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**Section of Environment, Energy, and Resources**

# The Legacy of *Winters v. United States* and the Winters Doctrine, One Hundred Years Later

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## Introduction

On January 6, one hundred years ago, the United States Supreme Court held that the establishment of an Indian reservation carries with it a reservation of water. Although grounded in Supreme Court precedent addressing the interpretation of treaties, including the understanding of tribes in ceding territory and natural resources, the case was to become the first in the development of a doctrine recognizing an implied water right whenever necessary for the purpose intended by Congress in establishing any federal or Indian reservation: the *Winters Doctrine*. In recent years it can be said that for Indian people the doctrine has come full circle to seek not what Congress wants for Indian people, but what they want by returning tribal governments to their rightful seat at the table to determine the future of our shared water resource in the process of settling Indian water rights.

Section I of this paper will describe the factual setting of *Winters v. United States*, on the Fort Belknap Reservation in the Milk River valley of north central Montana. Section II will describe the 1908 ruling and its basis in existing U.S. Supreme Court law interpreting treaties. Section III will describe the subsequent development of the Winters Doctrine in the key cases of *Arizona v. California,*[1] *Cappaert v. United States*,[2] *United States v. New Mexico,*[3] *and Wyoming v. United States.*[4] Section IV will describe the assertion of state court jurisdiction under the McCarran Amendment[5] and several important state court rulings in Wyoming, Arizona, and Idaho. Finally, Section V will describe the current era of settlement of Indian reserved water rights.

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[1] Arizona v. California, 373 U.S. 546, 600 (1963) (Arizona I).
[2] [2] Cappaert v. United States, 426 U.S. 128 (1976)
[3] United States v. New Mexico, 438 U.S. 696, 700 (1978).
[4] Wyoming v. United States, 492 U.S. 406 (1989).
[5] 43 U.S.C. § 666(a).

**The Fort Belknap Reservation and the Milk River**

Thousands of years ago, ice pushed the Missouri River south into its present channel in Montana, leaving an empty river bed and a vast plain of glacial debris.[6] A small stream that swells to a river in spring with runoff from the Rocky Mountain front, began to carve its own path in the wake of the ancestral Missouri.[7] Because of its load of suspended glacial silt, Meriwether Lewis called this stream the "Milk River."[8] With its headwaters in the Rocky Mountain front in what is now Glacier National Park and the Blackfeet Indian Reservation, the river has high spring runoff. Flows in the Milk River prior to development of the Milk River Reclamation Project are estimated to have ranged from as high as 35,000 cubic feet per second (cfs) during spring runoff to as low as 5 cfs during late summer and early fall of a dry year.[9] The Fort Belknap Reservation is located primarily in the valley of the Milk River,[10] and was established for members of the Gros Ventre and Assiniboine Tribes.[11] The river forms the reservation's northern boundary.[12]

The Gros Ventre and Assiniboine Tribes have strikingly different histories. The Gros Ventre are thought to have separated from the Arapaho and became known as a division of the Blackfeet Nation in the mid-1700's.[13] Gros Ventre were reported along the Milk River throughout the 1800's,[14] and were party to the Blackfeet Treaty of 1855.[15] The Assiniboine separated from the Sioux in the mid-1600's and were reported along the Upper Missouri River in the late 1700's and early 1800's.[16] The Assiniboine were party to the 1851 Treaty of Fort Laramie designating their territory in the vicinity of the Missouri and Muscleshell Rivers.[17] The Assiniboine Tribe was heavily reliant on the buffalo for sustenance and trade.[18] Prior to the 1880's, the Milk River valley had abundant large game, including buffalo.[19] Smallpox epidemics in 1780 and 1838 took their toll on the Assiniboine.[20]

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[6] Frank Swenson, *Geology and Ground-Water Resources of the Lower Marias Irrigation Project Montana,* USGS Water Supply Paper 1460-B (1957).
[7] *Id*.
[8] THE JOURNALS OF LEWIS AND CLARK – Lewis, 106-107 (Bernard DeVoto ed. The Riverside Press Cambridge 1953) ("Wed. May 8th 1805. we nooned it just above the entrance of a large river . . . from the quantity of water furnished by this river it must water a large extent of country . . . the water of this river possesses a peculiar whiteness, being about the colour of a cup of tea with the admixture of a tablespoonful of milk. from the colour of it's water we called it Milk River. . . . Capt. C. could not be certain but thought he saw the smoke and some Indian lodges at a considerable distance up Milk River).
[9] *Natural Flow and Water Consumption in the Milk River Basin, Montana and Alberta, Canada,* USGS Water Resources Investigations Report 86-4006 (1986).
[10] Montana Reserved Water Rights Compact Commission Staff, *Draft Technical Report on the Compact with the Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation* 1 (2002) (hereinafter Commission Staff, *Technical Report: Fort Belknap*) (unpublished report, manuscript on file with the Montana Reserved Water Rights Compact Commission, Helena, Montana)
[11] 25 Stat. 113 (May 1, 1888).
[12] *Id.*
[13] Commission Staff, *Technical Report: Fort Belknap*, *supra* note 10, at 13.
[14] *Id.*
[15] 11 Stat. 657, (October 17, 1855).
[16] Commission Staff, *Technical Report: Fort Belknap*, *supra* note 10, at 11.
[17] 11 Stat. 749 (September 17, 1851).
[18] THE ASSINIBOINE, Michael Stephen Kennedy ed. 63 (U. of Okla. Press 1961) ("To the Assiniboines, the buffalo was more than an animal. It was the staff of life.) A written record of the Assiniboine, as with many tribes, does not exist. Scholars must rely on oral history. "The Assiniboine" is the result of one of the attempts to record some of that history as part of the Depression era Federal Writer's Program of the Work Projects Administration, Montana.
[19] THE JOURNALS OF LEWIS AND CLARK, THE JOURNALS OF LEWIS AND CLARK -- Lewis 105 *supra* note 8 ("5th of May Sunday 1805, after brackfast I walked on shore Saw great numbers of Buffalow & Elk Saw also a Den of young wolves, and a number of Grown Wolves in every direction . . . in the evening we saw a

By the 1870's, the Gros Ventre and certain Assiniboine were known to inhabit an area along the Milk River near the Fort Belknap Agency.[21] As the buffalo disappeared from the plains, the tribes were moved onto smaller and smaller reservations with the promise of agriculture by the federal government. Prior to May 1, 1888, the entire Milk River Basin within the United States lay within the larger reservation of the Blackfeet, Gros Ventre and other tribes and groups of Indians,[22] and the Fort Assiniboine Military Reservation (a smaller area wholly within the larger Indian Reservation).[23] On May 1, 1888, the United States fragmented the larger reservation into three smaller reservations: the Blackfeet Reservation, Fort Belknap Reservation, and Fort Peck Reservation,[24] with Fort Assiniboine remaining as a separate military reservation in the vicinity of what is now the Rocky Boy's Reservation.[25]

The Acts of 1888 creating the Blackfeet, Fort Belknap, and Fort Peck Indian Reservations, opened the remaining area in the Milk River Valley to settlement.[26] Settlement began in earnest when the Great Northern Railroad was completed in 1890 along the north bank of the Milk River.[27] Federal policy toward the western public lands at the turn of the last century encouraged the development of small, family-owned, farms. The non-Indian irrigation development along the Milk River occurred with the encouragement of federal law.[28] At the same time, federal Indian policy favored establishment of smaller reservations and conversion of Indian people to farmers. Unfortunately, insufficient water existed in the Milk River for implementation of both policies, and the basin became one of the sites of the earliest water disputes between appropriative and reserved water rights.[29]

In 1895, farmers began diverting water from the Milk River upstream from the Fort Belknap Reservation.[30] Three years later, on July 5, 1898, the agency at Fort Belknap began diverting approximately 5000 miner's inches (approximately 125 cfs) of water from the Milk River for irrigation of reservation land.[31] Although downstream irrigators both on and off the reservation saw diminished flows as more people settled in the upper Milk River valley, the development of farming proceeded until, as is inevitable in the Milk River Basin, severe drought

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Brown or Grisley beare on a sand beach") This was a typical day for the Lewis and Clark Expedition in the vicinity of the Milk River.

[20] COMMISSION STAFF, TECHNICAL REPORT: FORT BELKNAP, *supra* note 10, at 11.

[21] JOHN SHURTS, INDIAN RESERVED WATER RIGHTS: THE *WINTERS* DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT 1880S - 1930S, 17-18 (U. of Okla. Press 2000); COMMISSION STAFF, TECHNICAL REPORT: FORT BELKNAP, *supra* note 10, (citing Executive Order of March 4, 1880, General Orders and Circulars, 1876-1881, Dept. of Dakota, Vol. 208, Adjunct General Field Office, National Archives, Washington D.C.).

[22] "Treaty with the Blackfoot [sic] Indians," 11 Stat. 657, (Oct 17, 1855).

[23] SHURTS, *supra* note 21, at 18.

[24] "An act to ratify and confirm an agreement with the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians in Montana, and for other purposes." 25 Stat. 113, May 1, 1888.

[25] Montana Reserved Water Rights Compact Commission Staff, *Technical Report on the Compact with the Chippewa Cree Tribe of the Rocky Boy's Reservation* 12 (2002) (unpublished report, manuscript on file with the Montana Reserved Water Rights Compact Commission, Helena, Montana).

[26] Two ranches on tributaries to the Milk River claim water right priority dates prior to the May 1, 1888 opening of the land to settlement. Thus, it is clear that settlers had already entered the Milk River Valley at the time of negotiation of the new treaty. Telephone conversation with Bill Greiman, Agricultural Engineer, Montana Reserved Water Rights Compact Commission, Helena, Montana, June 25, 2002..

[27] SHURTS, *supra* note 21, at 29.

[28] *See, e.g.*, Homestead Act of 1862, 43 U.S.C. 161-284 (repealed 1976), Desert Lands Act 1877, 43 U.S.C. 321-339 (repealed 1976).

[29] *See* Winters v. United States, 207 U.S. 564 (1908)

[30] Winters v. United States, 143 Fed. Rep. 740,742 (9th Cir. 1906) *aff'd* Winters v. United States, 207 U.S. 564 (1908).

[31] Winters, 207 U.S. at 566.

struck in 1904-1905.[32] As a result, water no longer reached the tribal diversion facilities. The United States filed suit in the United States Circuit Court for the District of Montana to enjoin diversion of water upstream from the Fort Belknap Reservation to the extent necessary to prevent interference with the flow of water to the reservation.[33] The result –*Winters v. United States*, 207 U.S. 564 (1908) – the first ruling in what would become the *Winters Doctrine*.

Historian and lawyer, Dr. John Shurts, has emphasized that *Winters v. United States*, does not itself embody the Winters Doctrine.[34] In fact, subsequent interpretation in development of the doctrine can be said to stray substantially from the original ruling.[35] Understanding this development must begin with the case itself.

### ***Winters v. United States*, 207 U.S. 564 (1908)**

U.S. Attorney Carl Rasch, who argued the *Winters* case on behalf of the United States and the Fort Belknap Reservation, argued several theories of the case as would any good attorney: (1) a factual argument based on prior appropriation which he knew he would lose if the court accepted the evidence of earlier diversion by irrigators upstream of the reservation; (2) a legal argument seeking recognition of riparian rights for a reservation with its northern border formed by the Milk River; and, as his primary argument, (3) a simple extension of precedent in the interpretation of treaty language reserving certain rights from the overall cession of territory by the tribes.[36] Although many list number 3 as an afterthought which the Court adopted out of the blue, historian John Shurts points out, it was Attorney Rasch's primary argument and the one that most closely followed U.S. Supreme Court precedent.[37]

The precedent relied on by *Winters* can be found in *U.S. v. Winans.*[38] In *Winans*, the Court held that the off-reservation treaty "right of taking fish at all usual and accustomed places, in common with the citizens of the territory,"[39] implied a right of access across private land to exercise the right.[40] Writing for the majority in *Winans* (as he would in *Winters*), Justice McKenna stated: "the treaty was not a grant of rights to the Indians, but a grant of right from them,-a reservation of those not granted."[41]

The key language in Winters indicating the Court's reliance on this precedent is: "[t]he 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?"[42] In reaching its conclusion the Court, as it did in *Winans*,[43] relied on the canons of construction for the proposition that treaties with Indian tribes must be construed liberally.[44]

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[32] SHURTS, *supra* note 21, at 29 and 35.
[33] Winters, 143 Fed. Rep. at 741.
[34] Presentation of John Shurts, panel on *Winters* in Historical Context, Conference on: The *Winters* Centennial: Will Its Commitment to Justice Endure? June 9-12, 2008, Santa Ana Pueblo, New Mexico.
[35] *Id.*
[36] Shurts *supra* note 21, at 35-66.
[37] Shurts *supra* note 21, at 35-36.
[38] United States v. Winans, 198 U.S. 371 (1905)
[39] Winans, 198 U.S. at 378 *quoting* Article 3 of the 1855 Treaty with the Yakima Nation, 12 Stat. 951.
[40] Winans, 198 U.S. at 381.
[41] Winans, 198 U.S. at 381.
[42] Winters, 207 U.S. at 576.
[43] Winans, 198 U.S. at 380-381.
[44] Winters, 207 U.S. at 576; *see also* Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers*, 30 Tulsa L.J. 61, 65 (1994); (noting that the Court relied on the canons of construction to liberally construe the purpose for establishment of the Fort Belknap Reservation in *Winters*). The canons of construction first applied to treaties, and later extended to statutes, executive orders and administrative regulations are: "[1] that treaties be liberally construed to favor Indians; [2] that ambiguous expressions in

Despite this grounding in precedent defining things reserved to be those historically used by and not ceded by a tribe, Winters had to address the fact that the threatened irrigation diversion not only was not in existence prior to establishment of the reservation, but irrigation was not part of the historic practices of the Gros Ventre and Assiniboine Tribes. Instead, reference to agriculture in the treaty occurred as a promise from the United States to provide training and tools in exchange for agreeing to boundaries not broad enough to support a hunter/gatherer lifestyle. Thus, in addition to the language quoted above, the Court turned to the treaty for the interpretation that: "[t]he reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people."[45] Thus, *Winters* is rarely referred to as articulating a principle of treaty construction and has become known for the principle that when the federal government sets aside public land for a particular purpose such as an Indian Reservation, it may reserve water under federal law for that purpose.[46] This principle is known as the *Winters Doctrine* and is only fully developed in cases subsequent to *Winters*.

## The Winters Doctrine

In 1963, after determining that five reservations in the Lower Colorado River Basin were established for agricultural purposes, the United States Supreme Court endorsed a method used to quantify the water rights for that purpose: the Practicably Irrigable Acreage method, or PIA.[47] PIA is a quantification method that gives tribes a right to the amount of water necessary to irrigate all land on the reservation that can feasibly and economically be irrigated.[48] Application of the method to the five reservations involved in *Arizona v. California* resulted in an award of just under 1 million acre-feet per year.[49] The average annual flow of the Colorado River is approximately 14 million acre-feet.[50]

Endorsement of the PIA method has lead to considerable debate over what composes acreage that is practicably irrigable.[51] Because quantification of most tribal water rights has been

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treaties must be resolved in favor of the Indians; and [3] that treaties should be construed as the Indians would have understood them" FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 222 (1982 ed.). *See also,* McClanahan v. State Tax Commission, 411 U.S. 164, 174 (1973) (ambiguous expressions must be resolved in favor of the Indian parties concerned), Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970) (Indian treaties must be interpreted as the Indians themselves would have understood them), Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943) (Indian treaties must be liberally construed in favor of the Indians). *See also,* Charles F. Wilkinson and John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As long as Water Flows or Grassgrows upon the Earth" -- How Long a Time is That?,* 63 Cal. L. Rev. 601, 610 (1975).

[45] Winters, 207 U.S. at 576.

[46] Winters v. United States, 207 U.S. 564, 577 (1908).

[47] Arizona I at 600-601.

[48] Arizona I at 600 (accepting the conclusion of the Special Master that quantification of the water necessary to irrigate the practicably irrigable acreage on the Reservation as an appropriate method to determine the water necessary for present and future needs. The relevant discussion of PIA occurs in the Report of the Special Master to the United States Supreme Court, Dec. 5, 1960.); *see also*, Arizona v. California 439 U.S. 419 (1979) (Arizona II) (further defining the water rights of the five tribes).

[49] Arizona I at 596.

[50] Monique C. Shay, *Promises of a Viable Homeland, Reality of Selective Reclamation: A Study of the Relationship Between the Winters Doctrine and Federal Water Development in the Western United States*, 19 Ecol. L. Q. 547, 578. (1992).

[51] Big Horn I, *aff'd mem. sub. nom.* Wyoming v. United States, 492 U.S. 406 (1989)*; see also*, Martha C. Franks, *The Use of the Practicably Irrigable Acreage Standard in the Quantification of Reserved Water Rights*, 31 Nat. Resources J. 549 (1991); Gina McGovern, *Settlement or Adjudication Resolving Indian*

the subject of settlement rather than litigation, it is necessary to turn to the one state case where the elements of PIA have been litigated: the adjudication in Wyoming state court of the water rights of the Arapaho and Shoshone Tribes of the Wind River Reservation (Big Horn I). In Big Horn I, the State, Tribes and United States stipulated to the following definition of PIA: '"those acres susceptible to sustained irrigation at reasonable costs."'[52] The Wyoming Supreme Court accepted the application of this test by the Special Master who required the following analyses:

(1) classification of lands based on arability of soils;
(2) analysis of the engineering feasibility of providing irrigation to those soils classified as arable; and
(3) analysis of the economic feasibility of irrigation on the lands considered arable and technically susceptible to irrigation.[53]

Each of these steps requires determinations that can result in a wide degree of variability in the PIA ultimately calculated. The area of greatest debate is the economic feasibility analysis, because small differences in factors can result in wide variability in the outcome.[54] Private water users and states point to these factors when they criticize PIA for awarding huge water rights without consideration of the effects on other water users.[55]

While states and private water users debate the technical aspects of the economic feasibility analysis, tribes debate whether its application is appropriate at all. Passage of the Reclamation Act in 1902 began the use of federal subsidy to facilitate settlement of the west.[56] This federal policy led to substantial non-Indian irrigation development in basins shared with Indian reservations. Many argue that the economic feasibility analysis under the PIA standard

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*Reserved Rights*, 36 Ariz. L. Rev. 195 (1994); Andrew C. Mergen and Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. Colo. L. Rev. 683 (1997).

[52] Big Horn I at 101.

[53] Big Horn I at 101.

[54] *See, e.g.*, Big Horn I at 104 (noting expert testimony on discount rate varying from 2% to 11%), *see also* Lynnette Boomgaarden, *Practicably Irrigable Acreage Under Fire: The Search for a Better Legal Standard*, 25 Land & Water L. Rev. 417, 430 (1990) (noting that small changes in variables, particulary the discount rate, have large effects on PIA); H.S. Burness, R.G. Cummings, W.D. Gorman, and R.R. Lansford, *The 'New' Arizona v. California Practicably Irrigable Acreage and Economic Feasibility*, 22 Nat. Resources J. 517, 522 (1982); Franks, *supra* note 51, at 562 (noting the considerable guesswork in the economic feasibility analysis); Shay, *supra* note 50, at 578 (asserting that the cost/benefit analysis in application of the PIA standard is highly subjective and can be an expensive battle of experts).

[55] Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers*, 30 Tulsa L.J. 61, 75 (1994); Elizabeth Weldon, *Practically Irrigable Acreage Standard: A Poor Partner for the West's Water Future*, 25 Wm. & Mary Envtl. L. and Pol'y Rev. 203, 205 (2000).

[56] On the size of the subsidy: DANIEL MCCOOL, COMMAND OF THE WATERS: IRON TRIANGLES, FEDERAL WATER DEVELOPMENT, AND INDIAN WATER, 71 (U. of Cal. Press 1987) (noting an investment of $6 billion in Reclamation by 1974, resulting in a 57-97% subsidy according to a 1980 study by the Interior Department's Office of Policy Analysis). On the policy behind the Reclamation Act: MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER, 4, and 120-124 (Viking Penguin, Inc. 1987) (summarizing the many bailouts of Reclamation projects through restructuring of repayment and extension of the repayment period required on the federal capitol investments in reclamation, Reisner states: "[w]ere it not for a century and a half of messianic effort toward [manipulation of water], the West as we know it would not exist."); *see also*, Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 292 (1958) (Congress intended the Reclamation program to benefit "the largest number of people, consistent, of course, with the public good."); Peterson v. United States Department of the Interior, 899 F.2d 799, 802-803 (9th Cir. 1990) ("[w]ith the Reclamation Act, Congress created a blueprint for the orderly development of the West, and water was the instrument by which the plan would be carried out . . ."); United States v. Tulare Lake Canal Co., 535 F.2d 1093, 1119 (9th Cir. 1976) (stating that the Act had the following goals: "to create family-sized farms in areas irrigated by federal projects . . . to secure the wide distribution of the substantial subsidy involved in reclamation projects and limit private speculative gains resulting from the existence of such projects").

holds quantification of tribal water to a higher standard than federal Reclamation projects.[57] The unfairness of this is particularly acute where tribal water resources are shared with a Reclamation project. Given the dissatisfaction on both sides of the debate, it is not surprising that parties to adjudication of tribal water rights sought change.

In 1989, the United States Supreme Court granted certiorari on Big Horn I on the question, "[i]n the absence of any demonstrated necessity for additional water to fulfill Reservation purposes and in the presence of substantial state water rights long in use on the Reservation, may a reserved water right be implied for all practicably irrigable land within a Reservation?"[58] The Court issued the following ruling: "[t]he judgment below is affirmed by an equally divided Court."[59]

With PIA reaffirmed, courts and parties proceeded to settle under the guidelines imposed by the PIA standard despite the fact that it resulted in a less than satisfactory outcome in the vast majority of cases.[60] Those affected by water allocation were thus startled to learn that an even more subjective standard might have prevailed. On opening of the papers of Justice Thurgood Marshall, parties learned that prior to her recusal from *Big Horn I* due to the conflict created by a family ranch with water claims in the Gila River adjudication, Justice O'Connor had written a majority opinion that would have altered the PIA standard.[61] Justice O'Connor would have required "sensitivity" to private development and reduced a PIA award if the projects proposed lacked a "reasonable likelihood" of being built.[62] Thus, a standard already highly variable in its application would have included the subjective requirement that the political will to develop irrigation on that particular reservation exists. Quite possibly that political will would decrease with the increasing level of water development in basins shared with a reservation. Lucky the tribe who ended up with flat land in a warm climate where its trustee did not promote irrigation of surrounding land through development of a Reclamation project. The dispute within the Supreme Court made public by the release of the Marshall papers, combined with growing concern over inequitable results rendered the issue of the standard for quantification of tribal water ripe for change, yet the U.S. Supreme Court has been given no further opportunity to do so.

With the exception of the brief endorsement of the Wind River water right, the United States Supreme Court has addressed the doctrine of reserved water rights since 1963 only in the context of non-Indian federal reservations.[63] In doing so, the Court has articulated a very narrow

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[57] Franks, *supra* note 51, at 578 (noting that a strict application of a PIA economic analysis would not show any modern federal water project to be feasible); Walter Rusinek, *A Preview of Coming Attractions? Wyoming v. United States and the Reserved Rights Doctrine, 17 Ecol. L.Q. 355,* 372 (1990) (criticizing the application of PIA in Arizona II for imposing more stringent standards than those required for federal reclamation projects); Shay, *supra* note 50, at 579 (noting that Tribes argue that the economic feasibility analysis under PIA is more stringent than the requirements for federal reclamation projects.).

[58] Wyoming v. United States, 488 U.S. 1040 (1989) (granting cert. on "Question 2 presented by the petition.") Text of the question may be found at Rusinek, at 394, n. 267.

[59] Wyoming v. United States, 492 U.S. 406 (1989).

[60] It should be noted that nothing in either Arizona I and II, or Wyoming v. United States, requires PIA as the only standard for quantification of a reserved water right. These cases merely endorse the method as a reasonable accommodation of the need to quantify future rights when the purpose of the reservation has been determined to be agricultural. Nevertheless, seeking to avoid a costly process of trial and error to determine what other standard the Supreme Court might accept, states and tribes have relied on the certainty of the validity of PIA.

[61] Wyoming v. United States, U.S. Supreme Court Second Draft Opinion No. 88-309, at 17-18, Justice O'Connor, June 1989 (hereinafter Wyoming v. United States, Draft Opinion) (available in the Manuscript Division of the Library of Congress, papers of Justice Marshall), *see also*, Mergen and Liu, *supra* note 51, at 684.

[62] Wyoming v. United States, Draft Opinion at 17.

[63] Cappaert v. United States, 426 U.S. 128 (1976) (affirming an injunction against private groundwater pumping affecting water levels at an underground pool within a national monument); United States v. New

construction of the scope of the implied right, raising the issue of whether the same narrow construction applies to Indian reserved rights.[64]

In *United States v. New Mexico* the United States Supreme Court addressed the reserved water rights of the Gila National Forest, and announced a distinction between primary and secondary purposes of a reservation.[65] The Court noted that for every gallon of water awarded to the federal government, one less gallon is available for appropriation under state law.[66] Thus, out of traditional deference to state law concerning allocation of water resources, the Court concluded that only primary purposes carry a reserved water right.[67] Water for secondary purposes can be fulfilled pursuant to state law.[68]

The Court further narrowed the scope of federal reserved water rights in addressing the rights associated with an underground pool expressly preserved in the establishment of a national monument.[69] The Court was unwilling to balance competing appropriative water interests against those of the federal land out of concern that Congressional intent with respect to the use of federal land could be defeated.[70] However, once again out of sensitivity to the traditional deference to state law, the Court stated "[t]he implied-reservation-of-rights-doctrine, . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more."[71] The Court has never had the opportunity to determine whether the narrow interpretation of reserved water rights associated with federal reservations also applies to Indian reservations. At least one state court has held otherwise as discussed below.

### State Court Jurisdiction

Application of the method to the five reservations involved in *Arizona v. California* resulted in an award of just under 1 million acre-feet per year.[72] The average annual flow of the Colorado River is approximately 14 million acre-feet.[73] With an indication of the magnitude of the cloud on appropriative water rights, states pursued jurisdiction to adjudicate tribal water rights. In a highly contentious process that included a last minute appropriation rider referred to as the "McCarran Amendment" waiving the sovereign immunity of the United States,[74] and

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Mexico, 438 U.S. 696 (1978) (addressing the scope of the reserved water right associated with a national forest).

[64] Mergen and Liu, *supra* note 51, at 697, and 706-707 (noting dispute over whether the Sensitivity Doctrine from *New Mexico* and *Cappaert* applies to Indian reserved water rights); Royster, *supra* note 39, at 72 (noting that '[t]he Supreme Court has not applied [the primary/secondary distinction of *New Mexico* to Indian Water Rights.); Rusinek, *supra* note 57, at 373.

[65] New Mexico, 483 U.S. at 701.

[66] *Id*. at 705. It should be noted that despite the influence of the concept of a gallon-for-gallon tradeoff on the reasoning of the Court, there is little actual data to support this assertion. Even on a stream considered fully appropriated, differences in timing of diversion use of storage, and return flow render calculation of the tradeoff more complex.

[67] *Id*.

[68] *Id.*

[69] Cappaert, 426 U.S. at 132.

[70] *Id*. at 138-139.

[71] *Id*. at 141 (note that the term "sensitivity" is not used in the majority opinion, but was raised in the dissent in reference to the quoted passage. The case nevertheless is cited as the source of the Sensitivity Doctrine. Note also that the quoted language is followed by a reference to *Arizona v. California* without reference to page number. It is difficult to read *Arizona v. California* as support for the concept.).

[72] Arizona I at 596.

[73] Monique C. Shay, *Promises of a Viable Homeland, Reality of Selective Reclamation: A Study of the Relationship Between the Winters Doctrine and Federal Water Development in the Western United States*, 19 Ecol. L. Q. 547, 578. (1992).

[74] 66 Stat. 560, §§ 208(a)-(c) (1952). The relevant text of the McCarran Amendment states that:

appeals to the United States Supreme Court interpreting the McCarran Amendment,[75] state courts achieved jurisdiction over adjudication of tribal water rights. This highly politicized process led to the startling outcome that state rather than federal courts define Indian reserved water rights in the first instance. State adjudication of tribal water rights addresses federal questions, thus state court decisions remain subject to United States Supreme Court review.[76] To avoid potential Supreme Court reversal by embarking on an untested path, most states and tribes proceed within the guidelines provided by PIA -- i.e. quantification of water based on the agricultural potential of the reservation land base -- even though the Supreme Court has never articulated PIA as the only method for quantification.

On November 26, 2001, the Arizona Supreme Court rejected agriculture as the standard purpose and PIA as the sole measure of reserved water rights on Indian reservations in Arizona, concluding that a homeland rather than an agricultural purpose applies.[77] The concept of a Reservation as a homeland is not new.[78] However, the Arizona Supreme Court is the first state court to squarely adopt a homeland standard and to further articulate a method of quantification consistent with that standard by indicating that the measure of the water right for a "homeland" is specific to the needs, wants, plans, cultural background, and geographic setting of the particular reservation, and cannot be defined by a single measure such as PIA.[79] In reaching its decision, the Arizona Supreme Court distinguishes Indian reservations from other federal reservations on the basis of the canons of construction requiring liberal interpretation of treaties, statutes, and executive orders pertaining to Indian affairs, and the federal fiduciary relationship with tribes.[80]

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> (a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction . .

43 U.S.C. § 666(a).

[75] Development of the interpretation of the McCarran Amendment in chronological order: United States v. District Court for Eagle Co., 401 U.S. 520 (1971) (holding that the waiver of sovereign immunity in the McCarran Amendment covers suits to adjudicate reserved water rights), Colorado River Water Conservation District v. United State*s*, 424 U.S. 800 (1976) (holding that although jurisdiction is not exclusive in state court, the policy apparent in the McCarran Amendment, to avoid piecemeal litigation, favors deference to state adjudication), Arizona v. San Carlos Apache Tribe, 463 U.S. 545(1983) (holding that dismissal of federal suits to quantify Indian reserved water rights in deference to state adjudication is appropriate).

[76] *See, e.g.*, Wyoming v. United States, 492 U.S. 406 (1989) (affirming *In re* the General Adjudication of all Rights to Use of Water in the Big Horn River System, 753 P.2d 76, (Wyo. 1988) (Big Horn I).

[77] Gila V at 76.

[78] Tribes have long asserted a homeland purpose in quantification of water rights. Courts have either rejected the approach: (Big Horn I at 94-97, rejecting the finding of the Special Master that treaty language stating "[t]he Indian herein named agree . . . they will make said reservations their permanent home," indicated that a primary purpose of the Reservation was to provide a permanent homeland), or relied on quantification for irrigation to provide sufficient water to account for future needs implicit in a homeland purpose: (Colville Confederated Tribes v. Walton, 647 F.2d 42, 47-48 (9th Cir. 1981) holding that "one purpose for creating this reservation was to provide a homeland for the Indians to maintain their agrarian society" and then concluding that the amount of water necessary to irrigate all practicably irrigable acreage is the appropriate measure of water for that purpose).)

[79] Gila V at 79-80.

[80] Gila V at 74 and 76.

State court jurisdiction has provided mixed results for tribes in Wyoming and Idaho. In the Big Horn case discussed above, after awarding the Shoshone and Arapahoe Tribes of the Wind River Reservation almost half a million acre-feet under the PIA standard, the court held that the right did not extend to groundwater simply because no Supreme Court precedent on this issue exists.[81] In a deeply divided opinion, the Wyoming Supreme Court concluded that law. that (1) only the State engineer (as opposed to the Tribe) could administer the tribal water right[82] and (2) water not historically put to use but quantified under the PIA standard could not be dedicated to instream flow by the Tribe. [83]

Claims of the Nez Perce Tribe in the Snake River Basin Adjudication in Idaho (SRBA) raised issues not previously addressed in any court. Among the claims asserted by the Tribe were off-reservation instream flow rights stemming from the treaty right to fish at the "usual and accustomed places," and a historic reliance on salmon and steelhead. The claims encompassed much of the Snake River water basin, the primary surface water supply in southern and central Idaho and would require consideration of whether a treaty right to fish carries with it a right to maintain habitat for fish outside the boundaries of a reservation.[84] In 1999, Judge Wood of the SRBA court ruled against the Nez Perce instream flow claims stating that "the parties to the 1855 treaties did not intend to reserve an instream flow water right because neither party to the Treaty contemplated a problem would arise in the future pertaining to fish habitat," and relying on the fact that the U.S. Supreme Court when ruling on the right of Steven's treaty tribes to an allocation of the harvestable fish did not consider the treaty language to guarantee the size of the salmon run. [85] Both the legal reasoning and the outcome of this decision were heavily criticized by legal scholars,[86] thus an appeal to the Idaho Supreme Court was anticipated.[87] Although that appeal

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[81] *In re* General Adjudication of All Rights to Use Water in the Big Horn River System (Big Horn I) 753 P.2d 76, 99 (Wyo. 1988)
[82] *In re* General Adjudication of All Rights to Use Water in the Big Horn River System (Big Horn II) 835 P.2d 273, 282-283 (Wyo. 1992); Despite the unfavorable ruling, the Shoshone and Arapaho Tribes chose not to appeal the decision to the U.S. Supreme Court out of concern that the current Court's unfavorable view of tribal sovereignty could result in an opinion with adverse consequences for all of Indian Country. Katharine Collins, *Water: Fear of Supreme Court Leads Tribes to Accept an Adverse Decision, in* WATER IN THE WEST: A HIGH COUNTRY NEWS READER 251-254 (Char Miller ed. 2000).
[83] Id. At 278.
[84] *In re SRBA,* Case No. 39576, Consolidated Subcase 03-10022 at 13 (Nez Perce Instream Flow Claims) (Nov. 10, 1999) *available at* http://www.srba.state.id.us/FORMS/sumjudg.PDF . ("In March of 1993, the United States and the Nez Perce Indian Tribe submitted instream flow water rights claims for fish habitat and channel maintenance in the Snake River Basin Adjudication ("SRBA") which were subsequently amended to include 1113 stream reaches located within the Salmon, Clearwater, Weiser, Payette, and Snake River drainage.")
[85] *Id.* at 32-33.
[86] Michael C. Blumm, Dale D. Goble, Judith V. Royster, and Mary Christina Wood, *Judicial Termination of Treaty Water Rights: The Snake River Case*, 36 IDAHO L. REV. 449 (2000) ("In 1983, in a decision that sanctioned state court determination of the existence, nature, and scope of Indian reserved water rights under the McCarran Amendment, Justice Brennan expressed optimism that the state courts would deal fairly with Indian water right claims. Justice Brennan noted that 'our decision in no way changes the substantive law by which Indian rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law.' [citation omitted] The SRBA court's decision casts doubt on Justice Brennan's optimism about the justice that tribal water rights would receive in state courts." *Id.* at 474)
[87] *See e.g., Id.* at 474 ("The Idaho Supreme Court has the opportunity to prevent that era [one in which tribes lose their resources in state courts] from beginning in Idaho by correcting the errors in the SRBA court's misguided opinion.")

was filed,[88] in 2005, the Nez Perce Tribe, State of Idaho, and United States entered an agreement settling the water right claims of the Tribe in Idaho.[89] It is nevertheless, not the fear of an unfavorable outcome so much as the possibility of a better solution that has resulted in the settlement of most Indian water right claims.

**Indian Water Right Settlements**

Twenty-two settlements have been through congressional or court approval or both.[90] Many are in various stages of implementation. These settlements have given rise to a greater tribal voice in western water and have begun to reverse the disparity between federal dollars spent on non-Indian water projects and Indian water projects.[91]

For non-Indian water users, settlement has removed a cloud of uncertainty over their water rights. Non-Indians have also seen benefits, not only from settlement water projects, but also through improvements in efficiency, coordination of management in basins with multiple jurisdictions, and in relations with their neighbors. The two benefits of choosing settlement over litigation referred to most often are:

(1) Wet Water: the greater likelihood that the tribe will see actual water rather than paper rights; and

(2) Tailored Solutions: the ability to tailor the solution to the needs of the particular tribe and of the basin in which it resides.

You need only look to the diversity of the twenty-one settlements to see that negotiators have taken full advantage of these benefits. Some examples:

(1) In Montana, an unsafe state dam on the Tongue River threatened downstream communities, [92] including some in which Northern Cheyenne is spoken – a language generally unknown to emergency evacuation services. The aftermath of Hurricane Katrina has reminded us that it is the marginalized populations that

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[88] *See,* Nez Perce Tribe v. Idaho, Supreme Court No. 26042 and 26128, In re SRBA Case No. 39576 subcase No.03-10022, June 27, 2005 *available at* http://www.isc.idaho.gov/opinions/srbaord2.pdf (Order granting remand of the appeal concerning the off-reservation instream flow claims to the district court for review of the settlement).

[89] The Nez Perce settlement among the State of Idaho, the United States, and the Nez Perce Tribe is reflected in the Mediator's Term Sheet of April 20, 2004 ("Term Sheet") *available at* http://www.idwr.idaho.gov/nezperce/pdf_files/complete-agreement.pdf The settlement was ratified in the Snake River Water Rights Act of 2004, introduces in the 108th Congress as S.2605 and passed as a rider on the omnibus appropriations bill. The Act also provides funding for many of the components agreed to in the Term Sheet.

[90] Jeanne S. Whiteing, *Indian Water Rights: The Era of Settlements*, 51 The Water Report 1 and 7 (May 15, 2008) *See also* BONNIE G. COLBY, JOHN E. THORSON, AND SARAH BRITTON, NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST, Table 1.1, xxiii, (University of Arizona Press, 2005). Not all of the 21 settlements listed in Table 1.1 are, strictly speaking, water right settlements. For example, the Truckee-Carson-Pyramid Lake settlement addresses endangered species and tribal trust issues. Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990, Pub.L. No. 101-618. At the same time, not all "water right" settlements are confined to issues of water rights. For example, the Nez Perce settlement includes a tribal role in salmon fish hatcheries and provisions addressing endangered species issues. The point being, in providing real solutions, it is no longer possible to segregate water rights from other attributes of a water system such as water quality or aquatic life.

[91] *See* Daniel McCool, *Winters Comes Home to Roost*, *in* FLUID ARGUMENTS: FIVE CENTURIES OF WESTERN WATER CONFLICT 121 (U. of Ariz. Press, Char Miller ed., 2000) (discussing disproportionate spending on non-Indian water projects).

[92] Montana Reserved Water Rights Compact Commission Staff, *Land and Water Resources of the Northern Cheyenne Indian Reservation*, 20 (July 1990), *available* from the Commission, Helena, Montana.

bear the brunt of a major disaster. The Tongue River dam has been repaired and enlarged. The increased pool belongs to the Northern Cheyenne Tribe.[93]

(2) In Nevada, Pyramid Lake once hosted a particular species of cutthroat trout. The trout disappeared from the Lake by the 1940's.[94] The Lake is now stocked with a hatchery population of Lahonton cutthroat trout.[95] The fish need high spring flows and cool temperatures to enter the river to spawn. The settlement provides for negotiation of an operating agreement to manage the five federal reservoirs and several private reservoirs in the basin in ways that allow enhancement of flows to the Lake during spawning, and provide a drought water supply for the growing Reno-Sparks area.[96] In 1997, a particularly wet year, the Lahonton cutthroat trout entered the Truckee River to spawn.[97]

(3) The Nez Perce settlement discussed above, recognizes the importance of salmon in the tribe's history and culture by giving the Tribe a greater role in the major hatcheries in the area and by providing for state-held instream flow protection and habitat restoration on many of the historic spawning streams in the Salmon and Clearwater basins in a way that accounts for current land use patterns.[98]

These settlements provide only a few examples of the results of the legacy of the Winters Doctrine. The University of Idaho Waters of the West Program has begun a process of developing an online database of all Indian water right settlements, settlement acts, and implementing documents including decrees and tribal water codes. It is anticipated that research made possible by the database will explore how, over the past 100 years, we have fundamentally altered the structure of power at the water table by bringing back the native voice. Looking forward to the next 100 years, we will use examples of creative solutions to explore how we can continue to solve problems in face of growing western water supply problems.

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[93] The Northern Cheyenne Compact can be found at § 85-20-301 MCA. Congressional ratification of the Compact occurred in P.L. 102-374 (1992). *See also,* Cosens, Barbara, *Northern Cheyenne Compact*, *in* BONNIE G. COLBY, JOHN E. THORSON, AND SARAH BRITTON, NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST, 124, (University of Arizona Press, 2005).

[94] Nevada Department of Conservation and Natural Resource, Division of Water Planning, *Truckee River Chronology: Chronological History of Lake Tahoe and the Truckee River and Related Water Issues, Part I (Truckee River Chronology Part I)* , *available at* http://www.state.nv.us/cnr/ndwp/truckee/truckee1.htm; CALIFORNIA DEPARTMENT OF WATER RESOURCES, TRUCKEE RIVER ATLAS, note 6 at 27 (June 1991).

[95] *Id*.

[96] Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990, Pub.L. No. 101-618, Title II; *see also, Farmers, Fish, Tribal Power, and Poker: Reallocating Water in the Truckee River Basin, Nevada and California,*10 U.C. Hastings, West-Northwest: Journal of Environmental Law and Policy 89, (2003).

[97] Chad R. Gourley, *Restoration of the Lower Truckee River Ecosystem: Challenges and Opportunities*, 18 J. Land, Resources, and Envt'l. L. 113, 118 (1998).

[98] S. 2605, 108th Cong. (2004). The bill was consolidated with the appropriations bill, H.R. 4818, 108th Cong. (2004).