

Notes

SETTLEMENT OR ADJUDICATION: RESOLVING INDIAN RESERVED RIGHTS

Gina McGovern

I. INTRODUCTION

Many Western states currently are engaged in extensive and protracted water rights litigation.¹ The goal of these general stream adjudications is to comprehensively and conclusively determine all the state and federal water rights to a particular river system and source.² These adjudications are important to the arid Western states because they provide an accurate gauge of what water is or is not available for future state development.³ Additionally, general stream adjudications provide a sense of security and repose to water right holders whose rights are precisely quantified and prioritized in the litigation process.⁴ However, the task is immense, commensurate only with the number of water rights involved.⁵ Given the extensive and comprehensive nature of this process it is no surprise that many significant water law issues are raised.⁶ Many of these issues involve water rights claimed by Native American communities under the doctrine of Indian reserved rights.⁷

1. PETER W. SLY, *RESERVED WATER RIGHTS SETTLEMENT MANUAL* 194 app. A (1988) (listing current litigation of water rights in state courts).

2. Thomas H. Pacheco, *How Big is Big? The Scope Of Water Rights Suits Under the McCarran Amendment*, 15 *ECOLOGY L. Q.* 627 (1988) (discussing various state approaches to general stream adjudications).

3. Frank Trelease, *Water Resources on the Public Lands: P.L.L.R.C.'s Solution to the Reservation Doctrine*, 6 *LAND & WATER L. REV.* 89, 94 (1970).

4. SUSANNA EDEN & MARY G. WALLACE, *UNIVERSITY OF ARIZONA WATER RESOURCES RESEARCH CENTER, ARIZONA WATER INFORMATION AND ISSUES* 6 (1992).

5. In Wyoming's Big Horn River adjudication, the Special Water Master signed the 451 page Report Concerning Reserved Water Right Claims by and on Behalf of the Tribes in the Wind River Reservation in that case on December 15, 1982, following four years of conferences and hearings involving over 100 attorneys, transcripts over 15,000 pages, and more than 2,300 exhibits. See *In re The General Adjudication of all Rights to use Water*, 753 P.2d 76 (Wyo. 1988), cert. granted in part sub nom. Wyoming v. United States, 488 U.S. 1040, *aff'd without opinion by an equally divided Court*, 492 U.S. 406 (1989) [hereinafter *Big Horn I*]; see also *In re The General Adjudication of all Rights to use Water in the Gila River System and Source*, Nos. W-1, W-2, W-3, W-4 (Ariz. Super. Ct., Maricopa County, filed Mar. 27, 1980) [hereinafter *Gila River*]. This adjudication involves an estimated 12000 parties and 61,000 claims. See SLY, *supra* note 1.

6. John Folk-Williams, *Environmental Dispute Resolutions: The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights*, 28 *NAT. RESOURCES J.* 63, 68 (1988).

7. *Id.* Some commentators have noted that states mount general stream adjudications for

Indian reserved rights are federally created rights to use state waters.⁸ In *Winters v. United States*,⁹ the Supreme Court fashioned these rights in what has become known as the *Winters* doctrine. *Winters* rights entitle Indians to enough water to accomplish the 'purpose' of their reserved lands.¹⁰ The Court specifically defined this 'purpose' as enabling Indians to make economically valuable use of their land so that they could "become a pastoral and civilized people."¹¹ However, the Court failed to specify a method for computing these reserved water rights.¹² Instead, the *Winters* doctrine grants tribes a vague and open-ended right to use state waters.¹³ Left unquantified, these water rights challenge established state water rights, threaten to displace current state water uses, and impede effective water planning and development by state governments.¹⁴

the very purpose of addressing Indian reserved rights that "hang over the heads of water users whose claims are based on state law." Pacheco, *supra* note 2, at 635. The State of Arizona has specifically acknowledged this reason. See, e.g., Brief for Appellant at 6, *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983) (No. 81-2147). This is not surprising considering that approximately one-third of the total land area of the State of Arizona is held in trust by the federal government for Indian reservations which are entitled to water rights under the doctrine of federal reserved rights. EDEN & WALLACE, *supra* note 4, at 29. Of these Indian reservations, fifteen currently are having their reserved rights quantified in *Gila River*, and *In re The General Adjudication of all Rights to use Water* (Ariz. Super. Ct., Apache County, filed May 19, 1980) [hereinafter *Little Colorado*]. Only the tribes along Colorado River, the Hualapai, Havasupai, Kaibab, and certain basins of the Tohono O'odham are excluded. EDEN & WALLACE, *supra* note 4, at 29.

8. There are three species of federal Indian reserved water rights: Aboriginal, Pueblo; and *Winters*. This Note focuses on *Winters* rights. For discussion of all three of these rights, see generally NATIONAL WATER COMM'N, WATER POLICIES FOR THE FUTURE—FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES 473-83 (1973); Susan M. Williams, *Water Rights in Transition: Reconciling Primacy of Indian Reserved Water Rights With Regional Economic Interests Through Inter-Governmental Cooperation*, FIFTH ANNUAL ABA NATURAL RESOURCES MANAGEMENT AND ENVIRONMENTAL ENFORCEMENT ON INDIAN LANDS CONFERENCE (Albuquerque, New Mexico, Feb. 4-5, 1993).

9. 207 U.S. 564 (1908).

10. *Id.* at 575. *Winters* involved a suit initiated by the United States on behalf of the Indian tribes of the Fort Belknap reservation in Montana. The suit was against a private, state water user who sought to divert water from the Milk River upstream from the reservation, thus depleting the amount of surface water flow available to the tribes. The Court enjoined the diversion stating that the treaty creating the reservation implied a reservation of water rights sufficient to accomplish the purpose of allowing Indians "command of the lands and waters—command of all their beneficial use, whether kept for hunting, ... 'grazing roving herds of stock,' or ... agriculture and the arts of civilization." *Id.* at 576. The *Winters* doctrine grew out of the policies of the Dawes Act of 1887 in which assimilation of Indians into the American "melting pot" was the desired goal. Dawes Act of 1887, ch. 119, 24 Stat. 338 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348-349, 354, 381 (1983)). SLY, *supra* note 1, at 6; see also *id.*, discussing the damage done to Indian culture by such assimilation policies. Nonetheless, the subsequent litigation clarifying *Winters* has maintained the assimilationist policies embodied in *Winters* rights by referring back in time to the federal documents creating reservation lands in order to discern the 'purpose' of a reservation. See *infra* note 67.

11. *Winters*, 207 U.S. at 576.

12. NATIONAL WATER COMM'N, *supra* note 8, at 477; For the intriguing proposition that the *Winters*' court deliberately left Indian reserved rights to state waters open ended in order to secure the Federal government's desire for centralized control of state waters via its Indian wards, see Marianna Guerrero, *American Indian Water Rights The Blood of Life in Native North America*, in THE STATE OF NATIVE AMERICA 189, 193 (M. Annette Jaimes ed., 1992).

13. Richard B. Collins, *The Future Course of The Winter's Doctrine*, 56 U. COLO. L. REV. 481 (1985).

14. See NATIONAL WATER COMM'N, *supra* note 8, at 477; Michael S. Laird, *The Winter's Cloud Over the Rockies: Water Rights and the Development of Western Energy*

In 1955, Congress enacted the McCarran Amendment¹⁵ to permit the quantification of Indian reserved rights in state general stream adjudications. However, adjudicating these rights is problematic.¹⁶ State courts must establish hydrologically sound methods of quantification, resolve novel and complex jurisdictional issues, and interpret ambiguous, often anachronistic, case law regarding Native Americans.¹⁷ As an alternative, Indian reserved rights can be quantified in settlement agreements.¹⁸ Negotiated settlements are considered superior to litigation in quantifying Indian water rights for several reasons.¹⁹ One particular advantage is that the settlement process provides a more flexible environment in which Indian communities can negotiate their rights according to each tribe's particular needs and circumstances.²⁰ Nonetheless, the inherently ambiguous nature and scope of *Winters* rights can make even the negotiation process problematic.²¹

Indian reserved rights are so vague and open-ended and the law defining them so uncertain, any attempt to quantify them entails the analysis of many complex issues. For example, do reserved rights include groundwater or merely surface water? By what standard should these rights be transformed into wet water?²² What government—state, federal or tribal—should administer

Resources, 7 AM. INDIAN L. REV. 155 (1979).

15. 43 U.S.C. § 666 (1982); see *infra* note 49 for the pertinent text of this amendment. Many states rewrote their general stream adjudication statutes in response to the McCarran Amendment, which made possible the adjudication of federal reserved rights in state courts. SLY, *supra* note 1, at 176.

16. Litigating Indian reserved rights is "difficult, time consuming and expensive." NATIONAL WATER COMM'N, *supra* note 8, at 475.

17. See generally Folk-Williams, *supra* note 6, at 63-64 (discussing the issues often raised in the process of quantifying Indian reserved rights).

18. *Id.*; see also SLY, *supra* note 1, at 11-12 (discussing current interest in Indian reserved right settlements).

19. Four reasons have been offered as proof of settlement superiority over litigation. First, adjudications are lengthy, often taking fifteen to twenty years to complete. The uncertain nature of Indian reserved rights promotes interlocutory appeals to clarify points of law with final appeals to the Supreme Court expected. Meanwhile, water is needed now and by the time these issues are finalized there is the risk that scarce water supplies will be reduced further. Second, adjudications cannot provide the alternative sources of water that will be required to settle Indian claims without significant harm to state water users while settlements enable tribes to contract with private parties for water supplies to decrease the injurious impact on non-Indian water users. Third, settlements can provide funding sources for the implementation of decreed reserved rights whereas adjudications simply confer a particular amount of water to tribes. Without the financial capital to develop this award of water, the award is largely insignificant. Finally, the settlement process is more flexible and can encompass issues not addressed in adjudications such as the post-quantification regulation of reserved rights and the possibility of off-reservation marketing of Indian water. EDEN & WALLACE, *supra* note 4, at 29-30; see also WESTERN STATES WATER COUNCIL, INDIAN WATER RIGHTS IN THE WEST 119-20 (1984).

20. SLY, *supra* note 1, at 37-38 (describing the role uniqueness plays in settlement negotiations).

21. Eileen Shimuzu, *Indian Water Rights: An Examination of the Current Status of the Department of Interior's Guidelines and the Opposition to Them*, 38 FED. B. NEWS & J. 88 (1991) (stating that the uncertainty of reserved rights makes their negotiation difficult); See, e.g., Folk-Williams, *supra* note 6, at 68 (discussing the many issues involved in the negotiation process); B. Kevin Gover et al., *Tribal-State Dispute Resolution: Recent Attempts*, 36 S.D. L. REV. 277 (1991) (stating that in light of the critical need for water and years of antagonism between tribes and states, "it is unreasonable to expect negotiations always to be fruitful ... The wonder ... is that they occur at all.").

22. The concept of "wet water" refers to the actual, physical manifestation of the water that is embodied in the concept of water rights. Whereas a reserved right is a paper right, that is, an entitlement to water, wet water is the actual, tangible water to which this right refers.

these rights after their quantification? These unresolved questions only begin to illustrate the problems associated with the quantification of Indian reserved rights. However, these rights are often the only means by which tribes can assert claims to necessary waters.²³ In general stream adjudications, questions surrounding Indian reserved rights disrupt the litigation process as state courts grapple to resolve them.²⁴ In the settlement process, the uncertainties inherent to Indian reserved rights are employed as tools of negotiation to gain leverage and bargaining power.²⁵

This Note asserts that tribal representatives and Congress must establish a clear, national policy for quantifying Indian water rights.²⁶ Such a policy would provide guidelines for parties attempting to quantify these rights in either the litigation or the settlement process by clarifying the extent of these rights, acknowledging economically viable standards for their quantification, and determining whether state, tribal, or federal law will govern their administration once they have been quantified.²⁷ A flexible policy designed to take into account individual tribal needs and circumstances while allowing for Indian self-determination will provide useful assistance in an area clouded by confused laws and obsolete Indian policies.²⁸

Section II of this Note presents the basic features of western water law

Historically, the concept of paper rights has plagued western state water management. JOSEPH L. SAX & ROBERT H. ABRAMS, *LEGAL CONTROL OF WATER RESOURCES* 143-44 (2d ed. 1991). In the early stages of western water law, when states first began to keep track of surface water diversions, appropriators were required to record their water diversions with the state. The result was an inaccurate record of "paper" rights which rarely paralleled the amount of actual "wet water" being diverted. *Id.* These paper rights "represented little more than an appropriator's own statement of what uses were being made." *Id.* Similar to paper rights, reserved rights are mere symbols of the actual, wet water to which they confer entitlement.

23. Folk-Williams, *supra* note 6, at 66 (stating that the uncertain federal laws currently defining Indian reserved rights are crucial to a tribes ability to stake their water claims); *see also* Steven J. Shupe, *Water in Indian Country: From Paper Rights to a Managed Resource*, 57 U. COLO. L. REV. 561, 566-67 (1986) (discussing tribal use of the power of the *Winters* doctrine).

24. Folk-Williams, *supra* note 6, at 63.

25. *Id.*; *see also* Lynette J. Boomgaarden, Casenote, *Water Law—Quantification of Federal Reserved Indian Water Rights—"Practically Irrigable Acreage" Under Fire: The Search for a Better Legal Standard*, 25 LAND & WATER L. REV. 417, 432 (1990) (contending that current federal law underpinning Indian reserved rights is a useful and appropriate tool for negotiation); Shupe, *supra* note 23, at 567 (discussing tribal use of the *Winters* right and PIA standard as a leveraging tool to ensure that tribal interests were included in western water development being financed by the federal government).

26. The Department of the Interior recently released a series of guidelines establishing procedures and criteria for negotiating Indian water settlements. Criteria and Procedures for Indian Water Rights Settlements, 55 Fed. Reg. 9223 (1990) (proposed March 12, 1990). However, the Indian community has objected to these guidelines. Shimuzu, *supra* note 21, at 88. One reason for this repudiation is that some members of the Indian community object to the very process of settling reserved rights. *Id.* Another reason is that the Department of Interior failed to consult them before adopting these guidelines. *Id.* The policies suggested in this Note, however, will not be limited to settlement guidelines. Rather, they seek to define and clarify Indian reserved rights so that their quantification in either the negotiation or litigation context is made easier. Moreover, they are consistent with self-determination policies insofar as they preserve Indian freedom of choice in selecting the arena for the quantification of their water rights.

27. *See infra* part IV.

28. SLY, *supra* note 1, at 5 (stating that the legacy of conflicting and vacillating Indian policies since the mid-nineteenth century plays a critical role in shaping current efforts to resolve water disputes).

and the essential conflict between this law and Indian reserved rights. Section III discusses the ambiguous nature of Indian reserved rights and the fragmented state case law generated by attempts to quantify these rights in state courts. Section IV addresses the settlement process as an alternative method for quantifying Indian reserved rights and the problems associated with negotiation. Finally, Section V offers guidelines to clarify the scope of these rights in order to facilitate quantification in either the litigation or settlement process.

II. WESTERN WATER LAW AND INDIAN RESERVED RIGHTS

The quantification of water rights is an important litigation process in the arid West where water resources are scarce and subject to strict regulatory laws.²⁹ Historically, western states have distinguished between surface and groundwater, applying two different legal doctrines to regulate water use according to its source.³⁰ The prior appropriation system regulates diversions of surface water flowing in streams and lakes,³¹ whereas the doctrine of reasonable use regulates the use of water taken from underground basins.³² However, this bifurcated system of water law has been condemned as hydrologically unsound because surface and groundwater sources generally flow in a unitary system.³³

Today, thirteen of the eighteen states that apply the prior appropriation system to surface water have extended this system's application to all hydrologically connected surface and groundwater.³⁴ Six of these states have a unitary water code for the management of hydrologically related waters,³⁵ five

29. 3 WELLS A. HUTCHINS, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES* 141-243, 361-649 (1971).

30. John D. Leshy & James Belanger, *Arizona Law Where Ground and Surface Water Meet*, 20 ARIZ. ST. L.J. 657 (1988).

31. CHARLES J. MEYERS, *A HISTORICAL AND FUNCTIONAL ANALYSIS OF THE APPROPRIATION SYSTEM* 4 (1971).

32. DAVID GETCHES, *WATER LAW* 254 (2d ed. 1990).

33. Leshy & Belanger, *supra* note 30. In 1973, the National Water Commission, recognizing that many states still clung to the "myth that ground water is separate from and unrelated to surface water," recommended that states work quickly to remedy this legal and scientific peculiarity and manage surface and ground waters conjunctively:

State laws should recognize and take account of the substantial interrelation of surface water and ground water. Rights in both sources of supply should be integrated, and uses should be administered and managed conjunctively. There should not be separate codifications of surface water law and ground water law; the law of waters should be a single, integrated body of jurisprudence.

NATIONAL WATER COMM'N, *supra* note 8, at 233, recommendation 7-1.

34. Leshy & Belanger, *supra* note 30, at n.453; see ALASKA STAT. § 46.15.030 (1991); COLO. REV. STAT. § 37-92-102 (1990); IDAHO CODE §§ 42-101, -103 to 226, 42-229 to -230 (1990); KAN. STAT. ANN. §§ 82a-703, -707 (1984); MONT. CODE ANN. §§ 85-2-101, -102(14) (1993); NEV. REV. STAT. ANN. §§ 533.025, -030, 534.020 (Michie 1986); N.M. STAT. ANN. §§ 72-1-1, -1-3, -3-1 (Michie 1985); N.D. CENT. CODE § 61-01-01 (1985); OR. REV. STAT. §§ 537.120, -515, -525, -535 (1991); S.D. CODIFIED LAWS ANN. §§ 46-1-1 to -3 (1987); UTAH CODE ANN. §§ 73-1-1, -1-3, -3-1 (1989); WASH. REV. CODE ANN. §§ 90.03.010, 44.020, 44.035, 44.040 (West 1992); WYO. STAT. §§ 41-3-101, -901, -905, -930, -936 (1977 & Supp. 1993).

35. Leshy & Belanger, *supra* note 30, at 726 n.454; see ALASKA STAT. §§ 46.15.030 to -185 (1991); COLO. REV. STAT. §§ 37-92-101 to -602 (1990); KAN. STAT. ANN. §§ 82a-701 to -731 (1984); MONT. CODE ANN. §§ 85-2-101 to -520 (1993); N.D. CENT. CODE §§ 61-01-01, 61-04-01 to -25 (1985); UTAH CODE ANN. §§ 73-3-1 to -29 (1989).

have statutes that require the integration of related surface and groundwater,³⁶ and two have court-approved integrated administration of water rights by state agencies.³⁷ By incorporating hydrologically connected groundwater within the prior appropriation system, western states have maintained the prior appropriation doctrine as a ubiquitous feature of western water law. What follows is a brief discussion of this law and its relationship to Indian reserved rights.

A. The Prior Appropriation System and Indian Water Rights

Under the prior appropriation system, the right to divert water from a stream is based on the notion "first in time, first in right."³⁸ This legal doctrine is identified by the following principles: the right to divert surface water is based on putting that water to beneficial use; the diversion or appropriation of water is a right of definite quantity; in times of shortage priority is given to those who first diverted; and the right may be lost by abandonment.³⁹ The relative rights and priority dates are regulated by state administrative bodies which require appropriators to register their diversions according to a particular permit/certification procedure.⁴⁰ Surface water appropriators must state the point of their diversions, the amount and purpose of the appropriation, and publish notice to other appropriators who may be affected.⁴¹

Indian reserved rights conflict with the prior appropriation system in three ways. First, reserved rights are implied rights 'reserved' at the time the Indian land was established.⁴² Since most Indian reservations were created prior to state users' claims, Indian reserved rights tend to usurp the priority of most state users.⁴³ Second, Indian communities are not required to put their reserved water rights to beneficial use in order to secure and maintain them. Because they do not have to be exercised in order to be valid, they are exempt from state permitting procedures.⁴⁴ Third, reserved rights are vague and open-ended, limited to loose standards rather than definite quantities.⁴⁵ In short, Indian reserved rights are at odds with the prior appropriation system and impede the abilities of states to manage, plan and develop scarce water resources effectively.⁴⁶

36. Lesly & Belanger, *supra* note 30, at 726 n.455; see IDAHO CODE § 42-237a(g) (1990); OR. REV. STAT. §§ 537.525(9), 620(3) (1987); S.D. CODIFIED LAWS ANN. § 46-6-3 (1987); WASH. REV. CODE ANN. § 90.44.030 (1992); WYO. STAT. § 41-3-916 (1977).

37. Lesly & Belanger, *supra* note 30, at 726 n.456.

38. MEYERS, *supra* note 31, at 4.

39. HUTCHINS, *supra* note 29, at 488-95.

40. *Id.*

41. *Id.* at 494-97.

42. Winters v. United States, 207 U.S. 564, 575 (1908).

43. NATIONAL WATER COMM'N, *supra* note 8, at 473.

44. *Id.*

45. *Id.*

46. *Id.*; see also PUBLIC LAND REVIEW COMM'N, ONE-THIRD OF THE NATION'S LAND, 141-55. (1970). To illustrate the conflict between water rights held under a state system of prior appropriation and those held under the doctrine of reserved rights, imagine a reservation that was established in 1865 is located on the same river system as a state water appropriator with a 1922 priority date. If and when the reservation has its reserved rights quantified, the priority date will be construed as 1865. In times of water shortage, the reservation will take its full entitlement to water under its senior priority date and displace the junior state appropriator.

B. Litigating Indian Reserved Rights in State Courts

To remove the lingering threat of these rights and to promote effective water planning, many western states have enacted statutes enabling or mandating general stream adjudications.⁴⁷ The passage of the McCarran Amendment,⁴⁸ and subsequent Supreme Court decisions interpreting this amendment, have provided states with the jurisdiction necessary to quantify Indian reserved rights in state courts.⁴⁹ However, state courts are granted procedural jurisdiction only.⁵⁰ They are not to effect any substantive changes in reserved rights and their adjudications must be 'comprehensive.'⁵¹ In other words, Indian water rights are to be determined by state courts utilizing federal law.⁵² Considering that there is no substantive federal water law,⁵³ and the ambiguity of the term "comprehensive,"⁵⁴ state courts are left to quantify

47. Pacheco, *supra* note 2, at 635.

48. 43 U.S.C. § 666 (1982).

49. Issues of United States sovereignty prevented state courts from asserting jurisdiction over Indian reserved rights. The amendment states in pertinent part:

Consent is hereby given to join the United States as 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 the necessary party to such a suit. The United States, when a party to any suit, shall (1) be deemed to have waived any right to plead that 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, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances

Id.

In *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1975), and *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983), the United States Supreme Court interpreted the McCarran Amendment to allow states court jurisdiction over the adjudication of Indian water rights held in trust by the United States in comprehensive state water right adjudications.

50. In holding that the McCarran Amendment authorized state adjudication of Indian reserved rights, the U.S. Supreme Court specifically noted "[t]he Amendment in no way abridges any substantive claim on behalf of Indians under the doctrine of reserved rights. Moreover ... 'questions including the volume and scope of particular reserved rights are federal questions which, if preserved, can be reviewed' by the Supreme Court" *United States Colorado River Water Conservation Dist.*, 424 U.S. at 813 (quoting *United States v. District Court for Eagle County*, 401 U.S. 520 (1971)).

See, e.g., *San Carlos Apache Tribe*, 463 U.S. at 571 (stating "any state court decision alleged to abridge Indian water rights protected by federal law can expect to receive ... exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment"); *United States v. Superior Court*, 144 Ariz. 265, 277, 697 P.2d 658, 670 (1985) (stating that "Indian rights are conferred by federal law, and it is the federal substantive law which our courts must apply to measure those rights in the state adjudication").

51. *Id.*

52. Lesby & Belanger, *supra* note 30, at 732.

53. *United States v. Fallbrook Pub. Util. Dist.*, 165 F. Supp. 806, 831 (1958).

54. The issue of comprehensiveness was recently addressed by the Arizona Supreme Court in an interlocutory appeal taken from the Gila River adjudication. In a July 27, 1993 opinion, the court held that the McCarran Amendment's requirement of comprehensiveness did not require state stream adjudications to quantify all hydrologically connected water. The Court stated that the purpose of the McCarran Amendment was to avoid the piecemeal adjudication of interdependent water rights by quantifying them in a single proceeding and that this purpose was furthered and not thwarted by excluding from Arizona's stream adjudications ground water rights with de minimus connections to surface water flows. *Gila River*, Nos. W-1 to W-4, Interlocutory Review, Issue No. 2., at 25-26 (Ariz. Super. Ct., Maricopa County, filed July

Indian reserved rights with little federal judicial guidance.

III. THE PROBLEMATIC PROCESS OF QUANTIFYING INDIAN RESERVED RIGHTS

Quantifying *Winters* rights in state court is highly problematic. No one is sure if these rights include groundwater, how to transform them from an abstract legal entitlement into actual water, or, what law is to administer them after they are quantified.

A. The Groundwater Dilemma⁵⁵

It is uncertain whether Indian reserved rights encompass groundwater. Some commentators argue that they do⁵⁶ and that the McCarran requirement of comprehensiveness compels states to adjudicate both ground and surface water rights when litigating Indian reserved rights.⁵⁷ Because general stream adjudications focus on the quantification of surface water rights,⁵⁸ the extent to which groundwater is involved will depend on the particular state's laws regarding hydrologically connected groundwater.⁵⁹ However, Indian reserved rights are federally-created rights. Thus, states must look to federal law to elucidate the scope of these rights. The absence of any such clarifying law has prompted three significant questions: (1) Do reserved rights encompass groundwater? (2)

27, 1993); see also *United States v. Oregon Water Resources Dep't*, 774 F. Supp. 1568, 1578 (D. Or. 1991) (Holding that the language of the McCarran Amendment does not require the simultaneous adjudication of rights to surface water and rights to ground water).

55. To fully appreciate the implications of whether or not *Winters* rights include ground water, it is helpful to understand some basic hydrogeological principals. Surface water is defined as liquid water above the earth's surface. CARLA W. MONTGOMERY, ENVIRONMENTAL GEOLOGY 224 (1989). Ground water is water beneath the earth's surface which has filtered through the earth and collects in underground basins or aquifers. *Id.* The diversion from one source of water will often affect the amount of water available from the other. See generally R. C. WARD, PRINCIPLES OF HYDROLOGY (2d ed. 1975); D. GRAY, HANDBOOK OF THE PRINCIPLES OF HYDROLOGY (1970). For example, pumping ground water may deplete the surface flows of a nearby stream. However, any affect will vary between watersheds and will depend upon a number of factors. These factors include: the amount of precipitation; the earth's permeability, pressure and equilibrium; surface vegetation; gravity; human actions; and the passage of time. Leshy & Belanger, *supra* note 30, at 660-61. If water from an aquifer feeds a lake, then continuously pumping water from this aquifer will eventually begin to deplete the amount of water in the lake. GRAY, *supra*, at 23-24. Similarly, diversions of hydrologically related surface water may also affect a ground water supply. *Id.* This was the problem in *Maricopa County Mun. Water Conservation Dist. No. One v. Southwest Cotton Co.*, 39 Ariz. 65, 4 P.2d 369 (1931). In this case, Southwest Cotton sought to enjoin the District's diversion of surface water for fear it would interfere with the amount of water available from its downstream wells. The court denied relief. *Id.* Thus, if Indian reserved rights were to include ground water, the question becomes to what extent do these rights encompass ground water? To the extent that they are hydrologically related to their surface water rights or to the extent that the water is necessary to fulfill the purpose of the reservation? These uncertainties highlight the complexities involved in the quantification process.

56. Robert Pelcyger, *Indian Water Rights: Some Emerging Frontiers*, 21 ROCKY MTN. MIN. L. INST. 743 (1975).

57. See *United States' Response to the City of Chandler et al., Motion to Exclude All Wells from the Gila Adjudication and the United States' Cross Motion for Summary Judgment*, at 11-12, *Gila River*, Nos. W-1 to W-4 (Ariz. Super. Ct., Maricopa County, Filed Mar. 27, 1980). But see *Maricopa County Mun. Water Conservation Dist. No. One*, 39 Ariz. 65, 4 P.2d 369.

58. Pacheco, *supra* note 2, at 635-36.

59. For the relevant state laws, see *supra* notes 34-37 and accompanying text.

If so, how much must be included to satisfy the comprehensiveness requirement? and, (3) How can a state court decide if and how much groundwater is encompassed within a reserved right without substantively affecting that right?

These questions are of particular concern to Arizona, a state that maintains a bifurcated system of water law.⁶⁰ What follows is a discussion of the groundwater dilemma and the legal inconsistencies that have resulted due to the difficult task of quantifying ill-defined reserved rights in the face of uncertain federal law.

In *Cappaert v. United States*,⁶¹ the only Supreme Court case addressing the issue of hydrologically connected surface and groundwater, the Court avoided deciding whether reserved rights absolutely included connected groundwater but firmly held that as a matter of federal law, federal reserved rights are protected from subsequently initiated pumping of hydrologically connected groundwater—even if that pumping is valid under state law.⁶² The *Cappaert* court reiterated the *Winters*' definition that a reserved right includes whatever water is necessary to accomplish the purpose for which the land is reserved.⁶³ The Court then went on to state that this right is protected against any water diversions—ground or surface—that detract from this purpose.⁶⁴

Unfortunately, it is unclear to what extent, if at all, the *Cappaert* decision elucidates the scope of Indian reserved rights. First, the Court's ruling addressed federal reserved rights associated with non-Indian lands.⁶⁵ These reserved rights are arguably distinguishable from the federally reserved Indian water rights fashioned in *Winters*.⁶⁶ Second, if the *Cappaert* decision is applicable to Indian reserved rights, the Court's insistence on equating the reserved land's water entitlement with the land's purpose of establishment would require an elusive search for a reservation's 'purpose'.⁶⁷ Thus, although the *Cappaert*

60. Arizona regulates its surface water under a system of prior appropriation. ARIZ. REV. STAT. ANN. § 45-141(A) (1987). Ground water use is managed under a comprehensive management plan. See Ground Water Management Act of 1980, ch. 1, § 86, 1980 ARIZ. SESS. LAWS 1392 (codified as amended at ARIZ. REV. STAT. ANN. §§ 45-401 to 45-637 (1987)). For the argument that this act is a movement toward a unitary system of water management, as well as a thorough discussion of Arizona's treatment of ground and surface waters, see Leshy & Belanger, *supra* note 30. See also Pacheco, *supra* note 2, at 650 (discussing the United States' argument in *In re Gila River* that the McCarran Amendment required all ground water users to be included in the litigation in those water basins to which reserved rights attached).

61. *Cappaert v. United States*, 426 U.S. 128 (1976).

62. *Id.* at 143; see also Leshy & Belanger, *supra* note 30, at 733.

63. *Cappaert*, 426 U.S. at 138. The Court held that when lands were set aside to establish a national monument, the United States implicitly reserved enough water to satisfy the purpose for which these lands were established. Here, the court held that the United States' purpose in establishing national monument land was to maintain a unique species of fish inhabiting an underground pool of water. This pool was sensitive to ground water withdrawals and the Court held it was to be protected against any diversion of water that would deplete the pool to the fish's detriment. *Id.* at 141.

64. *Id.* at 143.

65. There are two types of reserved rights: Indian and non-Indian. *Cappaert* involved non-Indian reserved rights and it is arguable whether the two are treated similarly. For further discussion of Indian versus non-Indian reserved rights, see *infra* notes 98-117 and accompanying text.

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

67. See SLY, *supra* note 1, at 168 (discussing how "[t]he entire edifice of federal reserved rights law has been judicially constructed application of canons of Indian treaty construction to unearth implied congressional intent to reserve water rights in the creation of federal reservations."). These canons are described in *infra* note 79. See also Martha C. Franks,

Court left no doubt that federal reserved rights are protected from subsequently initiated pumping of hydrologically connected groundwater, the Court failed to clearly delineate Indian entitlement to these waters. This failure has resulted in inconsistent state court rulings regarding the scope of *Winters* rights.

For instance, in the wake of *Caeppart*, Wyoming courts have held that there are no Indian reserved rights to groundwater⁶⁸ whereas Arizona courts have held otherwise.⁶⁹ While Wyoming avoided the issue of determining how much groundwater Indian reserved rights encompass,⁷⁰ Arizona courts are embroiled in complex hydrological analysis to determine the scope of reserved rights.⁷¹

The Wyoming and Arizona adjudications illustrate how the uncertain scope of reserved rights can subject tribes to potentially adverse and disparate treatment by state courts. Since both Congress⁷² and the United States Supreme Court have failed to delineate the extent of these rights—or even establish a clear policy regarding them—state courts will continue to grapple with the quantification process.⁷³ Indeed, although the McCarran Amendment was designed to avoid piecemeal and inconsistent adjudication of water rights,⁷⁴ its implementation has resulted in halted and protracted litigation producing disparate state decisions.

B. Transforming Indian Reserved Rights into Wet Water

Whether reserved rights entitle Indians to groundwater is only one of the questions states must contend with in quantifying water rights. Another puzzling issue is the quantification standard used to transform Indian reserved rights into wet water.⁷⁵ Under *Winters*, tribes are to receive enough water to fulfill the purpose for which their reserved land was set aside.⁷⁶ How this

The Uses of the Practicably Irrigable Acreage Standard in the Quantification of Reserved Water Rights, 31 NAT. RESOURCES J. 549 (1991) (arguing that historical analysis of federal documents creating Indian reservations is unhelpful to the quantification issue because the purposes of these reservations are often not explicit, varied, and sometimes contradictory).

68. *Big Horn I*, 753 P.2d 76, 99 (interpreting *Cappaert* to have held that reserved rights only included surface water or at most clearly connected aquifers).

69. "The fact that under Arizona case law, surface flow appropriators have no right to protection against upstream ground water pumpers does not diminish the right of holders of federal reserved surface rights from protection against such diminishment under *Cappaert*." *Gila River*, Nos. W-1 to W-4 (Ariz. Super. Ct., Maricopa County, Sept. 9, 1988).

70. *Id.*

71. For an example of the extensive hydrological analysis involved see the over 30 briefs submitted *Gila River*, Nos. W-1 to W-4 (Ariz. Super. Ct., Maricopa County, filed Dec. 10, 1992). In an interlocutory appeal taken from this adjudication, the Arizona Supreme Court recently held that trial courts may adopt a rationally-based test for excluding ground water wells having a de minimus effect on water rights held under federal law. *Id.*, Interlocutory Review, Issue No. 2., at 27 (Ariz. Super. Ct., Maricopa County, filed July 27, 1993). The Special Master and the presiding judge of the *Gila River* adjudication subsequently have filed motions to advance the hearing of two interlocutory issues regarding the scope of Indian reserved rights.

72. *But see* Leshy & Belanger, *supra* note 30, at 733 n.500 (arguing that by approving settlement acts that provide tribes with ground water, Congress has implicitly recognized Indians' "powerful legal claims" to such water.).

73. Joseph R. Membrino, *Indian Reserved Water Rights, Federalism and the Trust Responsibility*, 27 LAND & WATER L. REV. 1, 6 (1992).

74. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1975).

75. *See supra* note 22.

76. *Winters v. United States*, 207 U.S. 564, 576 (1908).

implied purpose is discerned and the amount of water necessary to satisfy it is the subject of on-going dispute.⁷⁷ Generally, courts have determined a reservation's 'purpose' by analyzing the treaty, Congressional Act or Executive Order⁷⁸ which created it according to canons of Indian construction.⁷⁹ Although some courts have recognized power generation⁸⁰ and preservation of instream flows for fishing, hunting and gathering⁸¹ as a reservation's purpose, most courts have recognized agricultural production as the purpose for which most reservations were established.⁸²

*Arizona v. California*⁸³ was the first United States Supreme Court case to clarify the water rights created in *Winters*.⁸⁴ In *Arizona*, the Court held that five Colorado River reservations had been established for agricultural purposes and stated that the amount of water reserved for these reservations equaled the amount necessary to irrigate all the practicably irrigable acreage (PIA) on the reservations' land.⁸⁵ This standard was adopted because it provided for the future as well as the present farming needs of the Indian communities by including every practicably irrigable acre on the reservation.⁸⁶ Although the PIA standard of quantification has drawn sharp criticism for the generous amount of water it confers to Indians at the expense of state users,⁸⁷ it is the one

77. Franks, *supra* note 67, at 559.

78. See, e.g., NATIONAL WATER COMM'N, *supra* note 8, at 473; SLY, *supra* note 1, at 101.

79. The canons of Indian construction require that treaties and federal agreements with tribes should be liberally construed in favor of Indians. *Choctow Nation v. Oklahoma*, 318 U.S. 423, 431-32 (1943); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *United States v. Walker River Irrigation Dist.*, 104 F.2d 334, 337 (9th Cir. 1939); that ambiguous expressions in treaties and statutes are resolved in favor of the Indians, e.g., *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Montana Power Co. v. Rochester* 127 F.2d 189 (9th Cir. 1942); *Carpenter v. Shaw* 280 U.S. 363, 367 (1930); *Winters v. United States*, 207 U.S. 564, 576-77 (1908); and that treaties should be construed as the tribe would have understood them. *Choctow Nation*, 397 U.S. at 631; *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Starr v. Long Jim*, 227 U.S. 613, 622-23 (1913); *Worcester v. Georgia* 31 U.S. (6 Pet.) 515, 582 (1832). For further information on the discussion of Indian treaty interpretation, see FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1982); INSTITUTE FOR THE DEVELOPMENT OF INDIAN LAW, INDIAN TREATIES (1980).

80. *Walker River Irrigation Dist.*, 104 F.2d at 340; *United States v. 5,677.94 Acres of Land*, 162 F. Supp. 108, 114-15 (D. Mont. 1958).

81. *Joint Bd. of Control v. United States*, 832 F.2d 1127 (9th Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988); *United States v. Adair*, 723 F.2d 1394 1410 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981), *appeal after remand*, 752 F.2d 397 (9th Cir. 1985); *United States v. Finch*, 548 F.2d 822 (9th Cir.), *vacated*, 433 U.S. 676, *remand*, 558 F.2d 555 (1977); *Confederated Salish & Kootenai Tribes v. Montana*, 616 F. Supp. 1292 (D. Mont. 1985). *But see Big Horn I*, 753 P.2d 76 (Wyo. 1988).

82. *Arizona v. California*, 373 U.S. 546 (1963) [hereinafter *Arizona I*]; *Arizona v. California*, 460 U.S. 605 (1983) [hereinafter *Arizona II*]; *Big Horn I*, 753 P.2d at 103-05; *Adair*, 723 F.2d at 1410; *Colville Confederated Tribes*, 647 F.2d 42.

83. 373 U.S. 546.

84. *Winters v. United States*, 207 U.S. 564, 576 (1908).

85. *Arizona I*, 373 U.S. at 600-01. In *Arizona II*, the PIA standard was affirmed as *res judicata*, with one important qualification—it was to be applied only on Indian lands that were capable of "economically feasible" irrigation projects. Special Master's Report 94 (Feb. 22, 1982), *adopted in pertinent part, Arizona II*, 460 U.S. 605.

86. *Arizona I*, 373 U.S. at 601. The Court adopted the PIA standard for its ability to provide a fixed calculation of future water needs based on the physical capacity of land as opposed to calculating the future population of the tribes which could "only be guessed." *Id.*

87. The PIA standard has been highly criticized as impracticable and insensitive to current state water users. One commentator notes that "[t]he PIA standard of quantification

clear federal guideline on which state courts can rely when quantifying Indian reserved rights.⁸⁸ It also provides tribes with powerful leverage in water right negotiations.⁸⁹

The PIA standard's future is doubtful. Although the Supreme Court recently affirmed its use in Wyoming's Big Horn River adjudication,⁹⁰ the Court was sharply divided.⁹¹ Moreover, by approving the Wyoming Supreme Court's limiting interpretation of the PIA standard,⁹² the Court severely diluted this standard's ability to command large water entitlements. The Supreme Court's divided views and approval of this limitation may signal other state courts to follow suit and diminish Indian water rights held under the reserved rights doctrine.⁹³ In any event, although the PIA standard is on shaky ground, it remains the principal quantification measure of Indian reserved rights.⁹⁴

The continued legal force of the PIA standard maintains the powerful bargaining position of tribes in the negotiation or litigation of their reserved right claims. However, it also perpetuates the confusion and controversy surrounding its application. The use of the PIA standard has not only been criticized as overgenerous, it has also been condemned as anachronistic⁹⁵ and

provides a significant threat to non-Indian users since irrigation uses of water are highly consumptive." *SLY*, *supra* note 1, at 104. Another has stated that "the 19.4 million acres owned by Indians under the PIA standard would entitle Indian tribes to more than ten times the amount of annual dependent water supply even if only one-third of reservation lands are practicably irrigable." Alvin H. Shrago, *Emerging Indian Water Rights: An Analysis of Recent Judicial and Legislative Developments*, 26 ROCKY MTN. MIN. L. INST. 1105, 1116 (1980). It also has been noted that potential claims based on the PIA standard for reservations in Arizona would consume eleven times the dependable surface supply in that state. *Indian Reserved Water Rights: Hearings before Senate Comm. on Energy and Natural Resources*, 98th Cong., 2d Sess. 27-28 (1984) (Western States Water Council, Report to Western Governors); *see also* Susan M. Campbell, *A Proposal for the Quantification of Reserved Indian Water Rights*, 74 COLUM. L. REV. 1299, 1311-12 (1974). *But see* *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 686 (1979) (holding Indians are entitled to no more than a "moderate [standard of] living" from their treaty rights to fishing waters); Collins, *supra* note 13, at 486 (commenting that the Supreme Court's standard of fairness in Indian cases has never made an Indian rich and that limiting them to a moderate standard of living was "gratuitous and bad form to announce ... in print").

88. *See supra* note 23 and accompanying text.

89. *See supra* note 25 and accompanying text.

90. *Wyoming v. United States*, 492 U.S. 406 (1989) (per curiam).

91. Chief Justice Rehnquist, Justices White, Scalia, and Kennedy would reverse the use of the PIA standard. *See* Membrino, *supra* note 73, at 9-11; *see generally* Walter Rusinek, *A Preview of Coming Attractions? Wyoming v. United States and the Reserved Rights Doctrine*, 17 *ECOLOGY L. Q.* 355 (1990).

92. The Wyoming Supreme Court held that factors such as land arability, engineering and economic feasibility must be considered in determining whether reservation land was practicably irrigable for the purposes of the PIA standard. In doing so, the Wyoming Supreme Court said they were being sensitive to state-held water rights. *Big Horn I*, 753 P.2d 76, 111-12 (Wyo. 1988), *aff'd sub nom.* *Wyoming v. United States*, 492 U.S. 406 (1989).

93. In *New Mexico ex rel. Reynolds v. Lewis*, the trial court rejected the Mescalero Apache Tribe's reserved right claims under the PIA standard as economically unfeasible. *State v. Lewis*, Nos. 20294, 22600 (N.M. Dist. Ct., Chaves County, filed Jan. 26, 1989); *see also* Boomgaarden, *supra* note 25, at 429 (criticizing *Big Horn I*'s restriction of the PIA standard as violative of the *Winters* guarantee of enough water to fulfill purposes of the reservation into the future). *Winters* rights are not premised on the economic capacity of Indians to implement them. *Id.*

94. Boomgaarden, *supra* note 25, at 433.

95. *See generally* Franks, *supra* note 67 (1991) (arguing that it is unfair to apply anachronistic technology to measure the water rights of modern reservations); Campbell, *supra* note 87, at 1313 (stating "[a]griculture is no longer the only, nor often a feasible or profitable, endeavor for Indian tribes."); *SLY*, *supra* note 1, at 104 (stating "water rights tied to irrigated

over-extended.⁹⁶ Moreover, the use of this standard requires detailed and complex research. In order for the PIA standard to apply, treaty analysis is required to determine whether a reservation's purpose is agricultural.⁹⁷ However, analysis of this 'purpose' issue can be quite perplexing. This confusion is due in part to the questionable applicability of non-Indian reserved rights case law to that of Indian reserved rights.⁹⁸

There are two types of reserved rights. Although this Note focuses on Indian reserved water rights, reserved rights also attach to federally established non-Indian land such as National Parks and Forests.⁹⁹ The two types of rights can be distinguished by the fact that Indian reserved rights are not owned by the United States but by Indian tribes.¹⁰⁰ The United States is merely the trustee holding these rights for their benefit.¹⁰¹ In contrast, the United States owns the non-Indian federal reserved rights that attach to National Forests and Parks.¹⁰²

Despite this distinction, the Supreme Court has treated similarly both types of reserved rights.¹⁰³ However, it remains uncertain whether these rights should be quantified similarly. The Supreme Court has never directly ruled on this subject and some courts have recognized the need for distinguishing between them.¹⁰⁴ In *United States v. New Mexico*,¹⁰⁵ the Supreme Court defined the quantification standard for non-Indian reserved rights in terms of a primary purpose test.¹⁰⁶ In *New Mexico*, the reserved rights attached to National Forest land were limited to the minimal needs of the original, primary purposes of the forest. The Court stated that any secondary water rights must

agriculture make little sense in the current depressed agricultural economy."); Boomgaarden, *supra* note 25, at 431 (arguing the use of the PIA standard would restrict Indians ability to pursue alternative on-reservation uses that are inconsistent with agricultural purposes ignores the reality of unprofitable agricultural commodities).

96. Although the PIA standard has been employed in many cases after its initial use in *Arizona I*, the special master who created this standard never intended it to be a universally applicable measure of converting Indian reserved rights into wet water: "Although the Court did not necessarily adopt this standard as the universal measure of Indian reserved rights, it constitutes the law of the case for the five Reservations under consideration." Special Master's Report 90 (Feb. 22, 1981), *adopted in pertinent part*, *Arizona v. California*, 460 U.S. 605 (1983) (footnote omitted); *see also* *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), where the Court implicitly described the creation of the PIA standard as a particular Special Master's discretionary response to the Court's directive to fashion enough water rights to ensure the Indians a reasonable livelihood.

97. *See supra* note 82 and accompanying text.

98. The National Water Commission took as an accepted premise that "[I]ndian water rights are different from Federal reserved water rights for such lands as national parks and national Forests." NATIONAL WATER COMM'N, *supra* note 8, at 477.

99. *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955). In *Arizona I*, the court noted that the principle underlying the reservation of Indian rights also applied to "other federal establishments such as National Recreation Areas and National Forests." *Arizona I*, 373 U.S. 546, 601 (1963). *But see infra* notes 106, 111, 120 and accompanying text.

100. NATIONAL WATER COMM'N, *supra* note 8, at 477.

101. *Id.*

102. *Id.*

103. *See, e.g., id.*; *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), where the Supreme Court held that "viewing the Government's trusteeship of Indian rights as ownership," there was no distinction between non-Indian rights and Indian rights for purposes of the McCarran Amendment, *id.* at 810; Peter Toren, Comment, *The Adjudication of Indian Water Rights in State Courts*, 19 U.S.F. L. REV. 27, 42-44 (1984).

104. *See infra* notes 109, 113 and accompanying text.

105. 438 U.S. 696 (1978).

106. *Id.* at 702.

be obtained through state procedures.¹⁰⁷ If applied to Indian reserved rights, this test would restrict judicial interpretations of the federal documents which created Indian reservations to the finding of one primary purpose and then limiting the amount of water accordingly.¹⁰⁸

In *Colville Confederated Tribes v. Walton*,¹⁰⁹ the Ninth Circuit applied the *New Mexico* primary purpose test to Indian reserved rights.¹¹⁰ In doing so, the court extended non-Indian reserved rights case law to Indian reserved rights.¹¹¹ However, in what appears to be a deft circumvention of this test's limitations, the court found two purposes for the tribal land involved.¹¹² Similarly, in *United State v. Adair*,¹¹³ the Ninth Circuit again found two primary purposes for the reservation of Indian land.¹¹⁴ This time the court stated that non-Indian reserved water rights cases only provided useful guidelines for Indian reserved rights.¹¹⁵ To emphasize this distinction the court noted that "[w]hile the purpose for which the federal government reserves other types of lands may be strictly construed, the purpose of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained."¹¹⁶ Later, in the Wyoming Big Horn River adjudication, the Wyoming Supreme Court used the primary purpose test to restrict the quantification of Shoshone and Arapahoe tribes' reserved rights to an agricultural purpose.¹¹⁷ The court refused to find reserved rights for any non-agricultural purpose.¹¹⁸

The uncertain applicability of the *New Mexico* test to Indian reserved rights cases exacerbates the already confused process of transforming these rights into wet water. Some argue that its application to Indian rights limits the amount of water owed to Indians under *Winters*.¹¹⁹ Justice Powell's opinion in *New Mexico*, referred to as the "sensitivity doctrine,"¹²⁰ has confirmed this

107. *Id.* at 706-08.

108. *But see* COHEN, *supra* note 79, at 584 (arguing that the primary versus secondary purpose test is not relevant to Indian reservations).

109. 647 F.2d 42 (9th Cir. 1981).

110. *Id.* at 47.

111. *Id.*

112. *Id.* at 48. The two purposes found were agricultural and instream flow rights to preserve fisheries.

113. 723 F.2d 1394 (9th Cir. 1983).

114. *Id.* at 1409. The two primary purposes were an agrarian homeland and the continuation of its traditional hunting and fishing lifestyle.

115. *Id.* at 1408.

116. *Id.* at n.13 (quoting WILLIAM CANBY, AMERICAN INDIAN LAW 245-46 (1981) (citation omitted)).

117. *Big Horn I*, 753 P.2d 76, 94-98 (Wyo. 1988), *aff'd sub nom.* Wyoming v. United States, 492 U.S. 406 (1989); *see also* *In Re General Adjudication*, 835 P.2d 273 (Wyo. 1992) [hereinafter *Bighorn III*], where the court stated it was persuaded by the Supreme Court's holding in *United States v. New Mexico*, 438 U.S. 696 (1978), "that water is impliedly reserved only to the extent necessary to meet the primary purpose(s) for which a reservation is made and that, where water is valuable for a secondary purpose ... [it] is to be acquired in the same manner as ... any other private or public [water] appropriator." *General Adjudication*, 835 P.2d at 278.

118. 835 P.2d at 278.

119. Tribes argue that taking into account the impact of reserved rights on state water rights during the quantification process violates the protection of their rights under the federal trust. *See* SLY, *supra* note 1, at 110.

120. *United States v. New Mexico*, 438 U.S. 696, 718 (1978) (Powell, J., concurring and dissenting).

argument. The sensitivity doctrine suggests a balancing of *Winters* rights against state-held water rights in order to be sensitive to the fact that the recognition of each reserved right results in a drop by drop reduction in the water available to state users.¹²¹ The Wyoming Supreme Court is the only state court to have directly addressed the applicability of this doctrine to Indian reserved rights.¹²² In *Big Horn I*, the court stated that although it "doubted" the sensitivity doctrine applied to Indian cases, it was being amply sensitive to state water rights by restricting the quantification standard to a more stringent PIA analysis.¹²³ Such expressions of confusion and the resulting restrictive quantifications illuminate the need for a clear and consistent approach to the quantification process.

C. Post Quantification: Who Administers Indian Reserved Rights?

The ambiguity shrouding Indian reserved rights does not disappear once these rights have been quantified and decreed. Rather, a new uncertainty is introduced: who should administer and control these rights. State, federal and tribal governments each have asserted compelling arguments for the administration of quantified Indian reserved rights.¹²⁴ It is the administrative body that dictates how, where, and when water can be used.¹²⁵ In view of the expansive

121. *Id.* at 705, 718. Justice Powell referred to the majority's statement that "[W]hen ... a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy and private appropriators ..." when he stated "I agree with the court that the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and Congress' general policy of deference to state water law." *Id.*; see *SLY*, *supra* note 1, at 110.

122. *Big Horn I*, 753 P.2d 76, 111-12 (Wyo. 1988).

123. *Id.* But see *supra* notes 111, 119 and accompanying text (illustrating the confused application of non-Indian reserved right case law to Indian reserved rights). Although the Wyoming Supreme Court adopted the use of *New Mexico's* primary purpose test in quantifying Indian reserved rights, it did not apply the sensitivity doctrine espoused in the same case.

124. States argue that they should administer Indian reserved rights post-quantification because: 1) these water rights impact state-held water rights; 2) states have the expertise necessary to manage comprehensive water administration systems; and 3) states have a significant interest in uniform control over state waters in view of interstate water compacts under which states are obligated to curtail state water use. Tribal arguments are grounded in issues of Indian sovereignty: 1) the right of tribal self-government over tribal property and tribal members; and 2) the ability of tribes to assert jurisdiction over tribal territory regardless of whether the water right-holder is non-Indian. The federal government's interest in administering these rights stems from 1) federal statutes recognizing water regulatory powers such as the Endangered Species Act of 1969, 16 U.S.C. § 1531 (1982), the Clean Water Act, 33 U.S.C. § 1377 (1987), the Safe Drinking Water Act, 42 U.S.C. § 300h-1 (e)(2) (1986); and the Resource Conservation and Recovery Act 42 U.S.C. § 6901 (1976). The Secretary of Interior's administrative powers over the lower Colorado River derived from the Boulder Canyon Project Act, 43 U.S.C. § 617 (1988) (originally enacted as Act of Dec. 21, 1928, ch. 42, 45 Stat. 1057), as well as his administration over Indian Irrigation Projects and Reclamation projects that serve areas on Indian reservations. *SLY*, *supra* note 1, at 148-52; see also *Shupe*, *supra* note 23, at 570-81.

125. For example, under the prior appropriation system water users must obtain permission from the state water administrative body if they want to change their current use of water to a different beneficial use. See generally *WATERS AND WATER RIGHTS* § 16.02(B) (Robert Beck ed., 1990). This is done to ensure that no injury is done to other water users when, for example, an individual wants to use her water entitlement for the preservation of in-stream flows instead of irrigating her land. *Id.* The potential harm in this example is that the change to an in-stream flow use leaves less water available to junior appropriators who must let the water flow by to protect the senior holder's right. Whereas an individual with the right to divert 10 cfs of water from a stream has been using this water for irrigation, the actual consumptive use of this water will be less than the 10 cfs diverted. Generally, a percentage of

control the administration of water rights affords, it is unsurprising that administrative issues invite highly charged and controversial debate. The historical wariness of tribes toward state governments and state hesitance to submit what is perceived as state waters to federal control only adds flame to the fire.¹²⁶

The law regarding the administration of decreed Indian reserved rights is fragmented and uncertain. Although the supreme court has established the PIA standard to transform Indian reserved rights into wet water, it did not address how these rights were to be regulated once they were quantified.¹²⁷ In particular, the Court left open whether the standard chosen should dictate how the water was to be used.¹²⁸ For example, the PIA standard grants Indians enough water to irrigate reservation lands which are capable of agricultural production.¹²⁹ However, under current law, it is undetermined whether tribes may use this water for only agricultural purposes, or whether, once the right is quantified, they may utilize the water for industrial or mining purposes.

In the controversial *Bighorn III*¹³⁰ decision, a fragmented Wyoming Supreme Court held that the standard used to quantify Indian reserved rights limited the use to which these rights could be put.¹³¹ The court insisted that this limitation was clearly expressed in *Bighorn I*, and that the Supreme Court's

this water returns to the stream as run-off, which is then available for another's use. However, there is no return flows where the water remains instream. Thus the change in use to an instream flow right leaves less water available to junior appropriators who must let the water flow by in deference to the senior holder's right.

126. SLY, *supra* note 1, at 11.

127. Although the Supreme Court held that the reserved rights at issue would be quantified according to the PIA standard, the Court approved the parties stipulation that the water could be used for non-agricultural purposes. How this arrangement was to be regulated was not addressed. *Arizona II*, 439 U.S. 419, 422 (1979).

128. According to the Special Master's Report in *Arizona I*, the agricultural standard used to quantify Indian reserved rights would *not* limit the use of that amount of water to solely agricultural purposes:

This does not necessarily mean, however that water reserved for Indian Reservations may not be used for purposes other than agriculture and related uses [T]he decree establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow.

Arizona v. California, 1960 Term, No. 8 Orig. Report of Simon H. Rifkind, Special Master, 254-266 (Dec. 5, 1960), at 265-66; see generally Harold A. Ranquist, *The Effect of Changes in Place and Nature of Use of Indian Rights to Water Reserved Under the "Winters Doctrine"*, 5 NAT. RESOURCES LAW. 34 (1972). After employing the PIA standard to measure reserved rights, the Ninth Circuit stated: "when the tribe has a vested property right in reserved water, it may use it in any lawful manner." *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48-49 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

129. See *supra* note 86 and accompanying text.

130. 835 P.2d 273 (1992).

131. *Id.* at 278. After receiving their quantified water rights under a more restrictive PIA standard in *Bighorn I*, the Shoshone and Arapaho Tribes established a tribal water code to administer the use of this water and granted themselves an instream flow right pursuant to this code. The Wyoming State Engineer who was vested with the authority to "monitor" water use on the reservation, refused to recognize this tribal-created water right and thus initiated *Bighorn III*. In holding against the tribes' ability to apply their reserved rights to an in-stream use the court referred to the PIA quantification standard it had established in *Bighorn I*, stating, "if we had we intended to specify what the water could be used for merely as a methodology to determine the amount of water the Tribes could use for any purpose, we would have said so It makes no sense whatsoever for this court to limit the use of the water for agricultural purposes and then to permit the tribes to unilaterally change that use." *Id.*

affirmation of this holding supports and finalizes this limitation.¹³² Although it is arguable whether this limitation was clearly expressed in *Big Horn I* and thus whether the supreme court ever even addressed the issue, *Big Horn III* has not been appealed.¹³³ Additionally, even though the federal government conceivably could grant jurisdiction to states over Indians without tribal consent,¹³⁴ this unilateral action is unlikely in view of the current congressional policies favoring Indian sovereignty.¹³⁵ Instead, state courts such as Wyoming are free to establish case law contrary to such policies due to the absence of clear federal authority mandating otherwise.

The Wyoming Supreme Court's denial of the Shoshone and Arapahoe's right to use their reserved rights for other than agricultural use after they had been quantified under the PIA standard, effectively established state control over the administration of Indian water rights.¹³⁶ However, the notion that states can restrict quantified reserved rights to the measure used to quantify them is contrary to precedent¹³⁷ and raises the controversial issue of tribal sovereignty.¹³⁸

The McCarran Amendment grants states judicial jurisdiction to quantify Indian water rights.¹³⁹ However, it is unclear whether this amendment confers state administrative jurisdiction over these rights once they have been quantified.¹⁴⁰ Only Wyoming has directly addressed this issue, holding that the

132. *Id.*

133. The tribe has not appealed because they would prefer to work out the change of use issue in negotiations with the state rather than in litigation. Moreover, they apparently do not want to jeopardize the status of the PIA standard by placing it before the Supreme Court where Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy are willing to overturn it. See generally Rusinek, *supra* note 91, at 398-410.

134. *E.g.*, *Anderson v. Britton*, 318 P.2d 291 (Or. 1957), *cert denied*, 356 U.S. 962 (1958).

135. *SLY*, *supra* note 1, at 8.

136. In both *Big Horn I* and *Big Horn III*, the court emphasized that the state engineer merely was to monitor water use on the reservation and to enforce tribal decreed rights according to principles of federal law. The court noted that although the State Engineer must resort to state court for enforcement power if he found that the tribes were violating their decree, state courts had proper jurisdiction since they interpret federal law. In short, the court held that state courts—not state water administrative bodies—have the authority to administer Indian waters but only according to federal law. However, this statement is suspect considering the notable absence of clear federal law regarding Indian reserved rights. This absence enables state courts to invent their own laws regarding Indian waters. Furthermore, in regard to tribal ability to change the use of a decreed reserved right, case law militates in favor of tribes employing their rights to non-agricultural ends. See *Arizona II*, 439 U.S. 419, 422 (1979) (tribes may use their reserved rights quantified under an irrigation standard for recreation and housing developments); *United States v. Anderson*, 736 F.2d 1358, 1365 (9th Cir. 1984) (tribe may use irrigation water rights for instream purposes); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981) [hereinafter *Colville I*]; *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 405 (9th Cir. 1985) (tribe may devote irrigated water rights to a replacement fishery) [hereinafter *Colville II*]. Thus, the Wyoming Supreme Court's assertion that federal law will regulate Indian water rights is inconsistent with this court's actions. Indeed, the court held that the method of quantification dictates the use to which Indian reserved rights may be put—a holding that was never a principle of federal law.

137. See *supra* note 136 for cases holding that decreed Indian reserved rights may be used for purposes other than those for which they were originally quantified.

138. *Toren*, *supra* note 103, at 43.

139. See *supra* note 49.

140. Arguably, the McCarran Amendment could permit state administration of Indian reserved rights. The amendment provides in part that the United States may be joined "[i]n any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2)

McCarran Amendment authorizes state *courts* to regulate decreed reserved rights.¹⁴¹ There is no state or federal decision which clearly holds whether the McCarran Amendment confers such authority upon state *executive* bodies.¹⁴² Although *Public Law 280* denies any intent to allow states to govern Indian reserved rights,¹⁴³ the McCarran Amendment may be interpreted to allow such state regulation.¹⁴⁴

In *Colorado River Water Conservation District v. United States*,¹⁴⁵ the Supreme Court dismissed *Public Law 280* as irrelevant to whether state courts could assert jurisdiction over Indian reserved rights under the McCarran Amendment.¹⁴⁶ Arguably, the Court could employ the same logic to hold that the McCarran Amendment also authorizes states to assert administrative jurisdiction over these rights. If so, *Public Law 280*'s ability to protect the ownership of tribal property would be largely defeated.

Notions of tribal sovereignty and Indian self-determination provide powerful arguments against state authority over the administration of Indian water rights on Indian lands.¹⁴⁷ Although the doctrine of Indian reserved rights originated in a time when governmental policies encouraged the assimilation of

for the *administration* of such rights." 43 U.S.C. § 666(a) (1982) (emphasis added). Several quantified Indian reserved rights stemming from pre-McCarran Amendment general stream adjudications are being administered by federal courts occasionally relying on state administrative expertise. For example, Orr Ditch Decree, Walker River Decree, Kittitas Decree, Chama River Decree. SLY, *supra* note 1, at 140.

141. *Big Horn I*, 753 P.2d 76, 114-15 (Wyo. 1988).

142. SLY, *supra* note 1, at 142.

143. 25 U.S.C. § 1322(b) (1968) provides in part that nothing: "shall confer jurisdiction upon the State to adjudicate ... the ownership or right to possession of [any real or personal property; including water rights, belonging to any Indian or any Indian tribe ... that is held in trust by the United States]." *Id.*; see also Mary Wallace, *The Supreme Court and Indian Water Rights*, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 197, 212-13 (Vine Deloria, Jr. ed., 1985).

144. 43 U.S.C. § 666 (1982).

145. 424 U.S. 800 (1976).

146. *Id.* at 812 n.20.

147. A major state concern with exclusive tribal authority to administer decreed reserved rights is that many Indian reservations are inhabited by non-Indians. This produces a checkerboard pattern of water rights held under state law and those rights conferred by the *Winters*' doctrine within tribal boundaries. This pattern takes on another dimension due to the uncertain water rights of non-Indian successors to reservation land with appurtenant *Winters*' rights. It is uncertain if and to what extent non-Indian successors in interest to Indian allottees can succeed to any of the original allotment's appurtenant *Winters* right. See *United States v. Powers*, 305 U.S. 527 (1939); *United States v. Pierce*, 235 F.2d 885 (9th Cir. 1956); *United States v. Alexander*, 131 F.2d 359 (9th Cir. 1942); *Segundo v. United States*, 123 F. Supp. 554 (S.D. Cal. 1954). Despite state interest in regulating water on tribal lands, one commentator has offered three reasons against this state authority. First, federal case law has indicated that state jurisdiction may be preempted by federal or tribal jurisdiction, see *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685 (1965); *Sangre De Cristo Dev. Corp. v. City of Santa Fe*, 503 P.2d 323 (N.M. 1972), *cert denied*, 411 U.S. 938 (1972). Second, logic dictates that jurisdiction should depend on the location of the property, that is, water right, at issue and not on the race or title status of the right holder. Otherwise confusion, inconsistency, and instability would result. See *United States v. Frank Black Spotted Horse*, 282 F. 349 (D.S.D. 1922). Finally, notions of Indian self-determination prevent states from impairing a valuable tribal right such as the control and regulation over scarce water resources—a right that is essential to Indian sovereignty. See *Williams v. Lee*, 358 U.S. 217, 220 (1959); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 179 (1973); *Kennerly v. District Court*, 400 U.S. 423 (1971), for the repeated point that state law cannot apply to non-Indians within the reservation when it would "infringe on the right of reservation Indians to make their own laws and be ruled by them." Pelcyger, *supra* note 56, at 770.

Indians into American culture, current policies purportedly emphasize the recognition of tribal government sovereignty and Indian self-determination.¹⁴⁸ Unlike the Wyoming Supreme Court, the Ninth Circuit has addressed this evolution of Indian policy and concluded that the McCarran Amendment does not authorize state regulation of permits for non-Indian waters flowing on reservation lands.¹⁴⁹ However, this decision was subsequently limited to the particular hydrogeological situation of reservation waters.¹⁵⁰ Where a body of water is a closed basin wholly confined to reservation territory, tribes may maintain administrative jurisdiction.¹⁵¹ However, in the more likely situation where a water system extends beyond tribal boundaries, the state interest in regulating this water is likely to prevail.¹⁵² It is important to note that these judicial resolutions involve only administrative questions pertaining to non-Indian uses of excess waters on Indian land.

Administrative questions can be complex because they often involve the water rights of non-Indian users—allottees—who are entitled to reserved water rights as purchasers of Indian land to which these rights attach.¹⁵³ Thus, whatever regulatory system a tribe selects to control water rights on reservation lands may not be limited to Indian water users. The law regarding administration issues of Indian and non-Indian allottees' use of decreed reserved rights on tribal lands is still developing. However, the recent *Big Horn III*¹⁵⁴ decision requiring tribes to comply with state law to change the use of their decreed reserved right is a development that runs counter to current Federal policy favoring Indian self-determination.¹⁵⁵

In the following section, this Note examines how the settlement process works under the current uncertain scope of Indian reserved rights and the absence of any established settlement formula.¹⁵⁶

148. "The unmistakable, overwhelming pattern of the case law is toward recognizing, respecting, and enforcing the sovereignty of Indian tribes except where it has been specifically, very specifically, limited by Congress." Pelcyger, *supra* note 56, at 765 n.78.

149. *Colville I*, 647 F.2d 42, 53 (9th Cir. 1981) (stating "[n]or do we perceive the McCarran Amendment as expanding the states regulatory powers over water on a federal reservation" (citation omitted)).

150. In *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984), the Indian water rights at issue attached to a creek that formed the eastern boundary of the reservation. Because the water was a boundary line along non-Indian lands where non-Indians exercised state water rights, the court concluded that the states interest in regulating the water rights outweighed that of the tribes, stating "[t]he weight of the state's interest depends, in large part, on the extent to which waterways or aquifers transcend the exterior boundaries of Indian country." *Id.* at 1366.

151. *Colville I*, 647 F.2d at 53.

152. See *Anderson*, 736 F.2d at 1366 (stating "The weight of the state interest depends, in large part, on the extent to which waterways or aquifers transcend the exterior boundaries of Indian country"). In addressing issues of administrative authority over non-Indian's use of water on reservation territory, the court will balance federal/tribal interests against the state's interest. In weighing this balance, courts will look at the potential threat to the political integrity of the tribe, the economic security, the health and welfare of the tribe against the extent of state activity within reservation boundaries. *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation v. Whiteside*, 828 F.2d 529 (9th Cir. 1987), *cert. granted*, 487 U.S. 1204 (1988).

153. The Supreme Court has declined to clarify the water rights of allottees. *United States v. Powers*, 305 U.S. 527 (1938).

154. *In re General Adjudication of all Rights to use Water*, 835 P.2d 273 (Wyo. 1992).

155. See *supra* note 148.

156. See generally SLY, *supra* note 1, at chs. 4-14 (discussing the settlement process in detail).

III. THE SETTLEMENT PROCESS

Settlements provide a flexible framework in which tribes can employ their reserved rights as leveraging tools to extract more favorable outcomes.¹⁵⁷ Thus, Settlement acts often are an attractive alternative for the quantification of Indian reserved rights.¹⁵⁸ However, even supposing an ideal situation in which all parties invested with the authority to negotiate a settlement of Indian reserved rights are present and willing to do so, the same difficult issues that plague the adjudication process arise in negotiations. The very nature of reserved rights compels questions such as whether reserved rights include both ground and surface water, and if so, how much; what standards of quantification should apply in transforming these rights into wet water; and how states can reconcile their interest in regulating reservation waters with issues of tribal sovereignty?

In developing mutually suitable answers to these questions, the negotiating parties must contend with the distrust and conflict that inevitably accompanies competing interests for a scarce resource. Years of fragmented policies regarding the disposition of Indian rights, animosity and rivalry among state and tribal and federal interests do not disappear in the settlement context.¹⁵⁹ Although settlements discourage an adversarial approach in favor of a more fluid, discussion-oriented resolution, the conflicts and the rights at stake still remain.¹⁶⁰ Years of distrust do not dissolve when parties opt to negotiate rather than litigate. Although the ability of the negotiation process to bring parties together to recognize their need for compromise should not be underestimated, it would be disingenuous to describe settlements as a panacea for resolving the inherently complex and ambiguous issue of quantifying Indian reserved rights.

A. How Settlements Work

There is no established framework or procedure for Indian water rights settlements. Some are initiated by McCarran Amendment adjudications in state courts where tribes and other litigants may opt out of the litigation process to negotiate a settlement which is eventually incorporated into the adjudication.¹⁶¹ Others are initiated by interested parties willing to strike a deal over contested water rights—deals Congress may subsequently approve.¹⁶² The “players” in

157. See *supra* note 25 and accompanying text.

158. See *supra* note 19.

159. Gover et al., *supra* note 21 (stating that in light of the critical need for water and years of antagonism between tribes and states, “it is unreasonable to expect negotiations always to be fruitful. The wonder ... is that they occur at all.”).

160. *Id.*

161. This was how the Salt River Pima-Maricopa Indian Community (SRPMIC) had their rights quantified as original participants in the Gila River adjudication in Arizona. *Gila River*, Nos. W-1 to W-4 (Ariz. Super. Ct., Maricopa County, filed Mar. 27, 1980); see also Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512, 102 Stat. 2549 (1988).

162. Indian settlements effected this way include the Ak Chin Settlement Act, Pub. L. No. 95-328, 92 Stat. 409 (1978), Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, 102 Stat. 2973 (1988), and the Southern Arizona Water Rights Settlement Act, Pub. L. No. 97-293, 96 Stat. 1280 (1982). See also Guerrero, *supra* note 12, at 204-205 (discussing the “Reaganites” manipulation of these Settlements and the overall unfair and racist policies incorporated into these agreements.).

the settlement process may include the representatives of tribal, state and federal governments, as well as interested private parties whose water rights are at stake.¹⁶³ Despite the potential diversity of settlement players and procedures, most settlement agreements are subject to congressional approval. This is so because of the federal funds necessary to implement them,¹⁶⁴ and, arguably, because the Indian Non-Intercourse Act requires it.¹⁶⁵

The United States Constitution provides for federal authority over Indian tribes under the Property Clause,¹⁶⁶ the Indian Commerce Clause¹⁶⁷ and the Treaty Power.¹⁶⁸ However, the federal role in the negotiating process is an uncertain one that is developing as more settlements are being initiated.¹⁶⁹ As the trustee for all Indian tribes and the holder of water rights under various government agencies, the federal government's role in settlements is often fraught with potential conflicts of interest which the Justice Department must reconcile.¹⁷⁰ Without a clear national policy or set of objective guidelines to direct the settlement process and its implementation, any disgruntled party may perceive or challenge the resulting settlement as unfair.¹⁷¹ Yet, the unique

163. See SLY, *supra* note 1, at 37-98, for a detailed descriptions of the particular roles the various governments play in negotiated Indian water rights settlements. Although the tribal and federal governments are necessarily involved in the water settlement, the state government may not be involved in the negotiation process at all, or only to the extent that the state court is involved in incorporating a settlement decree into a general stream adjudication. This was the case in the recent Salt-River Pima Maricopa Community Settlement where the state was largely absent and the Community's water claims were negotiated and fulfilled by interested parties willing and able to contract with the tribe to supply the necessary water. *Id.* at 32.

164. Settlements are generally not feasible without federal funds to implement them. SLY, *supra* note 1, at 165-66. However, some Indian reserved rights agreements have had only administrative consent. The Fort Peck Compact was not submitted to Congress. Instead, the Interior and Justice Departments approved it and the Montana Legislature subsequently codified it. MONT. CODE. ANN. § 85-20-201 (1987). See Folk-Williams, *supra* note 6, at 96. However, Congress must authorize certain elements of the agreement, although legislation has not yet been submitted. *Id.* But see *infra* note 165 (discussing the validity of any reserved right settlement construed as a "conveyance" absent Congressional approval under the terms of the Indian Non-Intercourse Act, 25 U.S.C. § 177 (1982)).

165. The Indian Non-Intercourse Act, 25 U.S.C. § 177 (1982), makes any conveyance of property by an Indian tribe invalid unless federally approved "pursuant to the Constitution." However, it is unclear whether this act pertains to water rights as it addresses only "land," and whether a water settlement is considered a "conveyance" within the meaning of the Act. Furthermore, although the Secretary of the Interior has broad management authority to settle Indian reserved rights, e.g., 25 U.S.C. § 2 (1982), the Act's language may require congressional approval. SLY, *supra* note 1, at 83-85.

166. U.S. CONST. art. IV, § 3, cl. 2.

167. U.S. CONST. art. I, § 8, cl. 3.

168. U.S. CONST. art. II, § 2, cl. 2. Congress' constitutional power over Indian affairs has been described as plenary. SLY, *supra* note 1, at 164.

169. In the absence of congressional approval or where settlement negotiations have not been instigated by McCarran Amendment adjudications in state courts, the general management powers of the Secretary of the Interior/federal trustee are unsettled. SLY, *supra* note 1, at 80-85.

170. The Bureau of Reclamation Projects, The Forest Service, The Bureau of Land Management, Fish and Wildlife Service and the military are just a few examples of government entities asserting proprietary water claims that may conflict with those asserted by tribes whom the federal government is obligated to protect pursuant to its trustee role. SLY, *supra* note 1, at 77-79. One commentator has coined the term "Iron Triangles" to describe how the Bureau of Reclamation, state officials, and corporate interests have formed powerful water lobbies to secure their joint interests in water development at the expense of Indian interests. DANIEL MCCOOL, *COMMAND OF THE WATERS: IRON TRIANGLES, FEDERAL WATER DEVELOPMENT*, INDIAN WATER 51 (1987); see also Guerrero, *supra* note 12, at 196.

171. For example, the Tohono O'odham Nation in Arizona settled their reserved rights claim in 1982 but have not yet received any water. Moreover, tribal participation in the

geographical locations and water needs of the various tribes has led to tribal resistance to a generic legislative quantification process.¹⁷² This resistance is understandable since such an approach may undermine unique tribal needs and possibly compromise the flexibility of the negotiation process which makes settlements such an attractive alternative to litigation. However, certain recurring questions are common to all Indian settlements and litigation and thus point in favor of some sort of constructive guidelines or policies for reference in either quantification procedure.

B. The Negotiation Process

Despite unique tribal needs, all settlements include discussions on basic topics such as costs, allottee rights, the marketing of reserved rights for use off of reservation land, quantification standards, and mechanisms for implementing the settlement.¹⁷³ Moreover, in negotiating a settlement tribes base the majority of their water claims on the reserved rights doctrine.¹⁷⁴ Consequently, tribes necessarily rely on the laws defining these rights.¹⁷⁵ For instance, in all the Arizona settlements tribes have used the PIA standard as a starting point to base their claims.¹⁷⁶ However, this standard of quantification was tailored to the needs of five particular Colorado River tribes whose reservation treaties were interpreted to provide these tribes with an agricultural lifestyle.¹⁷⁷ It is arguable whether this standard should be retained in a process which provides for Indian self-determination and resolves reserved right claims according to the particularized needs of tribes and tribal regions.¹⁷⁸ It makes little sense to employ an agricultural standard today in a region like Arizona where farming is economically and environmentally discouraged.¹⁷⁹

negotiation process was limited to the extent that community level meetings were held in English with no translators provided. Mary G. Wallace, *Solutions or Symbols: An Indian Perspective in Water Settlements*, in *INDIAN WATER IN THE NEW WEST* 36 (Thomas R. McGuire ed., 1993).

172. See, e.g., JOHN FOLK-WILLIAMS, *WHAT INDIAN WATER MEANS TO THE WEST* (Western Network, 1982); Eva Hanna Morreale, *Federal-State Conflicts Over Western Waters—A Decade of Attempted "Clarifying Legislation"*, 20 *RUTGERS L. REV.* 423 (1966) (discussing earlier legislative attempts to quantify and limit federal non-Indian reserved rights as unsuccessful).

173. SLY, *supra* note 1, at 162.

174. See *supra* note 24.

175. *Id.*

176. Interview with Mary Wallace, Research Specialist, Department of Water Resources, University of Arizona, in Tucson, Arizona (Jan. 28, 1993).

177. See *supra* notes 88–89 and accompanying text.

178. Although the use of the practicably irrigable acreage standard has been used widely in estimating the extent of Indian claims, "it is a standard that may have limited relevance to many reservations." Folk-Williams, *supra* note 6, at 67. Still, the use of the PIA standard in Indian water rights settlements has been applauded for its ability to provide Indians with a useful and appropriate starting point for negotiations. Boomgaarden, *supra* note 25, at 432. The weakening of this standard and the possibility of its demise after the recent *Big Horn I* decision has invited calls for its reaffirmation precisely because of its value as a negotiation tool and incentive for settlement. *Id.* at 433. However, the maintenance of this standard would also continue its use as an instrument of continued litigation and conflict. As the *Big Horn I*, *Big Horn III*, and the *Mescalero* decisions indicate, the PIA standard can be used against tribal interests. Moreover, the PIA standard has been criticized insofar as it induces tribes "to proffer what may be fictional irrigation projects in order to obtain enough water" for their real water needs which may or may not be agriculturally bound. Franks, *supra* note 67, at 563. Why import this uncertain and often impracticable standard into the settlement process?

179. See, e.g., Robert J. Glennon, "Because That's Where the Water is: Retiring Current Water Uses to Achieve the Safe-Yield Objective of the Arizona Groundwater Management Act,

The issue of Indian entitlements to ground and surface water is another issue common to settlements and general stream adjudications.¹⁸⁰ However, in the settlement process the legal question of whether Indian reserved rights include both ground and surface water can often go unanswered.¹⁸¹ Once a tribe asserts a right to a particular amount of water, that amount is negotiated. When an amount is agreed upon, the parties involved undertake to provide this amount from whatever water sources are available. Thus the flexibility of the negotiations can allow the quantification process to proceed without resolving complex legal issues such as whether an Indian reserved right encompasses groundwater.

The availability of Central Arizona Project water (CAP) has facilitated several Indian water right settlements, especially in Arizona.¹⁸² After years of litigation and interstate compacts, the federal government and Arizona implemented the CAP to divert water from the Colorado River into Phoenix and Tucson.¹⁸³ The addition of this water into scarce state water resources has provided a means for fulfilling Indian reserved right claims.¹⁸⁴ Moreover, its ready availability has enabled settling parties to avoid complex issues of physically related ground and surface water.¹⁸⁵ Tribes agree to have a certain amount of their water claims satisfied by a CAP allocation or other sources provided by negotiating parties.¹⁸⁶ Once the right to the water is secured, complex issues of legal entitlements are of little concern.

However, the future availability of CAP water is tenuous. According to several studies, the amount of Colorado River water allocated to the western states involved in its apportionment was based on anomalous high flows and is not representative of the long term flow of the river.¹⁸⁷ These studies conclude that these inaccuracies are likely to result in shortages when all the states demand their allocated share of CAP water.¹⁸⁸ Under the Colorado River Basin Project, Arizona is the lowest priority taker of CAP water.¹⁸⁹ Thus, the CAP

33 ARIZ. L. REV. 89, 102 (1991).

180. See Folk-Williams, *supra* note 6, at 63 (noting the issue of reserved entitlements to ground water in settlements). See *supra* part II.B for discussion of the ground water issue in general stream adjudications.

181. Settlements that resolve specific water supply problems by having the settling parties contract with one another to fulfill particular water needs do not resolve questions of legal entitlement unlike the litigation process. Folk-Williams, *supra* note 6, at 70.

182. SLY, *supra* note 1, at 39. The Salt River Pima-Maricopa Indian Community, the Ak-Chin Indian Community, and the Tohono O'odham Nation have all used CAP water to satisfy their reserved right claims. See EDEN & WALLACE, *supra* note 4, at 30-31.

183. See generally NORRIS HUNDLEY, *THE WEST AGAINST ITSELF—AN INSTITUTIONAL HISTORY IN NEW COURSES FOR THE COLORADO RIVER: MAJOR ISSUES FOR THE NEXT CENTURY* 9-49 (G. Weatherford & F. Brown eds., 1986); SAX & ABRAMS, *supra* note 22, at 701-12.

184. SLY, *supra* note 1, at 39.

185. See *supra* note 17.

186. See Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512, 102 Stat. 2549 (1988).

187. CHARLES W. STOCKTON ET AL., *LABORATORY OF TREE RING RESEARCH, UNIVERSITY OF ARIZONA, DROUGHT HISTORY AND RECONSTRUCTION FROM TREE RINGS* (1989); Helen Ingram et al., *Managing a Limited Resource: The Political Constraints on Water Policy in the Four-Corners States*, 1979 UTAH L. REV. 719, 724 (1979).

188. *Id.*

189. Colorado River Basin Project Act, 43 U.S.C. §§ 1501-1556 (1968). Prior to this act, the Colorado River Compact allocated the Colorado River among Wyoming, Utah, Colorado, New Mexico (upper basin states), and California, Nevada, and Arizona (lower basin

water which is being used currently to satisfy Indian reserved rights may not be available in the future. This potential shortage raises questions as to what recourse tribes will have if settling parties are unable to supply promised water after tribes have relinquished their reserved rights and the priority dates of these rights¹⁹⁰ in the settlement process.¹⁹¹

Once the negotiating parties have reached an agreement as to the amount of water to be allocated to the tribe, administrative issues inevitably arise as to who will regulate use of the water.¹⁹² A benefit of the settlement process is that it enables tribes to bargain for a special concern of theirs, such as administrative control over tribal waters.¹⁹³ However, as in the litigation process, the absence of any clear federal water law authority can complicate the administrative question.¹⁹⁴ With no clear policy delineating a preference for state, tribal or federal control over reservation waters, negotiations take place in a legal vacuum.

For example, it is uncertain whether the McCarren Amendment applies to administrative water disputes arising between tribes and non-Indians once a tribe's reserved rights have been quantified.¹⁹⁵ As a result, it is unclear whether tribal, state or federal courts have primary jurisdiction over Indian water

states). See 70 CONG. REC. 324 (1928) for the text of this compact. Under the Basin Project Act, the annual flow of the Colorado was assessed at 15 million acre feet (maf), with each basin receiving 7.5 maf. The 7.5 maf was divided among the lower basin states in priority order as follows: California takes 4.4 maf, Nevada .3 maf, Arizona 2.8 maf, 1.4 of which was designated lowest priority CAP water. See *supra* note 187 for studies indicating that the true annual flow of the Colorado River is closer to 13.5 maf per year, thus leaving only 6.6 maf to be split among the lower basin states. Since the Act assures California priority rights to 4.4 maf, Arizona's CAP allotment of 1.4 maf may never reach Arizona.

190. The Salt River Pima-Maricopa Indian Community, the Ak-Chin Indian Community, and the Tohono O'odham Nation have all "waived present and future claims to water in exchange for allocations of water and funds to support the development of the water." EDEN & WALLACE, *supra* note 4, at 30-31.

191. The federal trust obligation may be implicated if Indian reserved rights are compromised or inadequately protected. Folk-Williams, *supra* note 6, at 101-02. Tribes often rely on litigation "to ensure that federal protection of [their] rights is carried out." *Id.* at 102. Consequently, there are doubts about the finality of agreements reached with tribes since they may be subject to legal challenge as being inconsistent with the federal governments' obligation "to act according to exacting standards" for the protection of Indian water rights. *Id.*

192. Sly suggests that jurisdictional issues over the control of reserved rights should be postponed until after these rights have been quantified in the negotiation process. This suggestion is made in recognition that the issue of control over scarce waters tends to polarize states and tribes and, if discussed prematurely, will hamper the negotiation process. SLY, *supra* note 1, at 40.

193. In the Fort Peck-Montana Compact, MONT. CODE ANN § 85-20-201 (1987), the Tribal Council asserted a particular interest in water regulatory powers which resulted in their authority to allocate use of tribal water including uses by non-Indian allottees. In legislatively implementing this settlement, Montana explicitly disclaimed state court jurisdiction to administer these rights. SLY, *supra* note 1, at 153.

194. The current state of conflicting theories, rights and responsibilities of Indian, federal, and non-Indian water use has made the resolution of questions about Indian water rights by negotiation extremely difficult. Folk-Williams, *supra* note 6, at 68-69.

195. SLY, *supra* note 1, at 153 n.92. Sly notes that if the McCarran Amendment is applicable when a non-Indian sues a tribe over a water dispute, then a state court is the proper forum for adjudication of the dispute. However, if the McCarran Amendment is not applicable, then a private party is required to first raise their civil claim in tribal court where the potential for federal review is limited to the issue of whether tribal jurisdiction was appropriate. Issues of comity would preclude federal courts from reviewing substantive tribal court decisions. *Id.* at 153.

disputes involving non-Indian entities.¹⁹⁶ Indeed, the McCarran Amendment provides both sides of the negotiating table with leverage to assert administrative authority over decreed reserved rights. Whereas tribal representatives can argue that the McCarran Amendment does not preclude tribal jurisdiction over post-quantification administrative disputes, their negotiating parties can argue otherwise.

Ambiguous federal policy toward Native Americans also can leave negotiating parties in tenuous bargaining positions. Although federal policies purportedly favor Indian sovereignty,¹⁹⁷ it remains unclear whether this translates into exclusive Indian control over tribal waters that may affect state water users. Thus, states may rely on this uncertainty in the negotiation process to bargain for state control over decreed reserved rights. In contrast, tribes may base their negotiation strategy on federal policy, arguing that Indian-self-determination requires tribal control over quantified water rights. Additionally, states can rely on federal policies favoring conservation of scarce natural resources¹⁹⁸ as a bargaining chip to gain control over decreed reserved rights. States could argue that a more effective unitary system of state-controlled water management is necessary for proper water resource conservation.

In recognition that the law is still developing in this area, one commentator has suggested that settling parties should avoid jurisdictional questions by establishing a dispute resolution, mediation or arbitration board as a part of the settlement to resolve certain conflicts that may arise post-quantification.¹⁹⁹ Although this retroactive approach may facilitate the conclusion of a settlement, it provides little in the way of proactive clarification of the nature and extent of reserved rights which would effectively resolve future disputes.

Although all tribes received the same kind of water right under *Winters*,²⁰⁰ how that right is quantified in the settlement process may be determined by factors such as a tribe's political influence, reservation acreage, geographical region, economy, legal resources, population and timing.²⁰¹ Thus, fairness among settlements can be problematic. The funds that Congress approves for settlement depend greatly on the timing of the request and the political influence of the parties involved.²⁰² Timing is important in regard to the political climate and receptivity of Congress toward allocating federal funds for tribal needs.²⁰³ Furthermore, once the negotiating parties seek congress-

196. In *National Farmers Union Ins. Co., v. Crow Tribe*, 471 U.S. 845 (1985), the Supreme Court held that there could be no tribal court jurisdiction if such jurisdiction is "patently violative of express jurisdictional prohibitions." *Id.* at 856 n.21. As Sly points out, the McCarran Amendment is conceivably such an express "divestiture of tribal jurisdiction." SLY, *supra* note 1, at 153 n.92.

197. SLY, *supra* note 1, at 5.

198. See *supra* note 124 for federal statutes established to conserve and to protect.

199. SLY, *supra* note 1, at 152-153. (stating that as part of the dispute resolution process, each government is encouraged to include an express waiver of sovereign immunity. This is a particularly sensitive area for tribes and raises questions of the ability of congress and tribes to make such a waiver).

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

201. SLY, *supra* note 1, at 162.

202. "Approved settlements have had widely divergent ratios of funds allocated according to the [reservation's] acreage and population" *Id.* Settling parties have questioned how such government fiscal support is evaluated, with the suggestion that the legislative process for water settlements is "simply a bald political scramble." *Id.*

203. *Id.* at 164. "Early active involvement of a key legislator can help move negotiations

sional approval, particular tribal concerns may be expanded by interstate issues and other parties with interests in the water system who were not participants in the negotiation.²⁰⁴

The expansion of settlement issues by non-tribal concerns increases the risk that Indian interests will be deemphasized or diluted at the negotiating table.²⁰⁵ Absent a clear congressional policy for the quantification of Indian water rights, clarification of the extent of these rights and an established funding procedure for their implementation, the settlement process runs the risk of disparately resolving Indian water claims.²⁰⁶ More specifically, the risk is not one of disparate treatment but of inequitable treatment. Although tribes may argue against a generic legislative approach to the quantification of their reserved rights, some suggest that such arguments work mainly for the politically influential.²⁰⁷

IV. SOME SUGGESTED GUIDELINES

The problems involved in quantifying Indian reserved rights through state litigation were discussed in part II of this Note.²⁰⁸ These problems—whether reserved rights encompass both ground and surface water, what standard to apply to transform these doctrinal rights into wet water, who has administrative authority over tribal waters post-quantification—are exacerbated by the uncertain applicability of ambiguous and uncertain federal laws. Although settlements appear as an alternative approach to the litigation of these rights, part III of this Note discussed how these same problems are imported into the settlement process.²⁰⁹ Indeed, the problems involved with quantifying Indian reserved rights and the complex water issues that are raised all stem from the intrinsically ambiguous nature of these rights. These guidelines could inform both the negotiation and adjudication process without compromising the “unique” treatment of the various tribes’ particular water needs and circumstances.

First, Congress should enact legislation that clearly and definitively establishes whether Indian reserved rights encompass groundwater or are limited to surface water. Such legislation would enable tribes to more effectively argue their water entitlement in either the litigation or negotiation process. Without this clarification, negotiating parties are left grappling with uncertain federal laws upon which to base their interests and state courts have no yardstick upon which to measure their decisions. The legislation need not specifically delineate an exact entitlement to groundwater since such a pronouncement would be impracticable, if not impossible, in view of the hydrogeological variations that exist among Indian territory. Rather, the legislation could express whether Indian reserved rights entitle Tribes to stake

and shepherd negotiated legislation through Congress.” *Id.* at 163.

204. *Id.* at 162.

205. *Id.*

206. Sly suggests that if government funds are allocated primarily in response to settling parties’ ability to influence key legislators then parties with political clout have a greater interest in flexible negotiations that are unhindered by more restrictive, generic approaches to the resolution of water claims. *Id.* at 162.

207. *Id.*

208. *See supra* part II.

209. *See supra* part III.

claims to groundwater at all. A declaration either for or against Indian entitlement to groundwater under the reserved rights doctrine would resolve the uncertainties created by the *Caepart*²¹⁰ decision. More importantly, such clarifying legislation would protect tribes from inconsistent state court decisions that result in inequitable treatment among tribes. As it now stands, the disposition of this issue depends on the jurisdiction in which a reservation is located—from its political influence and water resource base to the attitude of its bench. All factors over which tribes have had little or no control. In contrast, a uniform federal policy that incorporates tribal voice and interests would more fairly dispose of this issue.

Also, Congress should enact laws clearly distinguishing Indian from non-Indian reserved rights—laws that recognize tribal sovereignty as the distinguishing difference between these two types of rights. Such laws would avoid the confused application of reserved rights case law to Indian reserved rights that arguably should have no bearing on the disposition of what are in effect Indian, not federal, rights.

Consistent with the policy of Indian sovereignty, Congress should establish a joint federal/tribal water management board that works closely with state water administrative authorities to regulate tribal waters. Such a board would invest tribes with authority to regulate all on-reservation water use including that of non-Indians. Moreover, it would allow tribes to create their own tribal economy and employ their water accordingly in keeping with Indian self-determination. State involvement would afford tribes with state expertise in water management while federal involvement could ensure compliance with federal conservation and environmental policies.

Additionally, Congress should reject the use and application of quantification standards tied to the anachronistic, assimilationist policies associated with the *Winters*' decision.²¹¹ *Winters*' requires complicated interpretations of historical federal documents that may ignore current tribal water needs. *Winters*' also invites quantification standards such as the PIA that have the potential to condemn Indians to a marginal and potentially uneconomical farm subsistence.

Under *Winters*, Indians were granted enough water to become a "pastoral and civilized people."²¹² Congress should respond to this language by enacting clarifying legislation that grants Indians sufficient water to establish an economically viable livelihood. A more contemporary interpretation of the reserved rights doctrine would provide Indians with sufficient leverage upon which to base their water claims without engaging in complex treaty analysis of a reservation's purpose. Current analysis limits Indians to a standard of quantification out of touch with modern water needs and is inconsistent with the right of Native American communities to determine their own purpose for being.

Congress also should clarify the scope of both the McCarran Amendment²¹³ and the Indian Non-Intercourse Act.²¹⁴ For instance, Congress

210. *Cappaert v. United States*, 426 U.S. 128, (1976); see discussion *supra* part III.A.

211. *Winters v. United States*, 207 U.S. 564, 575 (1908); see *supra* note 10.

212. *Winters*, 207 U.S. at 576.

213. 43 U.S.C. § 666 (1982); see *supra* note 54 and accompanying text.

214. 25 U.S.C. § 177 (1982); see *supra* note 165 and accompanying text.

could reject arguments that the McCarran Amendment requires state administration of quantified reserved rights. In doing so, Congress would reduce the litigation artillery and negotiating leverage the McCarran Amendment currently provides to states involved in reserved rights disputes. Moreover, parties embroiled in reserved rights disputes could pursue negotiation or litigation strategies that further the most efficient and conservative use of water instead of relying on the loopholes this ambiguous amendment affords.

Congress should enact clarifying legislation rejecting the interpretation of Indian reserved right settlements as 'conveyances' under the terms of the Non-Intercourse Act. In this way, congressional approval would not be necessary *per se* for the resolution of reserved right claims. By allowing federal agencies to approve settlements as in the Fort Peck Compact,²¹⁵ many of the political hazards of congressional approval could be avoided.

CONCLUSION

The process of quantifying Indian reserved rights by litigation or negotiation is a complicated and problematic procedure. The complex legal issues and uncertainties that arise in both resolution frameworks are attributable to the ambiguous nature of the rights themselves and are exacerbated by confusing federal and state laws. Furthermore, the fragmented policies toward the treatment of Native American communities over the years has resulted in the importation of obsolete assimilationist policies into today's concepts of Indian sovereignty. The outgrowths of these policies—for example, the *Winters* doctrine—are relied upon by courts and employed in the negotiation process to transform reserved "paper" rights into wet water according to anachronistic notions of a reservation's purpose. In an attempt to secure a more equitable quantification process, the guidelines that have been suggested recognize the need to extract the essential water right from its mired position under the current confusing and ambiguous state of Indian law and policy.

215. Fort Peck Compact, MONT. CODE ANN. § 85-20-201 (1987). The Fort Peck Agreement was specifically structured in order to avoid congressional approval. Although formally approved by the Secretary of the Interior and the Attorney General, congressional ratification was avoided for fear that downstream Missouri River states would withhold their consent due to the potential implications of the agreement's water awards on their future water supply. For further discussion, see John E. Thorson, *Resolving Conflicts through Intergovernmental Agreements: The Pros and Cons of Negotiated Settlements*, in INDIAN WATER 25, 39 (Christine L. Miklas & Steven J. Shupe eds., 1986).