174</sup> the Ninth Circuit upheld the EPA’s approval of the Confederated Salish and Kootenai Tribes of the Flathead Reservation’s application for treatment as a state. The court carefully analyzed and distinguished intervening Supreme Court precedent in confirming tribal authority over nonmembers.<sup>175</sup> Particularly significant to the court was the fact that water has such great importance to tribes, and that non-member pollution of reservation waters could have a substantial effect on the health and welfare of

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170. See *supra* text accompanying notes 95-96.

171. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 341 (2008) (quoting *Montana v. United States*, 450 U.S. 544, 566 (1981)).

172. EPA’s website lists the forty-nine tribes that have been found eligible to promulgate water quality standards, and the forty-one with approved water quality standards. *Indian Tribal Approvals*, Water: State, Tribal & Territorial Standards, UNITED STATES ENVTL. PROTECTION AGENCY, <http://water.epa.gov/scitech/swguidance/standards/wqslibrary/approvable.cfm> (last visited May 15, 2015); *Tribal Water Quality Standards approved by EPA*, Water: State, Tribal & Territorial Standards, UNITED STATES ENVTL. PROTECTION AGENCY, <http://water.epa.gov/scitech/swguidance/standards/wqslibrary/tribes.cfm> (last visited May 15, 2015). There do not appear to be any decisions rejecting a tribal application for TAS for failure to satisfy the *Montana* inherent authority test. It is interesting to note that the Spokane Tribe obtained TAS status despite the *Anderson* court’s ruling that the state could regulate “excess water” use by non-Indians on the reservation. Decision Document: Approval of the Spokane Tribe of the Spokane Reservation Application for Treatment in the Same Manner as a State for Sections 303(c) and 401 of the Clean Water Act at 11-15 (Apr. 22, 2003) (on file with author). See *infra* note 174, for information on the Confederated Colville Tribes’ status under the CWA.

173. See *City of Albuquerque v. Browner*, 97 F.3d 415, 421-23 (10th Cir. 1996).

174. *Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998).

175. The court distinguished *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), on the ground that the tribe in that case had completely surrendered its interests in the highway it sought to regulate, and reserved no right to exercise control over the federal right-of-way maintained by the state. *Id.* (“The conduct of users of a small stretch of highway has no potential to affect the health and welfare of a tribe in any way approaching the threat inherent in impairment of the quality of the principal water source.”).

the tribe and its members.<sup>176</sup> In *Wisconsin v. EPA*,<sup>177</sup> which involved the Mole Lake Band of Lake Superior Chippewa, the Seventh Circuit similarly agreed with the EPA's conclusion that non-member pollution would have a direct effect on the health, safety, and welfare of the tribe sufficient to bring it within the scope of tribal jurisdiction under *Montana's* second exception.<sup>178</sup> Wisconsin argued that its presumed ownership of submerged lands precluded tribal jurisdiction. The court rejected that claim.<sup>179</sup> Still, the Supreme Court could limit tribal eligibility to administer the program if it rejected the EPA's presumptive mode of analyzing tribal inherent authority; and, the time and expense involved in the TAS process has prompted the EPA to reconsider its position.

2. *EPA's proposal to reinterpret the CWA as a delegation of federal authority to tribes.*

EPA announced last year that it is considering a reinterpretation of the Clean Water Act's relevant provision to obviate the need for a finding of inherent tribal jurisdiction under the *Montana* line of cases to qualify for Treatment as a State.<sup>180</sup> In April of

176. See *Id.* at 1141 (citing *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (1981)) ("Colville also supports EPA's generalized finding that due to the mobile nature of pollutants in surface water it would in practice be very difficult to separate the effects of water quality impairment on non-Indian fee land from impairment on the tribal portions of the reservation: 'A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users.'). Interestingly, the Colville Confederated Tribes are the only tribe to have successfully litigated their inherent authority over non-member water use outside of the CWA. The water quality standards that operate on the reservation were promulgated by the EPA and the tribe is not now certified under the TAS provision. See *Water Quality Standards for the Colville Indian Reservation in the State of Washington*, 54 Fed. Reg. 28,625 (July 6, 1989). EPA explained that this "promulgation action is unique because: (1) It was initiated before the 1987 amendments to the Clean Water Act were enacted, and (2) it is based on water quality standards previously developed by the Colville Confederated Tribes for application to waters on their reservation." *Id.*

177. *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001).

178. *Id.* at 750 ("Because the Band has demonstrated that its water resources are essential to its survival, it was reasonable for the EPA, . . . to allow the tribe to regulate water quality on the reservation, even though that power entails some authority over off-reservation activities.").

179. *Id.* at 747 ("Because the state does not contend that its ownership of the beds would preclude the federal government from regulating the waters within the reservation, it cannot now complain about the federal government allowing tribes to do so. It was reasonable for the EPA to determine that ownership of the waterbeds did not preclude federally approved regulation of the quality of the water, and we uphold that determination.").

180. See Press Release, U.S. Evtl. Prot. Agency, Under Consideration: Potential Re-interpretation of a Clean Water Act Provision Regarding Tribal Eligibility to Administer Regulatory Programs (2014), [available at](#)

2014, EPA sent out a consultation letter to tribal leaders in anticipation of a rulemaking process for a major change in the administration of the CWA's application to Indian tribes.

The United States Environmental Protection Agency (EPA) is initiating consultation and coordination with federally-recognized Indian tribes concerning a potential reinterpretation of Clean Water Act provisions regarding treatment of tribes in the same manner as a state (TAS). The reinterpretation could reduce some of the time and effort for tribes submitting applications for TAS for regulatory programs under the Clean Water Act. Specifically, EPA is considering reinterpreting section 518(e) as a delegation by Congress of authority to eligible tribes to administer Clean Water Act regulatory programs over their entire reservations. This reinterpretation would replace EPA's current interpretation that applicant tribes need to demonstrate their inherent regulatory authority. All other tribal eligibility requirements established in the Act and EPA's regulations would remain in place.<sup>181</sup>

The idea of revising EPA's approach is a good one. The requirement that tribes demonstrate inherent tribal authority is a significant hurdle, although it is aided by EPA's presumption that tribes have such authority due to the significant effects of water pollution on tribal communities on reservations.<sup>182</sup> The Lummi Na-

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<http://water.epa.gov/scitech/swguidance/standards/wqslibrary/tribal.cfm>.

181. Letter from Elizabeth Southerland, Director, Office of Science and Technology, U. S. Evtl. Prot. Agency, to Tribal Leaders (April 18, 2014) (on file with author). See *Under Consideration: Potential Reinterpretation of a Clean Water Act Provision Regarding Tribal Eligibility to Administer Regulatory Programs*, U. S. Evtl. Prot. Agency, available at <http://water.epa.gov/scitech/swguidance/standards/wqslibrary/tribal.cfm> (last visited May 15, 2015). In response to a Freedom of Information Act request, the EPA provided letters from over twenty Indian tribes and tribal organizations supporting the reinterpretation. The gist of most of the letters was that the interpretation better mapped the plain language that authorized TAS status for tribes over land "otherwise within the borders of an Indian reservation." See, e.g., Letter from Silas C. Whitman, Nez Perce Tribal Executive Committee Chairman to Fred Leutner, U.S. Evtl. Prot. Agency (July 7, 2014) (on file with author). In addition, the majority of the tribes commented negatively on the expense and administrative burden of demonstrating that the *Montana* analysis supported their application. Two tribes asked for more consultation, and several states asked for more information and expressed concerns about the proposal. See, e.g., Letter from Cathy Stepp, Sec'y, Wisconsin Dept. of Nat. Res., to Dr. Susan Hedman, U. S. Evtl. Prot. Agency (Sept. 12, 2014) (on file with author).

182. Professor Tweedy points out that the process to demonstrate inherent authority is lengthy and requires significant resource investments that many tribes may not be able to make up front. In addition, undertaking the *Montana* analysis is complex and difficult given the Supreme Court's record in such cases. Ann E. Tweedy, *supra* note 169, at 479-80.

tion submitted an application in 1995, but it was not approved by the EPA until 2007.<sup>183</sup> The Swinomish Tribe went through a more expedited process that commenced in 2006 and concluded successfully in 2008.<sup>184</sup> The EPA recognizes that a significant part of the effort focuses on the inherent-tribal-authority prong of the current certification process, which may deter some tribes from applying.<sup>185</sup> The EPA's reinterpretation would consider section 518 of the CWA as a direct delegation of federal authority to tribes to regulate all land on a reservation regardless of its status as trust or non-trust land, and regardless of the non-member status of the regulated party.

Experience demonstrates that the application process is quite complicated and lengthy, and the EPA's judgment that a reinterpretation would more fully comport with congressional intent favoring tribal administration should be given some deference.<sup>186</sup> It is possible that many more tribes could use CWA authority if not required to undertake the complicated and expensive analysis required by the *Montana* line of cases. It would also eliminate the possibility that a Supreme Court decision adverse to the EPA on

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183. The Lummi decision reflects considerable back and forth between the agency and the tribe due in part to litigation over groundwater rights on the reservation. Decision Document: Approval of the Lummi Nation Application for Treatment in the Same Manner as a State for Sections 303(c) and 401 of the Clean Water Act, U. S. ENVTL. PROT. AGENCY (March 5, 2007) (on file with author).

184. Even so, the Swinomish decision reveals three separate submissions from tribal counsel with a total of ninety-two attachments. See Decision Document: Approval of the Swinomish Indian Tribal Community's Application for Treatment in the Same Manner as a State for Sections 303(c) and 401 of the Clean Water Act, U. S. ENVTL. PROT. AGENCY (April 8, 2008) (one file with author).

185. In its annual report addressing environmental justice, EPA's Office of General Counsel explained its view of the problem.

Under EPA's current approach, some tribes may defer seeking TAS for CWA programs because of this inherent authority element. To demonstrate inherent authority, tribes sometimes need to present detailed factual showings relating to impacts of the regulated activities on the applicant tribe, including non-member activities on reservation land. Tribes have expressed concern over making these demonstrations, which are functioning for some tribes as a deterrent to seeking TAS status. As EPA recognized in the preamble to its final TAS regulations for the water quality standards (WQS) program, the CWA might be amenable to a different interpretation.

United States Env'tl. Prot. Agency, *Plan EJ 2014 Legal Tools*, at 79 (2014), available at <http://water.epa.gov/scitech/swguidance/standards/wqslibrary/upload/ej-legal-tools.pdf>.

186. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, at 796–97.

the inherent jurisdiction question could severely undermine the program. In addition, most commentators disagree with the EPA's interpretation that the Act requires a demonstration of inherent tribal authority.<sup>187</sup> The D.C. Circuit, in a case involving the Clean Air Act, expressed similar doubt in the context of comparing the CWA's delegation provision to the delegation provision found in the Clean Air Act. "One federal court has observed, in *dicta*, that 'the statutory language [in the Clean Water Act] seems to indicate plainly that Congress did intend to delegate . . . authority to tribes.'"<sup>188</sup>

Most importantly, the EPA's preliminary proposal has strong textual support. Absent from the statutory text is any reference to the scope of an Indian tribe's inherent authority. As always, the words of the statute provide the best initial guide to its meaning. Congress set out three statutory criteria to determine where to recognize a tribal applicant as eligible to administer applicable provisions of the CWA. Section 518 provides for tribal treatment of a state if: 1) the tribe has a functioning governing body capable of administering substantial duties and powers; 2) the functions to be exercised relate to trust property, or property "otherwise within the borders of an Indian reservation; and 3) the EPA believes the tribe is "reasonably expected to be capable" of carrying out the functions prescribed by the relevant statutes.<sup>189</sup> The delineation between land held in trust, *i.e.*, tribal or individually allotted lands, and land "otherwise within the boundaries of the reservation" indicates that if the tribal functions relate to such lands, the tribal application may be treated as a state under section 518. As noted above, the plain meaning approach also has the benefit of eliminating a burdensome criterion from the application process, saving precious time that the staffs of both EPA and applicant tribes

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187. See *supra* note 169.

188. *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1291-92 (D.C. Cir. 2000) (internal citation omitted).

189. See 33 U.S.C. § 1377(e) (West 2014). This plain meaning approach fits neatly with the notion that statutory interpretation should ensure that the clear terms of a statute are enforced. See John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1317 (2010). From the outset EPA has acknowledged that the legislative history is ambiguous, so there is no argument that EPA's proposal would be contrary to any solid legislative history. See Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,880 (1991). See also Skibine, *supra* note 169 ("The main problem with EPA's interpretation is that nothing in the words of the statute mandates a finding of tribal jurisdiction over water resources before a tribe can be treated as a state under the CWA.").

must otherwise spend on the process. At the end of the day, the tribes end up in the same position they are in under the current regime: approved tribes have the authority to set water quality standards and issue NPDES (pollution discharge) permits on their reservations.<sup>190</sup> Similarly, states are left in the same position as well—they lack jurisdiction over on-reservation water quality matters regardless of a tribal certification under the CWA.<sup>191</sup> This approach would also relieve the legal uncertainty attached to the common law determination under the *Montana* line of cases.<sup>192</sup>

Even if the EPA were not to revise its interpretation of section 518 of the CWA, Indian tribes have an unblemished record in terms of EPA findings of inherent tribal authority to regulate all reservation waters with respect to water quality. On the other hand, the proposed reinterpretation would make the clean water regulatory regime consistent with the Clean Air Act, increase administrative efficiency, and reduce potential litigation.

## VI. SUGGESTIONS FOR INTERGOVERNMENTAL COOPERATION.

This section unites the three parts discussed above: tribal proprietary rights in water; regulatory rules governing Indian country; and the CWA's tribal provisions. It engages potential conflicts between state and tribal water management regimes, and offers suggestions for inter-governmental cooperation to provide effective

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190. Interestingly, no tribe has sought authority to issue such permits. Some tribes may feel that they get all they need by setting on-reservation water quality standards because the EPA will then issue any permits in a manner consistent with tribal standards, and tribes receive notice of any off-reservation permits that may affect on-reservation waters. It takes significant resources to set up a permitting system, and if the EPA already has the administrative infrastructure, tribes may view the investment in permitting apparatus as a low priority.

191. 40 C.F.R. § 123.1(h) (2015). See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, at 789–90.

192. For a discussion of rules regarding agency “re-interpretation” of ambiguous statutes see *Smiley v. Citibank*, 517 U.S. 735, 742 (1996) (“The mere fact that an agency position contradicts a prior agency position is not fatal.”), and *Motor Vehicle Mfrs. Ass’n. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 42 (1983) (“an agency must be given ample latitude to ‘adapt their rules and policies to the demands of changing circumstances’”), and Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 3.3, § 7.4 (2010). EPA may proceed by adopting an interpretive rule, which is exempt from notice and comment requirements of legislative rules. See *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1204 (2015) (“The critical feature of interpretive rules is that they are ‘issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.’” (citing *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995) (noting that interpretive rules do not require notice and comment))).

and rational processes for water management in Indian country. Precisely how such management would take place is highly dependent on the demographics of any given reservation, the cross-boundary nature of water resources, and relationships between tribal, federal and state governments. Existing law, however, provides useful guideposts for the various sovereigns to consider as they evaluate the most effective means of protecting water quality and water use within Indian reservations. What is plain, however, is the fact that water use regulation and water quality regulation are complex tasks that require some governmental cooperation. For example, in the *United States v. Anderson* litigation discussed above, the on-reservation water quantification issues have been settled. Now that someone must do the hard work of identifying and notifying off-reservation groundwater users that they must limit their withdrawals, the state government prefers to opt out and the United States does not want to use the court process (for which it would pay the lion's share of cost). On the Colville Reservation, tribal water rights have not been fully quantified, but the Tribes have confirmed regulatory authority over non-Indian water use related to the Omak Lake drainage, and also assert authority over other non-Indian on-reservation use. How should the regulatory questions be addressed?

The usual starting point is the reality that Indian tribes usually have the senior legal rights to substantial quantities of water for consumptive and non-consumptive uses on their reservation, but most have not received a final quantification of their rights.<sup>193</sup> Litigation to quantify reserved rights will continue, and water rights settlements undoubtedly will be approved by Congress as agreements are reached.<sup>194</sup> On the other hand, states have no regulatory

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193. *Hearing on Indian Water Rights: Promoting the Negotiation and Implementation of Water Settlements in Indian Country: Before the S. Comm. on Indian Affairs*, 112th Cong. (2012) (statement of John Echohawk, Executive Director, Native American Rights Fund).

194. *Id.*; *Indian Water Rights: Promoting the Negotiation and Implementation of Water Settlements in Indian Country: Before the S. Comm. on Indian Affairs*, 112th Cong. (2012) (statement of David J. Hayes, Deputy Secretary, Dept. of Interior). Many of the settlements provide for regulatory regimes. *See, e.g.*, The Claims Resolution Act of 2010, Pub. L. No. 111-291, Title IV § 407(f), 124 Stat. 3064 (2010) (affirming Crow Tribe regulation of tribal and individual Indian allottee water rights as provided in the settlement codified at Mont. Code Ann. § 85-20-901, art. IV A.2 (1999), and state regulation of state law-based rights as provided in Mont. Code Ann. § 85-20-901, art. IV. A.3). The tribe may authorize use of the right by the tribe itself, tribe members, or other persons, *id.* art. IV. B.1, and state laws regarding the use of water “do not apply to the Tribal water right.” *Id.* § B.2. The Settlement provides a model for settlement disputes between the tribe and state by the creation of a Crow-Montana Compact Board. “The Board shall consist of three members: one member

jurisdiction over Indian water rights.<sup>195</sup> The two appellate cases dealing with tribal regulatory authority over non-Indians on tribal reservations reached opposite results. In its implementation of the CWA, EPA has found that forty-nine tribes have inherent authority to set water quality standards for reservation lakes and rivers—including over non-Indian fee lands.<sup>196</sup> If the EPA interprets the TAS provision as a delegation of authority to implement the CWA, it will open the door for tribes who may have been reluctant to participate due to the burden of demonstrating inherent authority. With this legal and regulatory backdrop, it makes most sense for Indian tribes to be the lead regulatory body on Indian reservations with respect to water permitting and water quality control. Of course, as sovereigns, tribes may choose not to regulate certain matters for any number of reasons—including hard choices about the allocation of limited tribal resources.<sup>197</sup> For those who do seek expansive control over reservation water resources through tribal water codes and water quality regulation, cooperation from other interested governments would be ideal.

While states and non-Indian property owners have frequently resisted the exercise of tribal authority over non-members,<sup>198</sup> tribes

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selected by the Governor of the State of Montana; one member appointed by the Crow Tribal Chairman; and one member selected by the other two members.” Mont. Code Ann. § 85-20-901, art. IV. F. (1999). The Board has jurisdiction of disputes arising under the Compact, and its decisions are reviewable in “any court of competent jurisdiction”—which is not further defined in the Compact. The White Mountain Apache Tribe Settlement Act of 2010, Pub. L. No. 111-291, Title III, § 305(e), 124 Stat. 3064, also provides for a tribal code with authority to regulate use of tribal water rights by individuals both on the reservation and on off-reservation trust land. *See also* Snake River Water Rights Act of 2004, Pub. L. No. 108-447, Div. J, title X, § 7(b), 118 Stat. 2809, 3434 (providing for tribal code to regulate all reserved right consumptive uses). The Fort Hall Settlement Act, Pub. L. No. 101-602, § 7(b), 104 Stat. 3062, approved the 1990 Fort Hall Indian Water Rights Agreement, which provided for tribal administration of tribal rights within the reservation, while the State of Idaho administers rights established under state law. *Id.* §§ 4, 8.2.1, 8.2.6, available at <http://repository.unm.edu/handle/1928/21775>. The most recent example is contained in the “Act Ratifying the Water Rights Compact entered into by the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, the State of Montana the United States,” ch. 294 (Mont. April 24, 2015), available at <http://leg.mt.gov/bills/2015/sesslaws/ch0294.pdf>. That Compact creates the Flathead Reservation Water Management Board as “the exclusive regulatory body on the Reservation” for all matters related to water use and Compact interpretations on the reservation. *Id.* § IV.I.1. The Board has five members with two each appointed by the Tribal Council and Governor and a fifth member selected by the other four. *Id.* § 2.

195. *See supra* Part IV.

196. *See supra* note 172 and accompanying text.

197. States too, may choose not to regulate. *See supra* text accompanying note 141.

198. Tassie Hanna, Sam Deloria, & Charles E. Trimble, *The Commission on State-Tribal*

can obviate that opposition by respecting non-Indian water rights under tribal law. This might include recognition of state permits when consistent with tribal regulations, or developing regulatory regimes that provide for non-member participation. Tribal governments are the ultimate in local control, and states should recognize the advantages that can come from cooperating with tribes and melding technical and enforcement authority under tribal institutions. As a leading authority recently noted, conflict remains a growth industry,<sup>199</sup> but alternatives to litigation abound if parties look to their substantive interests in negotiations rather than simply asserting traditional positions.<sup>200</sup> For many tribes, there is a strong desire to exercise tribal authority over all on-reservation waters. But other tribes may have different priorities. Just as the decision to regulate or administer a regulatory program is an exercise of sovereignty, so too is a decision not to regulate or to rely on a partnership with another governmental entity. The next few paragraphs discuss some of the interests at play when tribes prefer to play a strong regulatory role. The political choice of whether or not to regulate is common to all of these scenarios.

The first scenario is where the water rights of tribes and non-Indian users have been quantified on a comprehensive basis in litigation. In these situations, the decree may be the instrument of regulation—presumably in the forum that adjudicated the dispute if it retained jurisdiction to administer the decree. The party to the decree who does not receive his or her entitlement can go back to the court and ask that those with junior priorities be enjoined from interfering with the senior right—whether it is an Indian reserved right or a state law right.<sup>201</sup>

This seems to be the case with jurisdiction over water use in the Chamokane Creek Drainage on the Spokane Reservation. Despite the fact that all reservation waters in the middle basin of the drainage have been adjudicated, upstream groundwater use off the res-

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*Relations: Enduring Lessons in the Modern State-Tribal Relationship*, 47 TULSA L. REV. 553, 557 (2012) (“As tribal governments increasingly wielded authority and resisted state jurisdiction, non-Indians and some state and local officials began to push back with substantial legal and political challenges.”).

199. See ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN, xiii (3rd ed. 2011).

200. *Id.* at 42-57; see also Frances E. McGovern, *Mediation of the Snake River Basin Adjudication*, 42 IDAHO L. REV. 547 (2006) (explaining the use of various mediation theories in reaching a complex water settlement among, federal, tribal, and state parties).

201. This assumes that the court issuing the original decree retains jurisdiction to hear enforcement of post-decree disputes.

ervation appears to be affecting tribal instream rights.<sup>202</sup> Here, both the tribe and the state favor federal regulation of the groundwater use through a federal court and its appointed water master.<sup>203</sup> Why is this? Actual regulation of water users is expensive, difficult, controversial, and politically unpopular in the western states.<sup>204</sup> For these reasons, it may be easier to leave the regulatory duties to the federal court and water master exercising continuing jurisdiction over the on-reservation users to protect senior tribal instream flows.<sup>205</sup> Moreover, there are apparently no excess on-reservation waters for the state to regulate,<sup>206</sup> and in any event the state has always deferred to the federal court-appointed water master to regulate any on-reservation water use.<sup>207</sup> The United States, Spokane Tribe and State of Washington appear to agree that off-reservation groundwater use by non-parties to the litigation must be regulated. Because the case is in federal court, the judge has authority and discretion to tailor the process in light of the parties' needs, but the exempt well owners are not parties to the case, and thus may not be regulated by the federal water master absent being added to the case as parties. If all water users in the Chamokane Creek Basin were joined as parties, they would be subject to the court decree and thus the authority of the water master. Short of that, it is not clear how non-parties could be regulated absent a general adjudication filed by the state, or a more narrowly targeted suit brought by the United States, or the tribe.<sup>208</sup>

A second scenario is where there has been no adjudication, or only a partial adjudication of water rights on a reservation. This is the situation on the Colville Indian Reservation in Washington.

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202. See *supra* text accompanying note 131-132. As noted earlier, the case was litigated in the 1970s and 1980s on the erroneous assumption that groundwater in the upper basin was not connected to surface flows.

203. See *supra* text accompanying notes 135-140.

204. See Benson, *supra* note 40; Tarlock, *supra* note 40 (arguing that "priority enforcement is more bluff than substance").

205. See *United States v. Anderson*, 736 F.2d 1358, 1366 (9th Cir. 1984) ("Central to our decision is the fact that the interest of the state in exercising its jurisdiction will not infringe on the tribal right to self-government nor impact on the Tribe's economic welfare because those rights have been quantified and will be protected by the federal water master.").

206. Brief for Spokane Tribe of Indians at 13, *United States v. Anderson*, No. CV 2:72-03643 (E.D. Wash. Dec. 15, 2015). All on-reservation surface water is necessary to satisfy tribal rights set out in the decree. *Id.*

207. See Order, *supra* note 132.

208. See *supra* notes 141-142 and accompanying text.

The Ninth Circuit determined that the tribe has a right to water for all practicably irrigable acreage on the reservation and for fisheries purposes,<sup>209</sup> but the Tribes' full entitlement has never been quantified. Tribal governments in such a situation are the entities best suited to determine allocations of tribal water rights and the rights of tribal citizens, and a nearly *per se* rule forecloses state regulatory jurisdiction over tribes and their members on reservations.<sup>210</sup> In most cases, the state will have issued permits to non-Indians, or individuals will have made claims under state common law rules. States have done this without any legal foundation. This was the case on the Colville Indian Reservation in the *Walton* litigation.<sup>211</sup> In *Walton*, the Ninth Circuit denied the state's claim of authority to issue water permits in No Name Creek.<sup>212</sup> As a result, the tribe now exercises exclusive authority over water use on the No Name Creek system, and asserts authority to issue any and all permits to other reservation waters.<sup>213</sup> Tribes in similar situations will need to take seriously the need to accord some respect to state water-right-holders, and the Colville experience to date indicates that tribe members and non-members alike comply with the tribal reg-

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209. See *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981).

210. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987) (state regulatory jurisdiction over Indians on reservations allowed only under "exceptional circumstances," or when expressly authorized by Congress); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985) (*per se* rule precludes state taxation of Indians in Indian country). The state could adjudicate all rights to the waters in the upper Columbia Basin where the reservation is located, but such an adjudication would be very expensive and time consuming. It would require a lawsuit joining all individuals and entities on and off the Colville Reservation, who use waters from that river system. *Dugan v. Rank*, 372 U.S. 609, 618 (1963); see also *Dep't of Ecology v. Acquavella*, 674 P.2d 160, 161 (Wash. 1983) ("A general adjudication, pursuant to RCW 90.03, is a process whereby all those claiming the right to use waters of a river or stream are joined in a single action to determine water rights and priorities between claimants.") By comparison, the Yakima Basin adjudication has been running for nearly forty years and is still not complete. See *In re Yakima River Drainage Basin*, 296 P.3d 835, 838 (Wash. 2013).

211. See *supra* text accompanying notes 111-124.

212. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52-53 (9th Cir. 1981); See *supra* text accompanying note 119.

213. *Colville Tribal Code* § 4-10-3 (2010), available at <http://www.colvilletribes.com/media/files/4-10.pdf> ("[It is] unlawful to divert or withdraw or otherwise make use of . . . the waters of the Colville Reservation unless the applicable provisions of this Chapter . . . have been complied with."). The tribal code also provides authority for the exchange of permits or rights claimed under other authority (presumably state law) for tribal permits. *Id.* § 4-10-281. The current Colville Tribal Water Administrator has issued over 300 permits to non-members on the reservation for domestic and agricultural uses—some of whom claim water rights under state law. E-mail from Lois Trevino, Colville Tribal Water Administrator, Lois Trevino to author (March 3, 2015) (on file with law review).

ulatory regime.<sup>214</sup> Modifications in water use from those allowed under a tribal permit are provided for under the Colville Tribal Code.<sup>215</sup> This is wise as tribe members and non-members alike will be more inclined to participate willingly if they know the process is fair and judicial review is available.<sup>216</sup> If non-members do not find the tribal regime fair, there could be litigation over tribal authority to regulate pursuant to a tribal water code, or a state might commence a general stream adjudication to determine all rights in the relevant watersheds. The Colville Tribes have a strong case for exercising their inherent authority over all water use on the reservation, and in fact, they appear to be successfully operating such a system. Tribal members and non-members are using water pursuant to tribal authority without resort to litigation because there is good tribal governance.

A third scenario takes into account tribal exercise of control over water quality under the CWA. The EPA has approved forty-one sets of tribal water quality standards.<sup>217</sup> There have been only three challenges to tribal standards in the past twenty-four years.<sup>218</sup> This indicates that there is no intense controversy over the tribes' role in setting water quality standards. If the EPA were to re-interpret the CWA's tribal provision as a delegation of federal authority, there would be even less opportunity to dispute the jurisdictional landscape.<sup>219</sup> As a result, any dispute would relate to the

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214. *See id.* Interestingly, the Colville Tribes do not exercise TAS authority under the Clean Water Act, although the EPA established water quality standards for reservation waters based on tribal standards. 40 C.F.R. § 131.35 (2014). EPA explained the Colville situation: "This promulgation action is unique because: (1) It was initiated before the 1987 amendments to the Clean Water Act were enacted, and (2) it is based on water quality standards previously developed by the Colville Confederated Tribes for application to waters on their reservation. This process is not intended as a model for other reservations. Where other Indian Tribes wish to establish standards under the CWA, EPA would expect such Tribes to apply, under the CWA section 518 regulation, to be treated as States for purposes of water quality standards." Water Quality Standards for the Colville Indian Reservation in the State of Washington, 54 Fed. Reg. 28,622 (July 6, 1989).

215. Colville Tribal Code §§ 4-10-160, 4-10-205 (2010), *available at* <http://www.colvilletribes.com/media/files/4-10.pdf>.

216. *Cf. id.* § 4-10-440 (providing avenue for judicial review in tribal court). *See* Hostyk, *supra* note 111, at 64 (suggesting recognition of tribal preeminence for on-reservation water use, but urging intergovernmental cooperation).

217. *See supra* note 172 and accompanying text.

218. *Wisconsin v. EPA*, 266 F.3d 741, 748–49 (7th Cir. 2001); *Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998); *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996).

219. Of course, there could be litigation over the re-interpretation itself, but for reasons set forth above it seems likely that EPA would prevail. *See supra* Part IV.B.2.

substance of water quality standards or the terms of permits for point sources. Because no tribe has sought authority to issue NPDES permits, the disputes would be limited to the validity of the water quality standards.<sup>220</sup> The EPA's regulations for conflicting state and tribal water quality standards provide an example for resolving tribal-state conflicts in the context of CWA programs.

In deciding whether to issue a permit for discharge within a state that may violate the water quality standards of a downstream tribe, the EPA may ask the parties to engage in mediation or arbitration, in which the decision-maker and the EPA administrator, who has the final authority over the issuance of the permit, will consider such factors as "the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards." 33 U.S.C. § 1377(e). The EPA may then ask the tribe to issue a temporary variance from its standards for the particular discharge or may ask the state to provide additional water pollution controls. See 54 Fed. Reg. at 39099–101; 56 Fed. Reg. at 64885–89; 40 C.F.R. §§121.11 through 121.16. This mechanism, rather than a futile effort to avoid extra-territorial effects, is the way both Congress and the agency sought to accommodate the inevitable differences that would arise.<sup>221</sup>

The mechanism works because Congress designated the EPA as the final arbiter of inconsistent tribal and state water quality regulations.<sup>222</sup> Another regulation provides for resolution of conflicts between tribes and states that share jurisdiction over boundary waters.<sup>223</sup> The regulation calls for mediation or arbitration, at the election of the parties and under the auspices of the EPA, with final decisional authority residing in the EPA.<sup>224</sup> These sorts of dispute resolution systems can work in the water quantity regulation arena as well. All reservation water users have an interest in maintaining clean, useable water for instream and out of stream uses,

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220. See *supra* sources cited note 172.

221. *Wisconsin v. EPA*, 266 F.3d 741, 748-49 (7th Cir. 2001).

222. 33 U.S.C. § 1377(e) (2014) ("The Administrator shall, in promulgating such regulations, consult affected States sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water.").

223. 40 C.F.R. § 131.7 (1992). See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, at 797-98.

224. See 40 C.F.R. § 131.7, *supra* note 223.

and the goal should be a regulatory system that is fair and efficient. If a tribe exercises authority under the CWA and regulates water use on a reservation-wide basis, it should consider devising a cooperative regime with neighboring jurisdictions to resolve any conflicts.

## VII. CONCLUSION

There are few reported decisions dealing with the tribal-versus-state authority to regulate on-reservation water use.<sup>225</sup> Nevertheless, many tribes assert ownership and control over all resources within their reservations as a general matter,<sup>226</sup> and forty-nine tribes are recognized by the EPA as having inherent jurisdiction over reservation waters—including jurisdiction over non-members and water use on non-member fee lands.<sup>227</sup> The fact that such tribes may clearly regulate non-members under the CWA, and may complement that authority with a comprehensive water code, makes a powerful case for tribal authority over the use of all reservation waters. Under these circumstances, tribes and states should consider the following propositions.

First, all parties should recognize that Indian tribes and their members have paramount rights to the use of some if not all reservation water resources. Second, many non-Indians have acquired fee simple land within Indian reservations and use water under tribal or state law, or both. Third, scarcity of water for new uses and controversy over changes in existing uses involve sensitive issues for policy-makers to consider. Tribal governments are best positioned to make such policy judgments and enforce local regulations within their reservation homelands. This is consistent with the original promises embodied in treaties, executive orders, and other agreements setting aside tribal lands for permanent tribal occupation. At the same time, vacillating federal policies resulted in non-Indian land ownership within reservations. Where non-members have acquired water permits or other claims to water under state law, tribes should honor those claims to the extent consistent with tribal water rights and policies. This may be a relaxation of full tribal sovereignty over water uses, but it may be worth it as a way to avoid lengthy and costly litigation—litigation that may

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225. See *supra* text accompanying notes 111-114.

226. See *supra* note 55.

227. See *supra* note 172.

resolve only the particular case and leave future outcomes uncertain. Through such a process, tribes could bring non-Indian water users into a comprehensive tribal system designed to allow for water use consistent with settled expectations, but be mindful of the need for environmental protection and changing needs of reservation communities. Of course, state cooperation (or at least non-opposition) will be necessary for such a regime to work, and not devolve into litigation.

The Secretary of the Interior should lift the moratorium on tribal water code approval, but in doing so could suggest that the approval process will consider how a tribal applicant will treat currently exercised state water rights—if any exist. This would move the discussion over tribal regulatory power from a judicially supervised contest to a process that considers the interests of the parties, rather than simply their legal positions. It would also put the Secretary in the proper position of facilitating tribal self-determination, and promoting effective water management as opposed to standing as an obstacle to these ends.

At the end of the day, it is tribal governments that must decide whether to assert some or all of their regulatory authority over water use and water quality. States must decide whether it is in their interest to cooperate with tribal efforts, or enter the labyrinth of litigation over tribal regulatory power. The EPA's current position regarding inherent tribal authority argues in favor of recognizing tribal authority where it is asserted. But any regulatory regime requires a substantial commitment of resources, and can be aided by efforts at inter-governmental cooperation. Reconciliation of interests in this area should be the goal to ensure efficient use of scarce reservation water resources while maintaining water quality.