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Indian *Winters* Water Rights Administration: Averting New Era

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INDIAN *WINTERS* WATER RIGHTS ADMINISTRATION: AVERTING NEW WAR

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I. INTRODUCTION AND SUMMARY

American Indian tribes' expansive federal reserved rights to water for their reservations are extremely controversial in the western states. Most persons obtain water rights under state laws which impose substantial restrictions on the right and award water on a time priority basis.[1] The relative lack of restrictions on the use of tribes' reserved water awards, and the early Indian water priority dates, make the tribal rights extremely valuable and also threatening. Indian rights have been characterized as having ". . . enormous potential to disrupt existing patterns of western water use."[2] Because of the fear that tribes will do precisely that—disrupt rather than enhance western development—states and affected parties have taken judicial and political aim at the size[3], and now the scope, of Indian water rights.

The challenges regarding the scope of Indian water rights under federal law involve essentially two questions. Three governments—federal, state, and tribal—claim authority over reservations, including Indian water administration; the jurisprudence in this area, unfortunately, is far from clear. Perhaps the more difficult question is what rules should govern the use of *Winters* reserved rights. The only bedrock law in this area is that state law does not govern the quantification or use of Indian water rights.[4]

A long list of complicating factors makes answering these questions uniquely challenging. These factors include shifting currents in western water law, the unique source of Indian water rights and federal obligations attendant to these rights, the historical circumstances of water development on Indian reservations, longstanding state-tribal and Indian/non-

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1. The western system of prior appropriation, popularly known as "first in time, first in right," evolved so that in times of water shortage, users with the earliest priority dates receive their full allocation, later users very well could receive no water.

2. Storey, *Leasing Indian Water Off the Reservation: A Use Consistent with the Reservation's Purpose*, 76 CALIF.L.REV. 179 (1988).

3. In re Rights to Use Water in Big Horn River, 753 P.2d 76 (Wyo. 1988); *cert. denied*, Shoshone Tribe v. Wyoming, 109 S.Ct. 3265 (1989); *aff'd by equally divided court per curiam*, Wyoming v. United States, 109 S.Ct. 3265 (1989) [hereinafter *Big Horn*]. The Shoshone and Arapaho Tribes defended successfully a Wyoming Supreme Court Decision awarding the Tribes substantial water based on their Reservation's practicably irrigable acreage.

4. Arizona v. California, 373 U.S. 546, 597-98 (1963), *decree entered*, 376 U.S. 340 (1964).

Indian tensions, a precipitous decline in federal assistance for water delivery infrastructure, and the roles of tribes as both sovereigns and owners of water on their reservations. This article argues that Indian tribal governments should retain primacy in regulating water use on the reservations and that tribal law should govern the use of tribal water rights reserved under federal law.

A current dispute on the Wind River Indian Reservation in Wyoming best illustrates the issues involved in administration of federally created Indian water rights. In 1985, based on the Fort Bridger treaty, the Shoshone and Arapaho Tribes were decreed approximately 189,000 acre-feet per year of 1868 priority date water that they had not used historically.[5] The Wyoming Supreme Court affirmed the decree in 1988. The Tribes' water right was computed on the basis of the Reservation's practicably irrigable acreage in a decree that also ruled the Tribes may use the right for any purpose.[6] Since the turn of the century, Wyoming has permitted many non-Indians on the Reservation the right to use water from the Reservation's rivers. The United States, significantly, has expended over $77 million to develop non-Indian farms on the Reservation, as compared with only $4 million expended for the Indian farms. The Tribes' full use of their award likely would force many non-Indian farmers to stop using the Reservation's waters for their farms; no other feasible water sources exist. The Tribes have dedicated a substantial portion of their historically unused award to instream flows. State law, if it were applicable, likely would prohibit the Tribes' dedication on the grounds that it is not a beneficial use, and is an effective transfer of use that injures junior users. Pursuant to state law no use transfer can occur where junior users are injured. Wyoming and the non-Indian farmers urge that new federal law governing tribal water rights should incorporate state law restrictions on the use of those water rights. The Tribes maintain that they have a vested property right to water with no restrictions, and that federal Indian law and policy mandate not only this result but also tribal sovereign authority over the use of the Tribes' federally reserved water rights.

This article concludes that Indian tribal governments should have exclusive and wide latitude to develop a statutory and common law governing water use, including federally reserved tribal water rights, on their reservations. That tribal law, however, must weigh carefully the public interests of all reservation citizens. The United States, in its role as trustee with respect to Indian water rights, has an obligation to support and shepherd the tribal law development to ensure that tribal decisions are

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5. *Big Horn*, 753 P.2d at 103. The total amount of water recognized in the decree for the Tribes was in excess of 500,000 acre-feet per year.

6. *Id.* at 101.

rational and do not jeopardize the value of the tribal water right. The challenge for tribal leaders as they develop reservation water policies and federal officials as they oversee such development will be great. Many disparate water user needs must be balanced against a backdrop of decaying western economies, a growing realization of shortcomings in strict adherence to state water law, and emerging public calls for environmental and aesthetic protections in water use. Sound science and resource management, education, and intergovernmental cooperation will be key to just recognition of both Indian tribes' water rights bargained for in their treaties and the unique circumstances facing many non-Indian reservation citizens.

II. The Indian Reserved Water Rights Doctrine

A. *Indian Tribes as Water Owners*

The seminal decision regarding Indian rights to water for their reservations, *Winters v. U.S.* specifies neither the method for computing nor any standards for administering Indian water rights.[7] The *Winters* Court held simply that when reservations were established, the tribes and the United States implicitly reserved, along with the land, sufficient water to fulfill the purposes of the reservations, with a priority date as of the reservation's creation.

The *Winters* right, accordingly, resembles a right under the state law prior appropriation system that allocates water on the basis of a "first in time, first in right" priority. The Court, however, has made clear that the reserved right is governed by federal, and not state law.[8] The Court has ruled, specifically, that the *Winters* right is not subject to abandonment or beneficial use restrictions.[9] No court since *Winters* has established other criteria for administering Indian *Winters* awards. Instead, without comment, the United States Supreme Court affirmed the Wyoming Supreme Court's award to the Shoshone and Arapaho Tribes based on the reservation's agricultural purpose, but not restricted as to use.[10]

Commentators' views on the question of standards for *Winters* water use fill a broad spectrum. On one end, some urge Indian water should be used only for the primary purpose of a reservation, which typically was agricultural.[11] Others urge that federal Indian policies which support the strengthening of tribal self-government and reservation economic develop-

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

8. Arizona v. California, 373 U.S. 573, at 577.

9. *Id*; Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982), *consolidated with*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

10. *Big Horn*, 753 P.2d at 76.

11. *See* Storey, *supra* note 2, at 207 n.150.

ment should guide courts in defining broad permissible uses of Indian water awards.[12] And, significantly, in the 1989 *Big Horn* argument, two justices evinced keen interest in the contours of *Winters* reserved water use.[13]

In light of the present sparse judicial direction for administering Indian water rights, an accurate understanding of the nature of *Winters* rights becomes a particularly critical foundation. The source of the right and subsequent judicial descriptions of the right are discussed below.

1. *Treaty Construction Rules—Implications for the* Winters *Doctrine*

Longstanding principles of Indian treaty construction guide the determination of precisely what water was reserved by treaty. In the treaties, tribes and the United States bargained for the terms of vast land cessions by the Indians and retention of certain lands for Indian use and occupation. With respect to off-reservation areas, a treaty effected total cession and thus the governing treaty must explicitly retain any tribal rights in these areas, such as hunting and fishing.[14] With respect to on-reservation areas, conversely, tribes reserved all original rights, except those expressly ceded by treaty.[15] Pursuant to this principle, the Court in *Winters* concluded that the absence of an explicit reservation of water in the treaty did not mean the Indians did not retain water for the reservation. Instead, water—simply, was one of the original rights on the reservation that was not ceded expressly.

A second principle of treaty construction is that the courts consistently have held that should any doubt exist as to treaty interpretation, the doubt must be resolved in favor of the Indians. Treaty provisions, moreover, must be interpreted as the Indians understood them, and congressional intent to abrogate Indians' treaty rights must be expressed unequivocally.[16]

Based on these principles, no doubt can exist but that Indian *Winters* awards are subject to no restrictions on their use except as the tribe may impose, because that is exactly what the Indians possessed originally. Restrictions on the right, therefore, either must be contained in the applicable treaty or in subsequent congressional abrogations. Relevant judicial and congressional statements conform closely to these important treaty principles, and have made clear that no restrictions exist on the use

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12. *See generally* Storey, *supra* note 2, at 206.

13. Official Transcript Proceedings Before the Supreme Court of the United States, Wyoming v. United States, Case No. 88-303, April 25, 1989.

14. United States v. Winans, 198 U.S. 371, 381 (1905).

15. *Id.*

16. *E.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985).

of Indian *Winters* awards. Those expressions are described below.

2. *Judicial and Congressional Statements*

Several courts have opined that, unlike state law derived water rights, Indian *Winters* rights are not subject to a beneficial use requirement or to abandonment, may be used for any purpose, and are separable from the irrigable lands that were used to quantify the right.[17] This bundle of rights embodied in Indian *Winters* awards has been characterized, importantly, as a vested property right.[18]

At least one court has gone further to describe explicitly quantified Indian water rights as a vested property right that may be transferred to new uses in any lawful manner.[19] Another court has found no congressional abrogation of a Pueblo's inherent right to transfer his or her water right to unenumerated uses without restriction.[20] Importantly, moreover, the Department of the Interior, on the heels of a flurry of congressional and executive branch correspondence, recently announced its support for the view that Indian water rights cannot be lost, *even if leased off-reservation*, as a result of the application by contract of state law regarding a change of use, or abandonment of water.[21]

To state the matter differently, the courts in the Indian *Winters* cases have established methods for quantifying the amount of water Indians retained for their reservations. For example, where agriculture was intended to be a primary economic activity on the reservation, the courts have determined that the amount of water reserved was the amount needed to irrigate the reservation's practicably irrigable acreage (PIA). Rulings in these cases, however, make clear that the PIA award can be used for other purposes; thus, the PIA standard is only a convenient measure of the amount of water retained for the reservation. The PIA and other measures

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17. *American Indian Resources Institute*, SOURCEBOOK ON INDIAN WATER SETTLEMENTS, (1989) [hereinafter SOURCEBOOK]; *see* Storey, *supra* note 2, at 210 (citing United States v. Anderson, 591 F.Supp.1 (E.D. Wash. 1982)); *Big Horn*, 753 P.2d at 92, 98, 99; In re The General Adjudication of all Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, Order Ruling on Motions to Alter or Amend the Decision of May 10, 1983, No. 101-234 (Wyo. Dist. Ct., 1st Jud. Dist., June 8, 1984; p. 14).

18. *See* Storey, *supra* note 2, at 211 (citing Arizona v. California, 373 U.S. at 546).

19. United States v. Anderson, 736 F.2d at 1365 (citing Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981)).

20. State of New Mexico, Reynolds v. Aamodt, No. 6639-M, Mem. Op., 3, (D.C.N.M. Dec. 1, 1986). While the source of Pueblo water rights is different from *Winters* rights, the *Aamodt* court's analysis is instructive here. The court reasons that no use restrictions existed when the right originally was a native Pueblo (or Indian) water right. Accordingly, any restriction must be found in subsequent congressional abrogations and was not found in *Aamodt*.

21. Letter from the Honorable Manuel Lujan, Secretary of the Interior, to the Honorable Bill Bradley, Chairman, Subcommittee on Water and Power Committee on Energy and Natural Resources, (April 5, 1990).

of water retained for the reservation, in short, are not limited as to use and are not subject to any judicial restrictions on changes of use.

To summarize, federal law regarding Indian treaty interpretation compels the conclusion that Indian *Winters* rights are vested property rights with no restrictions on their use. Should any significant restriction be imposed by the United States on use of a *Winters* right for the first time, then a compensable taking would occur.[22] On the other hand, if the tribal governments impose restrictions on the use of the tribal water, then no such taking would occur. The existence and scope of tribes' powers to enact binding laws regarding property rights, including water rights on-reservation, therefore, is relevant.

III. Indian Tribes' Sovereign Authority over Reservation Water Use

A. *General Principles*

Indian tribes have long been held to possess inherent sovereign authority over their members and territory.[23] With respect to Indian on-reservation trust lands, absent contrary congressional mandates, tribes possess sovereign powers in most instances to the exclusion of state authority.[24] While tribes' power in these circumstances is unquestioned as a threshold matter, state power is subject to a balancing of governmental interests.[25] Tribes' interest in regulating tribal activities in all cases was found to outweigh any possible state interest in regulating Indians on their reservations. Indians' use of their *Winters* awards surely is no exception, and no court has held to the contrary.

Courts, similarly, have concluded without exception that tribes have sovereign power over non-Indians on Indian trust lands within a reservation.[26] Until recently, in many cases, the United States and the tribes were held to have sufficient interests at stake in regulating activities on tribal trust lands, as to leave no room for state authority.[27]

States' authority over non-Indians on trust lands, as with Indians, turns on a unique federal pre-emption balance of federal and tribal interests on the one hand and state interests on the other hand.[28] Sparse

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22. *See* United States v. Sioux Nation of Indians, 518 F.2d 1298 (Ct. Cl. 1975), *cert. denied*, Sioux Nations of Indians v. United States, 423 U.S. 1016 (1975).

23. United States v. Wheeler, 435 U.S. 313, 322-23 (1978).

24. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Cabazon Band v. County of Riverside, 783 F.2d 900, 903-05 (9th Cir. 1986).

25. *Cabazon*, 783 F.2d at 903-05.

26. *Merrion*, 455 U.S. at 130.

27. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982).

28. *See generally*, *id.*

state activities and services on the reservation likely will yield a ruling that states lack jurisdiction over the reservation activity at issue. Only recently, after an unbroken line of decisions striking down state taxation jurisdiction, the United States Supreme Court identified circumstances justifying state taxation authority over non-Indians on the reservation's trust lands.[29] In that case, the unique power of taxation, where two governments both can impose their laws, was at issue. Inconsistent water regulations, in contrast, will be a different matter.

Tribes' and states' authority over non-Indian activities on fee lands within a reservation presents even more difficult questions after the 1989 term of the United States Supreme Court. In the key decision in this area, *Montana v. United States*, the Court established principles to guide the lower courts in determining the extent of tribal civil regulatory authority over non-Indians on fee lands within reservation boundaries.[30] At issue was a Crow tribal ordinance prohibiting hunting and fishing within the Crow Reservation by nonmembers of the Tribe.

The United States Supreme Court held that neither the Crow Treaties nor inherent tribal sovereignty empowered the Tribe to regulate non-Indian hunting and fishing on fee-patented land on the Reservation. The Court characterized tribal power over non-Indians as quite limited: "[E]xercise of the tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[31]

The *Montana* Court then used equally broad language to describe the scope of jurisdiction over non-Indians which is retained by tribes:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[32]

While the immediate reaction of tribal advocates to the *Montana*

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29. Cotton Petroleum Corp. v. New Mexico, 109 S.Ct 1698 (1989).
30. Montana v. United States, 450 U.S. 544 (1981).
31. *Id.* at 564 (citations omitted).
32. *Id.* at 565-66 (citations omitted).

decision was negative, and the result undoubtedly was negative for the Crow Tribe, the *dicta* concerning the degree of retained tribal power to regulate non-Indians left tribes in a position to engage in such regulation under at least some circumstances. Indeed, the lower courts in the main had upheld tribal jurisdiction under the *Montana* test.[33]

On June 29, 1989, the United States Supreme Court rendered its decision in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*.[34] *Brendale* involved three consolidated challenges to tribal zoning laws by two nonmember reservation landowners and by Yakima County. The Court held the Yakima Indian Nation did not have authority to zone fee lands owned by nonmembers within the open (heavily non-Indian populated) area of the Reservation. The Court found that the exercise of Yakima County's zoning authority over these lands did not have a direct effect on the tribe and would not threaten important tribal or federal interests. The Court let stand, however, a lower court decision upholding tribal zoning authority over all lands in the closed (almost exclusively Indian populated) area of the Reservation. The votes of the nine Justices were split. Although a majority agreed on the outcome of each issue, no majority agreed on the rationale supporting these outcomes.

Justice White, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, opined that the tribe did not have jurisdiction in the open area for several reasons. First, they found that the treaty's provision protecting tribal lands and their exclusive use and benefit no longer applies, because the General Allotment Act authorized alienation of significant areas of land in the reservation to individual tribal members and thereafter to non-Indians. They then held that zoning authority does not flow from the tribe's retained inherent sovereignty. They recognized that Indian tribes retained sovereignty to control aspects of their internal affairs, but that such sovereignty is divested to the extent that it involves tribes' external relations.[35] They concluded that tribal zoning regulations over nonmembers in the open area necessarily are inconsistent with tribes' dependent status, reasoning that a tribe's authority does not extend necessarily to all activities encompassed within the *Montana* exceptions.[36]

Justice White, in his opinion, opined that tribes have no sovereign power to regulate the use of land owned by nonmembers and instead the only inquiry is whether the tribes have a protectable interest under federal

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33. Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982), *cert. denied*, 459 U.S. 967 (1982); Knight v. Shoshone & Arapaho Indian Tribes, 670 F.2d 900 (10th Cir. 1982).

34. 109 S.Ct. 2994 (1989).

35. *Brendale*, 109 S.Ct. at 3005 (citing United States v. Wheeler, 435 U.S. 313-23 (1978)).

36. *Id.* at 3007-08.

law at stake.[37] He emphasized that the protectable tribal interest must be demonstrably serious and that relief must be obtained in the county zoning proceedings. He wrote that the tribes should appear in such proceedings to assert their imperiled interests and federal district courts have jurisdiction to protect tribes' interests in the event that the county fails to acknowledge them.[38]

Justices Stevens and O'Connor delivered an opinion concurring with the result of Justice White's opinion but disagreeing with its reasoning. They determined that the tribe's power to exclude nonmembers from the reservation derives from its treaty and the tribe's aboriginal sovereignty. They concluded that this power includes a lesser power to regulate land use or determine the character of the tribal community.[39] They stated, finally, that because of the large percentage of land in the open area owned in fee by nonmembers, they cannot conclude Congress intended that tribes retain the power to determine the character of any area populated by a vast majority of non-Indians who have no vote in tribal government.[40] Justices Stevens and O'Connor also delivered the opinion of the Court upholding tribal power to zone in the closed area. Here, they concluded, Congress could not have intended that a tribe would lose control over the character of its reservations upon the sale of only a few, relatively small parcels of land.[41]

Stripping the confused *Brendale* legal doctrine to its essence, where substantial Indian populations exist in the relevant geographic area on a reservation and where the non-Indian activities on fee lands significantly threaten tribal rights or interests, a tribe that asserts its authority in conflict with state law likely will be found to have sovereign authority over such non-Indian activities which is exclusive as against the state.[42] Both the *Montana* and *Brendale* decisions likely will be applied in the water administration arena. The decisions in this arena to date and possible impacts of the *Brendale* decision in this arena are discussed below.

B. *Water Use Regulation*

Setting the foregoing jurisprudence in the water rights context should yield fairly predictable results. Surface and groundwaters are intimately interrelated, and water follows no political boundaries. Few circumstances should exist, therefore, where a tribe could not show ample interests and

37. *Id.* at 3008.
38. *Id.*
39. *Id.* at 3010.
40. *Id.* at 3011.
41. *Id.*
42. Montana v. United States, 450 U.S. at 544; *Brendale*, 109 S.Ct. 2994.

thus justification for its authority to regulate all uses of water on a reservation. Simply stated, two sovereigns simply cannot impose conflicting standards upon a geographically unified resource such as water.[43]

The courts, however, have complicated the field by upholding tribal jurisdiction over all water use in some cases and state jurisdiction over non-Indians in other cases. In part these holdings are derived from the unique circumstances of water use on reservations. These circumstances include, importantly, a history of state permitting of water use for federally-subsidized farm projects for non-Indians on the Indian reservations. The courts have wrestled with this history of *de facto* state administration in an arena of strong justifications for exclusive tribal authority over reservation water use. The courts, predictably, have reached diverse results.

In 1981, the Ninth Circuit Court of Appeals issued its decision in *Colville Confederated Tribes v. Walton.*[44] In that case, the Court held that state regulation of water on the reservation was pre-empted under federal law, leaving the tribe with primacy over all reservation water use. The case arose from a dispute over water rights from a river system that is located entirely within the reservation boundaries. The precise question was whether the state or the tribe had authority to permit seven allottees' successors the use of water from the reservation rivers. These successors are non-Indians who purchased land in fee from an Indian whose land was severed from tribal trust status pursuant to the General Allotment Act.[45]

The key facts supporting the *Walton* court's decision regarding the balance of the respective governmental interests was as follows. The river system was non-navigable and flowed exclusively within the reservation boundaries. All of the lands in question were located entirely within the reservation boundaries. The *Walton* court noted with interest that the United States Supreme Court had held water use on a federal reservation is not subject to state regulation absent explicit federal recognition of such authority. Finally, no impacts off-reservation were felt as a result of the water use on-reservation.[46]

Three years later, the Ninth Circuit issued another decision concerning the scope of state and tribal jurisdiction over water use by non-Indians on a reservation. In *United States v. Anderson*[47] the dispute concerned which government had the authority to permit the use of water by non-Indians from reservation waterways. The non-Indians had purchased on-

43. Reservation water quality regulation, importantly, appears to fall within the exclusive tribal domain.

44. 647 F.2d 42 (9th Cir. 1981).

45. *Id.* at 49-51.

46. *Id.* 52-53.

47. 736 F.2d 1358 (9th Cir. 1984).

reservation land deemed surplus to Indian needs and thus available for homesteading under an early twentieth century federal statute. As in *Walton*, the Court noted the *Montana* decision. The Court then concluded that on a balance of interests, the interest of the state weighed more heavily, because the situation at issue was contrary to that addressed in *Walton*.

The *Anderson* Court reasoned, specifically, that the weight of the state interests depends in part on the extent to which waterways or aquifers transcend the exterior boundaries of the reservation.[48] The waterway in question in *Anderson* formed the eastern boundary of the reservation rather than cutting through the heart of the reservation as in *Walton*. The source and end of the river also were off-reservation. Central to the *Anderson* decision appears to be the fact that the state, by exercising its jurisdiction, would not infringe upon the tribal right to self-government or the tribe's economic welfare, because the tribe's water rights were quantified and protected by a federal water master.[49]

In 1989, the Wyoming Supreme Court issued a ruling concerning the scope of Wyoming and the Shoshone and Arapaho Tribes' jurisdiction over water use on the Wind River Indian Reservation. Though noting both *Walton* and *Anderson*, the Court did not address explicitly the possibility of tribal regulation of water and concluded that the state might have monitoring authority on the reservation, and possibly other administration jurisdiction over state permitted users on the reservation. State authority over Indian water use explicitly was denied.[50] Aside from the foregoing decisions, no court has rendered a decision helpful in determining the question of what governmental entity has jurisdiction over reservation water use.[51]

C. *Navigable Waterways*

As noted above, sovereign control over reservation lands turns significantly on the ownership of the land. Ownership of the riverbeds, therefore, is a component of the reservation water administration question. Whether states or tribes own the bed of rivers running through the reservation is decided in a unique context where a presumption of state

48. *Id.* at 1366.

49. *Id.* at 1365.

50. *Big Horn*, 753 P.2d at 115.

51. In Holly v. Titus, 13 I.L.R. 3029 (E.D. Wash. 1985), *aff'd*, 812 F.2d 714, *cert. denied*, 484 U.S. 823, *reh. denied*, 484 U.S. 970 (1988), the court ruled that the Yakima Nation did not have jurisdiction to assert its water code over non-Indian water use on fee lands within the reservation. The problem with this case, however, is that the tribes made absolutely no showing of any impacts under the *Montana* test. Accordingly, this case cannot be viewed as an illustrative balance of state versus tribal interests over reservation water use.

ownership exists, at least off-reservation.

A state's claim to ownership of a riverbed is based on the equal footing doctrine. Under the equal footing doctrine, states admitted to the Union after the original thirteen states were admitted, acquired the same rights as the original states. The original states had full title to all lands, including the riverbeds in their territory. Under the doctrine, the land acquired by the United States from the colonies or foreign governments was held in trust for the new states so that they may be admitted on an equal footing with the original states.

The leading cases[52] establish the following test for tribal ownership of reservation riverbeds. The first question is whether an express conveyance of the riverbed to the tribes is contained in the treaty. If the treaty contains no express conveyance language, the courts still may infer congressional intent to convey the riverbed to the tribes through the existence of a public exigency, such as Indian hostilities that would result from state ownership of the riverbed. Further, in the absence of express language, courts may infer a conveyance of the riverbed if Congress' intent was "otherwise made plain."[53] Examples of such intent might be found in a government awareness of tribal dependency upon waterways at the time of the grant, such as fisheries dependence, spiritual ties to the river, religious rituals based on aquatic life, and self-identification or language concerning the rivers. Finally, if no express treaty conveyance language exists, the courts might identify special circumstances such as those recognized in *Choctaw Nation* where a "pain and suffering test" was announced. The Choctaws were among several tribes that had been marched hundreds of miles in a grueling removal from their aboriginal homelands to the Oklahoma Territories. In these circumstances, the treaty language governing the Choctaw lands, providing that the granted lands never would be embraced within a state or territory, was viewed as a special circumstance warranting an inferred riverbed conveyance to the tribes.

Under the foregoing test, the likelihood is that many tribal riverbeds will be found to be within state ownership.[54] The test will prove to be stringent for tribes to satisfy, and flatly ignores applicable rules of statutory and treaty construction. This legal fiction, moreover, will serve only to exacerbate tensions and complexities surrounding jurisdiction over reservation water use. Nonetheless, tribes still should be able to establish in most

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52. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970); Montana v. U.S. 450 U.S. 544 (1981); Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1257 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049, *reh. denied* 466 U.S. 954 (1984).

53. Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d at 1258.

54. This means that the analysis of tribal versus state jurisdiction over activities on the rivers will be subject to a *Montana* and possibly *Brendale* analysis.

cases their jurisdictional authority over the rivers, despite state riverbed ownership, pursuant to the *Montana* test.

D. *Conclusion*

Important federal policy statements supporting no restrictions on the use of *Winters* reserved rights, judicial decisions upholding unrestricted use of *Winters* awards as a vested property right, and undeniably strong tribal sovereign authority over all, not just Indian, water use on the reservations surely are unyielding cornerstones of *Winters* reserved water rights administration jurisprudence. Increasing economic and political pressures to gain control over scarce water, and old Indian/non-Indian fears and hostilities, however, will continue to support challenges of the valuable *Winters* right. These pressures suggest some limit on the use of the *Winters* right may be inevitable, especially since all other rights under state laws are regulated heavily.

As an equitable matter, many non-Indian farmers have relied financially on western state water systems and their priority in that system, some without awareness of large, superceding Indian *Winters* rights from the same or intertwined water sources.[55] Those expectations will not, and some fairly should not, be cast aside easily. Accordingly, the question of what limits, if any, should exist with respect to *Winters* water use, now comes sharply into focus. Setting the questions in a real context, at issue is to what extent and under what law should the Shoshone and Arapaho Tribes' appropriation of their *Winters* water for instream flows or any other new or changed use be subject to restrictions.

IV. WINTERS WATER ADMINISTRATION: CONSIDERATIONS

The Shoshone and Arapaho Tribes' adjudication was the first to be completed of many adjudications winding their way through the state courts pursuant to the federal McCarran Amendment.[56] The question of refining the scope of Indians' use of their *Winters* rights and the question of the jurisdiction of state, federal, and tribal governments to administer such rights, which issues were not addressed fully in *Big Horn*, no longer can be avoided. Moreover, as western water law flows toward new frontiers compelled by water demands for higher economic uses and cultural and aesthetic needs, tribes will be viewed as potential flexible sources of water for these new needs. The ability of tribes to use their water in an open

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55. Legally, of course, these persons had constructive notice of such rights since the *Winters* decision in 1908.

56. *See, e.g.*, Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976); Washington v. Confederated Bands of Yakima Indian Nation, 439 U.S. 463 (1979).

market is of growing interest. As argued in the previous section, the sparse case law on these questions holds that the *Winters* right may be applied to any uses without restriction. Any congressional alteration of this fundamental character of a *Winters* right, therefore, for purposes of imposing regulations on the right, will subject the United States to a takings claim. Tribes, in contrast, can impose reasonable tribal regulation upon the *Winters* right without the takings specter. This reason, and the strong interest any government has in regulating critically important natural resources in its territory, argue for the exclusiveness of tribal law restrictions, if any, on *Winters* rights. Considerations which should inform tribal decisions about *Winters* water administration are discussed below.[57]

A. *The Treatment of Winters Reserved Rights Administration in Negotiated Settlements*

Several negotiated settlements have been approved by Congress. Each of them, in varying degrees of detail, have addressed administration of the quantified right. These provisions are highlighted below, as they likely will be proffered as precedents for *Winters* water administration.

The Ak Chin settlement imposes no substantive law on the use of the *Winters* right; the only restriction is that the reliance on groundwater sources to satisfy the tribe's quantified water right may not severely damage other users.[58] The Colorado Ute settlement imposes no restrictions on the use of the tribal water right on-reservation. If tribal water physically is transferred off the reservation, Colorado law applies except that no state law may result in the loss or diminishment of the water right.[59] The Salt River settlement imposes no on-reservation administration standards; the tribe is unable to lease water off the reservation except to certain designated adjacent cities.[60] The Seminole settlement imposes no substantive law restrictions on the use of the water right.[61] The Tohono O'Odham settlement imposes no on-reservation restrictions on the use of the award; any off-reservation leasing by the tribes of their water right can occur only in the Tucson Active Management Area.[62] The Fort Peck, and the Uintah and Ouray settlements uniquely contemplate certain state law restrictions on the on-reservation use of tribal water, although the tribes' water can be used for any purpose.[63] The settlement appears to contemplate that the

57. This law waives the United States sovereign immunity from suit in state courts for purposes of adjudicating all water rights to a particular water source.

58. SOURCEBOOK, *supra* note 17, at A-1 to A-55.

59. *Id.* at B-1 to B-33.

60. *Id.* at E-1 to E-65.

61. *Id.* at G-1 to G-31.

62. *Id.* at H-1 to H-63.

63. *Id.* at C-1 to C-54, I-1 to I-49 (respectively).

state "no injury" rules and other restrictions on any changes in the use of water rights would apply.

The negotiated settlements to date illustrate several relevant points. Tribal authority over reservation water use largely has been ignored in the settlements. With respect to off-reservation water use, tribal water rights typically are not subject to the full range of state law; congressional policy plainly negates any state law restrictions that result in loss or diminishment of any portion of the quantified *Winters* award. Finally, even on-reservation—certain state water law is authorized only in two cases. Large gaps exist, in short, in what substantive law applies in many instances, and these omissions very likely will yield continuing post-settlement controversies. Accordingly, a careful look at potential regulatory models and the obligations of the United States for Indian water administration provide a foundation for determining what institutional and substantive law scheme for administration of Indian *Winters* rights should be adopted.

B. *The Federal Role*

The United States has a fiduciary responsibility with respect to all reservation lands held in trust, including minerals, and wildlife, fish, and other natural habitat on such lands.[64] Water reserved by treaty to fulfill the purposes of the reservation plainly falls within this trust rubric. The pervasive federal regulation of water supply in federal irrigation projects and the General Allotment Act provide additional sources of federal responsibility and, specifically, a federal agency trust responsibility to protect Indian water use on the reservations.[65] The existence of both a general fiduciary or trust duty to protect reservation trust assets including water, and specific agency duties for water project management are significant to the *Winters* water administration question. A federal role in *Winters* administration necessarily may be mandated by these trust duties and indeed may be desirable to certain affected parties. Precisely what these fiduciary duties impress upon the United States, therefore, is important.

The general federal trust responsibility for trust asset protection is relevant. Aggressive federal protection of the *Winters* right undoubtedly is mandated by the general trust duty. More, however, may be required by the governing legal decisions. The general trust duty to Indian tribes was described originally in what now is termed the "Marshall Trilogy," or three early nineteenth century United States Supreme Court decisions

64. Northern Arapaho Tribe v. Hodel, 808 F.2d 741 (10th Cir. 1987).

65. *See e.g.*, 25 C.F.R. §§ 159.1, 172.1-177.55, 241.1-250.23 (1989); v. United States, 34 U.S. (9 Pet.) 711 (1835) [hereinafter *Mitchell I*].

describing the federal-tribal-state relationship under the United States Constitution.

The Marshall Trilogy addressed the creation, scope and enforcement of the United States trust responsibility to Indian tribes. In *Johnson v. M'Intosh*,[66] the United States Supreme Court invalidated a non-Indian's purchase of Indian land from an Indian tribe because the United States had not approved the sale. The doctrines of discovery and conquest were the asserted bases for the power to require federal approval of Indian land sales. Those doctrines hold that the fee title to land in North America vested with the European discoverers upon conquest, and that the Indians retained the lesser possessory or equitable title. The Court observed that with the legal title the federal government acquired an obligation to protect Indians from unscrupulous settlers.[67]

In *Cherokee Nation v. Georgia*,[68] the Court ruled that the Cherokee Nation should not be considered as a state for purposes of invoking the original jurisdiction of the Supreme Court. In reaching its decision, the Court characterized the Cherokee Nation as a distinct political society capable of managing its own affairs and governing itself. The Court also characterized the Nation as not entirely a foreign nation, but rather a "domestic, dependent nation."[69] The Court then described the existence of a federal trust relationship to tribes and likened the relationship to that of a guardian and ward. The Court, however, acknowledged that the tribes retain certain property and governmental rights which the United States has agreed to protect as part of its trust duties.[70]

Only one year later, the Supreme Court issued its landmark Indian law decision in *Worcester v. Georgia*.[71] In *Worcester*, the Court held the State of Georgia did not have jurisdiction to require a license from a non-Indian missionary who conducted his work solely within the boundaries of an Indian reservation. In support of its decision, the Court described the tribes as self-governing nations who enjoy a relationship with the federal government as one of "a nation claiming and receiving the protection of one more powerful, not that of individuals abandoning their national character and submitting as subjects to the laws of a master." [72] From this can be inferred the core purpose of the federal trust obligation to tribes, namely—protection of tribal real and personal trust property, and promotion of the tribes' national character.

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66. 21 U.S. 543 (1823).
67. *Id.*
68. 30 U.S. (5 Pet.) 1 (1831).
69. *Id.* at 17.
70. *See generally id.*
71. 31 U.S. (6 Pet.) 515 (1832).
72. *Id.* at 555.

Additional guidance for federal trust duties to Indians can be obtained from the legal decisions establishing limits on Congress' exercise of power over Indian matters. In *United States v. Kagama*,[73] the Supreme Court upheld the Major Crimes Act, which listed certain crimes between Indians that could be tried in federal court if committed in Indian country. Previously, federal criminal law did not apply to Indians committing crimes against other Indians in Indian country. The Court ruled that the power of Congress to adopt the Act is based on tribes' dependency upon the federal government, and their weakness and helplessness. Pursuant to treaties with tribes, the Court found that Congress has both the duty of protection and with it—the power.[74]

Congress' cloak of virtual immunity from judicial scrutiny of its decisions regarding the United States trust responsibility to tribes as described in *Kagama* and *Lone Wolf* was lifted slightly in 1935 in *Creek Nation v. United States*.[75] In that case, the Creek Nation ceded half of its tribal lands to the United States in exchange for guaranteed ownership of other tribal lands. Years later, a survey of tribal lands was made and showed incorrectly that a portion of the Creek lands had been ceded to the United States. The Creek Nation sued the United States to obtain compensation for the survey error. The Court ruled for the Creek Nation holding that the federal trust responsibility did not permit the United States to take Indian land without assuming an obligation for just compensation. The Court argued that such an action would not be an exercise of guardianship but rather of confiscation.[76]

In 1974, the Court for the first time described more explicitly a constitutional limitation upon Congress' exercise of its trust powers with respect to Indian tribes. In *Morton v. Mancari*,[77] the Court invoked the equal protection clause of the Fifth Amendment to strike down a challenge lodged against the Bureau of Indian Affairs by non-Indian employees. In so doing, the Court upheld a federal statute imposing an Indian employment preference in the Bureau. The Court reasoned that the preference was based not on a racial but a political classification. Thus, the strict standard of judicial scrutiny for racial classifications could not be invoked. Instead, the Court opined that Congress' actions with respect to Indian tribes must be related rationally to Congress' unique obligation to Indian tribes.[78] No

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73. United States v. Kagama, 118 U.S. 375 (1886).

74. *Id.* at 384; *accord*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

75. 318 U.S. 629 (1943).

76. *Accord*, Seminole Nation v. United States, 316 U.S. 286 (1942); Menominee Tribe v. United States, 59 F.Supp. 137 (Ct.Cl. 1945); Manchester Band of Pomo Indians v. United States, 363 F.Supp. 1238 (N.D. Cal. 1973).

77. 417 U.S. 535 (1974).

78. *Accord*, Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977).

further explanation of Congress' "unique obligation" was given in the decision.

In *United States v. Sioux Nation of Indians*,[79] the Court had another occasion to review Congress' actions on Indian matters pursuant to the Fifth Amendment, this time under the takings clause. In *Sioux Nation*, the Court found that Congress' obligation to compensate Indian tribes under the Fifth Amendment for takings of tribal land, obliges the United States to make a good faith effort to compensate the Indians with property of equivalent value.[80] The tribes had challenged the amount of compensation Congress had given to them for their lands.

Congress' unique obligation to Indians must be found in the legal decisions issued contemporaneously with the establishment of those obligations. The Marshall Trilogy provides this important guidance. Specifically, the Court in *Worcester v. Georgia* described a very broad and pervasive federal trust responsibility for the protection not only of specific tribal real and personal trust assets but also of tribes' political autonomy. Moral norms and established constitutional precedent necessarily support this view.[81]

The general trust duty, in the context at hand, arguably requires the United States to assist tribes in enacting reasonable sovereign regulations governing reservation water development and protection. Correspondingly, providing wide latitude for tribal decisions regarding water development and protection policies also would seem to be at the core of the duty to promote tribes' national character confirmed in *Worcester v. Georgia*.[82] Meeting both the trust obligation to protect *Winters* water as a trust asset and the trust obligation to support tribal sovereign control over these assets arguably would bring federal trust obligations into play only in two instances. If tribal decisions pose a significant threat to the Indian trust or *Winters* water right, or to the tribe's ability to manage reservation water use, and especially *Winters* water use, then a federal duty to act may arise.[83] The paradigm of an unreasonable tribal decision potentially implicating the federal *Winters* water rights use would be an utter failure to provide due process of law and utter disregard for the impacts of tribal

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79. 448 U.S. 371 (1980).

80. *Id.* at 415-16.

81. *See* Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422 (1984).

82. *Worcester*, 31 U.S. (6 Pet.) at 555.

83. Federal obligations also may arise when a tribe contemplates a lease or sale of tribal water either on- or off-reservation. The Non-Intercourse Acts bar alienation of any Indian trust property interests without congressional consent. Congressionally enacted laws and authorities permit on- and perhaps also off-reservation leases of water subject to the scrutiny of the Interior's review and approval. *See generally* Storey, *supra* note 2.

government decisions upon all affected citizens.

In 1980, the United States Supreme Court issued its latest decision on the federal trust responsibilities to tribes. In *United States v. Mitchell*,[84] the Court held that the General Allotment Act did not create a fiduciary obligation requiring the government to compensate individual Indians for mismanagement of their timber. As rationale, the Court first held that the Indian Tucker Act (the Court of Claims jurisdictional act) does not waive the United States sovereign immunity from suit. Instead, the Court opined that such a waiver must be found in the source of law relied upon for the assertion of the claim. The Court then concluded that the General Allotment Act did not meet the mandated waiver (i.e. trust) standards, notwithstanding the fact that the Act requires the United States to hold land "in trust" for tribal allottees. Thus, the government was not held liable for breach of any duty and the case was remanded to the Court of Claims for further consideration.

Significantly, in *Mitchell I* the Court applied strict statutory construction standards rather then the usual special statutory construction canons unique to Indian law. These rules require, *inter alia*, that all statutory ambiguities be resolved in favor of the Indians.[85] This misplaced reliance on general statutory construction alone may explain the Court's decision contrary to Indian interests.

In 1983, the Court issued its sequel to *Mitchell I*, which sequel affirmed a Court of Claims decision that federal Indian timber management statutes and regulations imposes fiduciary duties on the government, and thus compensation is due for breaches of such duties. In *United States v. Mitchell*,[86] the Court first ruled that the United States presumptively has consented to suit for claims under the Tucker Act, thus appearing to overrule *Mitchell I*'s holding that the sovereign immunity waiver must be found in the source of law on which the claim is brought. The Court then adopted the Tribe's position that the federal timber management statute creates substantive rights, which rights fairly give rise to claims for money damages. The Court found, specifically, that timber management statutes and regulations impose very specific duties which make the government responsible for managing Indian resources pursuant to fiduciary standards. The Court then adopted the Court of Claims view that where the government assumes pervasive control or supervision—by statute or otherwise—of a property belonging to Indians, a fiduciary relationship arises. The Court finally ruled that because a trust had been created, and in the absence of contrary provisions in the governing statutes and regula-

84. 445 U.S. 535 (1980).
85. Montana v. Blackfeet Indian Tribe, 471 U.S. at 759.
86. 463 U.S. 206 (1983).

tions, liability to the Indian trust beneficiaries in money damages naturally follows, based upon common law trust principles.

The General Allotment Act requires the Secretary of the Interior to ensure that Indian allottees receive a fair share of tribal waters.[87] The Bureau of Indian Affairs has authority and responsibilities for federal irrigation project management, including impoundment and delivery of water.[88] These regulatory obligations may be a basis for finding fiduciary duties to ensure individual tribal members' or allottees' access to a fair share of the tribal *Winters* water right. Any interference with these entitlements will require protective action by the federal trustee.

In sum, the United States has a trust obligation to protect tribal *Winters* water and, similarly, to protect the right of tribes to assert reasonable regulatory control over *Winters* and other reservation waters. These federal obligations are grounded in United States Supreme Court decisions regarding both general and specific agency fiduciary duties to Indians as well as in current federal Indian policy supporting the strengthening of tribal self-government and tribal economies.[89] The United States, against this backdrop, should accord tribes the right to adopt reasonable tribal water policies and laws for the reservation and for *Winters* water use. Defining what policies and laws are reasonable requires careful consideration of western water law in general and the unique circumstances of reservation water and economic development.

C. *State Water Law and Policies*

States long have enjoyed rather exclusive control over the allocation of water rights in the United States, except for the federal government's navigation servitude, federal reserved rights for Indians and other federal reservations, and certain reclamation project laws.[90] New challenges to exclusive state control and strict application of the prior appropriation system, however, are emerging rapidly from many fronts. Judicial forums, for example, are announcing interstate commerce clause prohibitions and are impressing public trusts upon longstanding private water rights to protect public needs for water.[91] Economic pressures increasingly favor higher value over lower value historical water uses.[92] And, political

87. United States v. Powers, 305 U.S. 527 (1939); United States v. Ahtanum Irrig. Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957).

88. 25 C.F.R. at §§ 172.1-177.55.

89. Indian Self-Determination Act, 25 U.S.C. §§ 450-50n, 455-58e (1975).

90. DuMars and Tarlock, *Symposium Introduction: New Challenges to State Water Allocation Sovereignty*, 29 NAT. RESOURCES J. 331, 333 (1989), [hereinafter *New Challenges*].

91. Sporhase v. Nebraska, 458 U.S. 941 (1982); NEW COURSES OF THE COLORADO RIVER (G. Weatherford & F. Brown ed. 1986).

92. *New Challenges*, *supra* note 90, at 511-27.

pressures increasingly compel water quality and other restrictions upon unbridled water use.[93]

These pressures are causing many of the western states to reevaluate the policies and laws that underlie their water allocation systems. These western states base water entitlements on the prior appropriation system which allocates water rather strictly on a "first in time, first in right" basis. Notably, however, although all western states have adopted the prior appropriation doctrine, the state institutions, laws, and policies in reality are quite diverse.[94] In-state transfers of water entitlements—in use, points of diversion, streams of diversion, etc.—are particularly subject to diverse state law and policy.[95] Montana, for example, until recently prohibited transfers of water from agricultural to energy uses.[96]

Common to most states, however, are policies that tie water to particular lands in recognition of user reliance upon the hierarchy in time and place of stream diversions established by the prior appropriation system. Similarly, all states require water to be used beneficially or be forfeited. These policies find expression in state laws concerning beneficial use, and in the "no injury" rule. Significant variations exist among states regarding what constitutes a beneficial use; some states *e.g.*, do not define instream flows as a beneficial use. Bedrock law in every state, however, is the no injury rule.

1. *The No Injury Rule—Generally*

The no injury rule provides that a transfer of a water right—among permittees—in use, in point of diversion, etc.—cannot cause injury to junior appropriators. One court described the policy backdrop for this rule by stating, "[J]unior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations, and . . . they may successfully resist all proposed changes . . . which in any way materially injures or adversely affects their rights."[97] The rule has been criticized, but generally receives strong support among the commentators as a way to promote certainty and thus more complete utilization of water resources.[98] Strictly applied, however, the rule effectively can block higher economic and socially desirable uses of

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93. *Id.* 336-44.

94. WATER AND AGRICULTURE IN THE WESTERN U.S.: CONSERVATION, REALLOCATION, AND MARKETS (G. Weatherford ed. 1982).

95. Inter-state transfers are outside the scope of this article as they are subject to special compact and, federal constitutional restrictions.

96. MONT. CODE ANN. § 85-2-402(3) (1979), *repealed by*, 1985 Mont. Laws, ch 573, § 7.

97. Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629, 631 (1954) (citations omitted).

98. *New Challenges*, *supra* note 90, at 457, 465.

water. Injuries, moreover, are exceedingly difficult to quantify.[99]

2. *The No Injury Rule—Agriculture*

As a condition to the transfer of water rights, many states limit the amount of water that can be transferred to the "consumptive use" amount. This means that junior downstream users have an absolute right to use the return flows from upstream farms. Virtually no other use explicitly is subject to this restriction. States vary in their definitions of consumptive use, but a typical definition includes the amount of water that plants consume along with the irretrievable losses in the delivery systems.

State water laws and policies may provide important models for tribal water policies. If state laws are imposed wholesale on Indian *Winters* rights, however, the right is emasculated. For example, if a consumptive use limitation is applied to a transfer of use from agriculture to instream flows, a portion of the *Winters* award is abandoned in conflict with bedrock *Winters'* doctrine principles. Similarly, if a no injury rule is applied, much of the tribal water realistically could not be devoted to any new purpose. Instead, the right is useful only for purposes that do not injure junior users; hundreds of junior users on most reservations, however, now stand ready to assert their injuries and thereby freeze tribes in their current—often first time—water uses. Thus, strict incorporation of state law for *Winters* water administration would cut the heart of the *Winters* right, as established through an unbroken line of legal decisions.

D. *Unique Circumstances Affecting Winters Water Administration*

To assess what government and what substantive law should govern Indian *Winters* water rights administration, the unique characteristics of water development and administration on Indian reservations must be considered. These considerations suggest that wholesale incorporation of state law restrictions and, in particular, the no injury rule to *Winters* rights, is both unjust and unconstitutional.

1. *Historical Circumstances*

Despite early nineteenth century promises of expansive farm and water project development on Indian reservations, history shows a stark emphasis on farm project development for non-Indian rather than Indian benefit on the reservations.[100] Moreover, although the United States

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99. *See generally Water and Agriculture, supra*, note 94.

100. On the Wind River Indian Reservation in Wyoming, as an example, the United States expended over $77 million in largely unreimbursable subsidies for non-Indian farm and water delivery systems development, as compared with only $4 million for Indian project development. Brief for

Supreme Court announced in 1908 that Indian reservations enjoy senior water rights under federal law, the historical failure by the United States to quantify those rights makes *Winters* claims in fact the newest and most threatening demand on the rivers.

Even though the tribes legally and properly may demand their rights to the rivers, non-Indians who have borrowed Indian water for generations of use, predictably are reluctant to return to the Indians their water right in water scarce drainages. These reluctant debtors failed to limit the size of the *Winters* award in the *Big Horn* case and thus now have turned their attention to limiting the scope of tribal uses of these *Winters* awards. They urge new federal law imposing no injury and other state law rules. The incorporation of state law restrictions on the use of *Winters* rights, however, would be grossly unjust.

Many junior users, typically—non-Indian agriculture appropriators—exist on the reservations. Application of a no injury rule would eviscerate the *Winters* award. That is—the award could be used only for historical purposes or the purposes for which the award was computed, which in most cases is agricultural. Any departure from these uses likely would be denied due to real or potential injury to hundreds of junior users.

Similarly, application of a consumptive use rule to transfers of *Winters* water from agriculture to other uses seems quite unfair in a context where junior users really had no basis to rely upon Indian farm return flows. That is—until recently the consumptive use amount and, indeed, the amount of Indian entitlement in most instances was not quantified.

2. *The Nature of the Indian* Winters *Rights*

As discussed above, *Winters* rights are unique in the federal-state water system. Because they typically arise from treaties, these rights were established by mutual federal/tribal agreement. Principles of reservation establishment and treaty construction make clear that all tribal rights on a reservation were preserved except those expressly ceded. Unrestricted water use was not ceded in any treaty or subsequent congressional enactment.

If the original unrestricted *Winters* right is altered by Congress, a taking under the Fifth Amendment to the United States Constitution will occur.[101] Tribes' damage claims very possibly could far exceed any damages that might be suffered by junior agricultural water users as a result of unrestricted use of the *Winters* right. This possibility and the fact

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Tribal Respondents at 6-7, *Big Horn*, 353 P.2d at 76.

101. Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

that desired Indian water uses may exceed the economic value of historic uses should be an extremely important policy concern for the United States and the western states.

3. *The Potential for Conflict Between Federal, State, and Tribal Water Law and Policy*

In 1903, Congress enacted the Reclamation Act to provide the means for establishing agricultural projects for western settlement.[102] In this Act, Congress provided that the right to divert water for these projects should be obtained under state law. Many turn-of-the century projects on and near the reservations obtained their water rights under state law, with no consideration of the fact that the Act did not impose state law on Indian reservations in the required unequivocal fashion.[103]

To complicate matters further, the United States often obtained protective state water use permits for Indian projects, a practice that was ended after the 1963 *Arizona v. California* decision establishing the practicably irrigable acreage standard for computing water for agricultural reservations.[104] Although the United States is not estopped from now asserting senior Indian claims that could require every drop in the rivers,[105] and all persons had at least constructive notice of the *Winters* right since 1908, in reality some non-Indian farmers assert that they reasonably believed the prior appropriation system, as it developed, was a certainty.

On the other hand, at least one court has ruled that state governments have the power to alter the state-permitted water right to accommodate compelling public interest needs.[106] Application of this concept would weaken state permittees' arguments that their expectations for water under a pre-*Winters* quantification should be accommodated completely.

Even assuming no restrictions on *Winters* uses, the reality of state and federal or tribal decreed rights existing in fact on reservations cannot be ignored. Integrated resource management will be frustrated if states insist that tribal law has no role to play in reservation water use. As discussed above, tribes typically will have the strongest claim to regulate vast quantities if not the majority of reservation water entitlements. This is due to the characteristically large size of *Winters* awards over which tribes undeniably have the strongest sovereign claims. *Winters* and other water

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102. Reclamation Act, 43 U.S.C. §§ 391-98 (1988).

103. Montana v. Blackfeet Indian Tribe, 471 U.S. at 759. Projects for Indians, significantly, were built pursuant to Bureau of Indian Affairs laws, and not the Reclamation Act.

104. 373 U.S. at 546.

105. *Big Horn*, 753 P.2d at 76.

106. National Audubon Society v. Superior Court of Alpine County, 33 Cal.3d 419, 189 Cal.Rprt. 346, 658 P.2d 709 (1983).

follows no political boundaries: Indian and non-Indian and state and tribal permittees on a reservation are intimately intertwined in their water uses. Tribes uniquely, therefore, may be suited legally and practically to administer the entire reservations' water supply in a uniform fashion. Clearly on the horizon are litigation and other tensions between state and tribal governments over jurisdiction to regulate reservation water use, and over the substantive law which will apply to *Winters* rights. These battles will paralyze needed economic development on and near reservations and, thus, viable alternatives to litigation must be crafted.

4. *Tribal Governments' Opportunities to Develop Vitally Important Reservation Water Laws and Policies*

Water is the lifeblood of people and economies. Water entitlements establish or sustain a social order. And, in Indian country water often embodies important spiritual and other cultural values.[107] Quite clearly, no activity on the reservation has potential for affecting more significantly the economic and political integrity, and health and welfare of reservation citizens than does water use. States, for these same reasons, have devoted enormous study and deliberation to water policies that promote important state interests. This most fundamental right of governments should be accorded to Indian tribal governments.

Indeed, failure to accord the tribal governments a fair opportunity to develop their own water laws and policies may subject the United States to constitutional scrutiny. While Congress may have expansive power to legislate on Indian matters,[108] Congress' management of Indian affairs must be rationally related to its unique obligations to Indians.[109] In other words, that unique obligation must mean the United States has general trust duties to tribes, including the duty to assist tribes in achieving greater self-government.[110] Meaningful government has to mean at least a fair opportunity to establish tribal law and policy governing the reservation's most vital natural resource; namely—water. With these considerations as a backdrop, let us consider a possible framework for *Winters* water administration.

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107. *Federal Government's Relationship with American Indians: Hearings Before the Special Comm. on Investigations of the Select Committee on Indian Affairs United States Senate*, 101st Cong., 1st Sess. 13-17 (1989) (statement of Starr Weed, Shoshone Tribal Member and Religious Spokesman).

108. U.S. v. Kagama, 118 U.S. at 375.

109. Morton v. Mancari, 417 U.S. at 535.

110. *See* section III B, *infra*.

V. WINTERS WATER ADMINISTRATION: AN APPROACH

The important questions in this area are (1) what government should regulate on-reservation water, including *Winters* water use and (2) what substantive law should apply to *Winters* rights. The institutional question perhaps is the easier to address of the two. States typically can assert only faint government interests in regulating Indian water rights and such rights characteristically comprise the largest block of water rights on most reservations. Tribal governments logically have the strongest claim to authority over their water rights. Jurisdiction over non-Indian water use will turn on a balance of government interests. Keys to this balance are that the tribes have clear claims of jurisdiction over typically the majority of reservation waters (the *Winters* right) and that geographically uniform regulations are critical to sound water management. Tribal governments, accordingly, have compelling interests in support of their primacy over reservation *Winters* and other water use.

The United States' role as trustee over Indian *Winters* rights requires the federal government to support the strengthening of tribal self-government and to protect vigorously the *Winters* trust asset right. Current federal policy supports tribal law governance of reservation trust assets, provided the tribal regulation is reasonable.[111] The United States has power to ensure such reasonable regulation where the tribes pursuant to tribal constitutions have vested in the United States the power to review and approve tribal ordinances.[112] In addition, the United States may have authority to act pursuant to its powers as trustee over Indian *Winters* waters in extraordinary cases where tribal regulation threatens the reserved right.[113] And, affected parties may be able to force the trustee to act either through administrative appeals or suits for administration pursuant to the McCarran Amendment.[114]

Federal law and policy compels the federal government to leave to tribes broad power to set standards for the regulation of the *Winters* rights. The wide latitude which must be accorded by the federal trustee to tribal decisions regarding water policies for the reservation requires a deferential scope of review of tribal decisions. That review arguably should measure whether the tribes have acted without any rational basis. Any other standard of review would intrude too far upon perhaps the most critical sovereign prerogative—the right to establish natural resource use policies within the sovereign's territory. Such review, significantly, also may

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111. *See* Colville Confederated Tribes v. Walton, 647 F.2d at 42.

112. Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985).

113. 25 U.S.C. § 2 or § 3 (1988).

114. *Opening Brief of Appellants Shoshone and Northern Arapahoe Tribes* (Type Two Issues) at 68-72, *Big Horn*, 353 P.2d at 76.

require first an exhaustion of remedies available under tribal law. In two cases, the United States Supreme Court held that federal courts must stay the exercise of their jurisdiction over matters in diversity and of federal questions until tribal remedies are exhausted. The Court cited federal Indian policy that requires federal support for the strengthening of tribal self-government, as the basis for its decision.[115]

With respect to the substantive criteria for reservation water administration by Indian tribes, tribes, without any foreign pressures, fairly should be given the opportunity to establish sensible water use policies for all reservation citizens and especially the *Winters* rights holders. The complication, however, is that many of those citizens, namely—non-Indian farmers, often have obtained and relied on state water permits, in some cases for over eighty years. In developing their policies, therefore, tribes must balance the complex equities of these non-Indians against historical circumstances leading to scant *Winters* water development. To require tribes to adopt state law type restrictions on the *Winters* award, or other reservation water uses in historical circumstances of aborted Indian water project development and only recent quantifications of the most senior right on the rivers, however, would nullify the *Winters* rights before tribes have had an opportunity to direct water to its highest and best use. Non-Indians have had such an opportunity for generations, when far fewer junior users could claim injury and thus impede water transfers under the state no injury rule.

To be sure, no solution to these difficult challenges will be free of some disruption to settled expectations regarding water use. Tribes reasonably and legally are entitled to appropriate their *Winters* awards without any restriction. If tribes do use their water without any restrictions, though, junior users very well may be injured. Moreover, Indians as a minority, importantly, could face difficult congressional challenges to their water right. The unique historical circumstances of water development on Indian reservations thus may compel accommodation. That compromise, however, must be one that accords tribes wide latitude in the administration of their *Winters* water rights, at the same time that it accords sensitivity to persons who reasonably relied on state permits to use water from Indian reservation water sources.

Perhaps the only suitable compromise, in these circumstances, is to encourage tribes to adopt as criteria for reservation water administration a public interest standard. Such a standard would enable tribes either by code or regulations to weigh, for example, with respect to a transfer of use

115. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985); Iowa Mutual Ins. v. La Plante, 480 U.S. 9 (1987).

application—possible injury to junior users, the economic value of the new and existing uses, environmental and cultural concerns, and other important tribal government interests. In this way the rigidity and concomitant unfairness to tribes resulting from a strict application of the no injury rule, as an example, is mitigated by other possibly countervailing concerns. On the other hand, such junior user injury would not be rendered irrelevant.

A public interest standard for tribal administration of reservation water, coupled with tribal primacy over reservation water administration, is a just and legally supportable scheme for reservations. Primacy, importantly, does not mean tribes and states will have no need to work cooperatively on the reservations, or that state permitted rights can be ignored by tribes. Tribal law recognition of state permitted rights may be advisable. That recognition fairly could incorporate state law rights under tribal law, at the same time that *Winters* awards are administered more flexibly.

The states often have a long history of data collection and supply forecasting for reservations that can be invaluable to tribes. Integration of reservation water administration with administration activities off-reservation likely will be compelled by the physical realities of water. Intergovernmental agreements surely will be necessary in these circumstances. These agreements likely will address data collection and research, monitoring, development of water budgets for each drainage, enforcement, disputes, and other matters. Consummated tax agreements and hunting and fishing regulatory agreements between tribes and states provide important precedents for water administration agreements.

If tribal primacy and the tribal public interest standard for *Winters* water administration do not yield satisfactory results and instead disrupt economies, then Congress properly may be requested to act. Federal trust obligations and federal Indian policies mandate that the tribal path be tried before more intrusive measures are adopted for the administration of quantified Indian *Winters* awards. Indians have a remarkable record of extending generosity and forbearance to persons who often have not extended these gifts to Indians. This record no doubt will be sustained in the difficult water rights administration arena.