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WINTERS AND WATER CONSERVATION: A PROPOSAL TO HALT “WATER LAUNDERING” IN TRIBAL NEGOTIATED SETTLEMENTS IN FAVOR OF MONETARY COMPENSATION

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ABSTRACT: In the century since the U.S. Supreme Court, in *Winters v. United States*, granted Indian tribes reserved water rights, few tribes have received the promised delivery of water, while at the same time, the Department of Interior—the same agency tasked with a fiduciary duty to hold all tribal assets in trust—constructed massive, multibillion-dollar water projects without cognizance of senior Indian rights. The water transformed much of the West, from arid desert to a green expanse of farmland and steel-and-mirrored urban centers with populations rivaling cities in the water-rich East. However, the rapacious pace of development has placed unsustainable strain on the groundwater aquifers and surface waters of the parched Interior West, all while untold millions of acre-feet of water are still owed to Indian tribes under *Winters*. As state courts and the U.S. Supreme Court have proven hostile to Indians, tribes have increasingly settled their *Winters* claims through negotiation with states, cities, and other junior appropriators. The benefits of these negotiated settlements have proven illusory. While tribes turn their “paper rights” into “wet water,” they are often shortchanged, and bound to market water exclusively to competing municipal economies off-reservation. The linchpin of most negotiated settlements is federal investment in otherwise politically unpalatable water delivery projects, made possible by the purported necessity of settling senior Indian claims. This form of exchange might critically be called “water laundering.” This Article argues that negotiated settlements are bad public and environmental policy. Instead, this Article proposes that tribes should instead seek financial compensation for their inchoate *Winters* rights by suing the federal government for a century of abject breach of its fiduciary duty to hold water in trust for the benefit of tribes. This suit should be modeled on the recent *Cobell* class action litigation, where Congress ratified a $3.4 billion settlement with the Departments of Interior and Treasury for gross mismanagement of Indian allotment lands. A class action approach would allow the tribes to receive the maximum financial value, and vindicate rights long neglected by the federal fiduciary, all while averting further overconsumption of the West’s perilously scarce water resources.

INTRODUCTION

In 2010, a new pumping station on the Animas River had nearly filled to capacity a 120,000 acre-foot reservoir above Durango, Colorado. The reservoir is the culmination of 20 years of negotiation above Durango, Colorado. The reservoir is the culmination of 20 years of negotiation, more than $200 million in cost overruns, and what some have called the U.S. Bureau of Reclamation’s last big water project. The largesse of a century of rapacious water diversion and dam-building in the West has come to a close, and as such, there is little political appetite, capital, and most importantly, available surface water remaining for large reclamation projects. The Colorado water delivery system, called the Animas-La Plata Project, and its major financial commitment from the federal government would never have become reality without Indian tribes. The project was the linchpin of an agreement to settle the senior water rights claims of the Colorado Ute tribes. However, more than 35
percent of the water diverted by the project is directly delivered to slake the thirst of fast growing desert municipalities in southwestern Colorado and northern New Mexico. Moreover, the settlement, as approved by Congress, waives federal law barring Indian tribes from alienating proprietary interests off-reservation. In all likelihood the Colorado Ute tribes will simply market the water to municipalities, power plants or other industries that feed the urban growth of the dry Interior West. It leads one to question whether the settlement of the reserved water rights claims benefits Indians any more than traditional water appropriators, and whether the otherwise unpalatable water project was simply wrapped in an Indian blanket to “launder” water through the tribes.

The arid West is under great strain from the unchecked population growth of the past several decades. Excess appropriation of surface waters and overdraft of groundwater in the urban oases of America’s deserts and canyon lands are threatening an environmental and public health catastrophe. While energy production, wastewater treatment and other water-intensive processes degrade the quality of scarce water, climate change further drains the few arteries of freshwater that support life in this harsh, dry environment. Water use averages 150 gallons per day per person for domestic and municipal purposes and an additional 1,300 gallons per day for agriculture and industry. Yet, the four fastest growing states in the nation—Nevada, Arizona, Colorado and Utah— have the least water. Meanwhile, Albuquerque, El Paso, Las Vegas and Tucson already are unable to meet the water needs of their current populations, and must import supplies to satisfy demand. Arizona shows truly alarming shortages. Many wells monitored in the Tucson Basin have depleted more than 200 feet in the past 50 years.

This region at its tipping point, and ominously it is also home to the largest concentration of Indian reservations in the country. Under Winters v. United States, these Indian tribes own water rights senior to nearly all other appropriators, and most of these rights remain entirely inchoate. This “cloud” cast by Winters threatens to displace junior appropriators—big cities, utilities, farmers, ranchers and industries alike— or worse, encourage settlements, like the Colorado Ute contract, that demand federal investment in a new round of wasteful water projects. This Article argues that in a region at or above the carrying capacity of available water, and with demonstrable overdraft of the underground water table, Indian tribes should not pursue the costly and unfulfilling strategy of litigating their water rights claims or reaching unfair negotiated settlements in which they become a “fence” to launder otherwise unavailable water. The federal government, as trustee of all Indian assets, including water, pursued a relentless century-long policy of investing billions in reclamation projects for the exclusive benefit of non-Indians. Therefore, tribes should seek compensation from the federal fiduciary for breach of its trust obligations. This option increases the potential payout to tribes, without subjecting them to hostile state courts, unfavorable case law or negotiated settlements that continue the trend of benefitting junior appropriators. In short, a suit for breach of fiduciary is the soundest and most sustainable policy option for Indians to realize compensation for their long-unrealized senior water rights.

Part I of this Article offers a brief summary of water law doctrines, while Part II discusses the seminal Winters case, its progeny, and the evolution of Indian
reserved water rights. Part III includes an exposition of the trust relationship between Indian tribes and federal fiduciary, particularly as it relates to mismanagement of reserved water rights. Part IV describes the increasingly common practice of settling tribal reserved water rights through negotiated settlements with states and other stakeholders. This Part discusses three illustrative settlements involving the Colorado Ute tribes, and the Ak-Chin and Tohono O’odam tribes in central Arizona, with an emphasis on off-reservation water marketing provisions. Finally, Part V argues that tribes should seek compensation for breach of fiduciary duty arising from abject federal neglect of their Winters rights, preferably as a class action lawsuit modeled on the successful Cobell litigation.

I. PRINCIPLES OF WATER LAW

Water law in the United States is a function of geography more than any other factor. In eastern states, laws allocating rights to surface water are vestiges of the English common law’s riparian doctrine. In these riparian states, where water is abundant and frequent rainfall is restorative, individual rights to surface water are appurtenant to estates in real property. In the riparian system, each landowner abutting a water source is entitled to usufructuary rights akin to a license, but not possessory ownership, of the stream’s flow. Riparian states impose a reasonable use rule, subordinating commercial withdrawals to the equal rights of other riparians. In other words, the streams are shared, and each water user owes other proprietors a correlative duty not to interfere in another’s use. Both consumptive uses, such as irrigation, impoundment for industrial processing and domestic intake, and non-consumptive uses, namely maintenance of in-stream flows for habitat conservation, swimming, fishing or recreation, are subject to the general reasonableness standard.

Since water rights are incident to land ownership, a riparian is not obligated to make beneficial use of stream water under threat of forfeiture. Although a riparian may insist that a stream remain in its natural condition, prescriptive property law doctrines still apply, and rights to withdrawal may vest in an upstream riparian as a result of non-use. Riparian rights are severable from the real property

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2 See e.g. Hendrick v. Cook, 4 Ga. 241 (Ga. 1848) (explaining common law origins of riparian systems).
3 See id.
5 Id.
6 Id.
7 Id. at § 850A.
8 RESTATEMENT (SECOND) OF TORTS, Introductory Note: Interference with the Use of Watercourses and Lakes by Use of Water, § 858 at 216.
9 Id.
interest, and may be conveyed or transferred to a non-riparian. In times of drought or shortage, no individual riparians gain priority to the burden of other stream users; rather all riparians must correspondingly reduce usage on a pro rata basis. The riparian system is generally regarded as flexible and economically efficient—not only allocating water rights to the most reasonable and democratic uses, but also the least wasteful.

In the arid West, where demand for water outstrips supply, the frontier custom and usage system known as prior appropriation has become the backbone of state common law and administrative permitting regimes. The doctrine of prior appropriation was born of the traditions of 19th Century miners, who trespassing in the public domain with the silent acquiescence of the federal government, developed a rule of “first in time, first in right.” Prospectors who diverted surface waters to faraway claims acquired an ownership interest senior to all subsequent, or, junior appropriators. Thus, water is a separately identifiable possessory estate, and unlike the riparian East, the right of usage is not incident to land ownership. As between the prior appropriators and the federal patentees who took title to land abutting western water under the homesteading laws, the Supreme Court ruled in favor of the former in California Oregon Power v. Beaver Portland Cement Co. The decision allowed official severance of water from land under state law, and affirmed prior appropriation’s status as the reigning doctrine of the West.

The particulars of each western state’s water laws differ, but with some nuance, there are several common elements. First, an appropriator’s possessory

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10 Id. (“By permitting grant and transfer of water rights, less valuable uses of water can be changed to higher and more beneficial uses through purchase by persons and entities for whom the water has greater value or productivity.”).
11 Id. at § 850.
14 Id. at 643; see also Arizona v. California, 373 U.S. 546, 555 (1963) (“Under that law the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time. ‘First in time, first in right’ is the short hand expression of this legal principle.”).
15 Id.
16 Id.
18 Id.
19 See Ranquist, supra note 13, at 646 (“The same basic legal concepts are found in each state system: (1) beneficial use is the measure of the existence and scope of the right; (2) the right may, but need not necessarily, be appurtenant to the land; (3) ownership of the land itself is not considered a basis for a water right; (4) the appropriated water may be applied at any place as needed, regardless of the distance from the stream; (5) diversions out of a watershed and interstate diversions are protected; (6) the rights of the prior appropriator must be filled before a junior appropriator is permitted to take water, and the burden of shortage falls on those who have the latest right; (7) in time of shortage, there is no proration; (8) the holder of the prior right can take no more water than is necessary for his original need; (9) the rights of various users among themselves are very carefully regulated by means of court decrees, state administration practices, and a bevy of water masters and ditch riders who operate a system of diversions through canals, headgates, and ditches; (10) the
interest in water is recognized against the whole world, save appropriators with an earlier priority date, and as will be discussed, reserved rights holders. Second, the water right need not be appurtenant to a real property interest, and conversely ownership in land does not create any separately cognizable water interest. Third, an appropriator does not secure any rights or liabilities under the priority system until he has perfected his right. An appropriative water right is not perfected until the potential user files a notice of intent to appropriate, physically diverts water from the source, and puts the water to a beneficial use. Diversions outside the watershed are permissible, as are beneficial uses at any distance from the water source. However, an appropriator is only entitled to the quantum of water necessary to accomplish the beneficial use, and no more. In all states, inter alia, irrigation, industrial, domestic and municipal purposes constitute “beneficial uses,” while some states have begun to recognize maintenance of return flows as well. Fourth, unlike riparians, a senior appropriator owns an exclusive right and can enjoin a junior user for interference with the senior appropriator’s access. Thus, in times of drought or shortage there is no proration—water is allotted in sequentially descending order from the most senior priority dates. Lastly, most state laws allow alienability of appropriative water rights, but consonant with the theory of ensuring consumptive purpose in a parched region, the conveyed priority right only attaches to the quantity of water put to beneficial use. Further, conveyances must protect the return flow rights of junior users.

II. THE WINTERS DOCTRINE AND THE CREATION OF INDIAN RESERVED RIGHTS

(11) each right is recorded in detail on a use-by-use basis; and (12) mining, irrigation, municipal, and sanitary purposes, and industrial power production are recognized as beneficial uses.

20 Id.
21 Id.
22 Id.
23 Every state except Colorado manages appropriative rights, and the concomitant water use, through an administrative permitting regime where state water managers record the use, quantum and priority of rights held by appropriators in a water system. See Ronald B. Robie, The Public Interest in Water Rights Administration, 23 ROCKY MTN. MIN. L. INST. 917, 935–38 (1977).
24 Ranquist, supra note 13, at 646.
25 Id.
26 Id.
27 Id; see also WASH. REV. CODE ANN. § 90.22.010 (1974) (recognizing maintenance of minimum stream flows for fisheries, wildlife preservation, recreation and aesthetics as “beneficial use” that comports with state water law).
28 Ranquist, supra note 13, at 646.
29 Id.
30 See, e.g, Johnston v. Little Horse Creek Irrigating Co., 13 Wyo. 208 (Wyo. 1904) (accepting validity of water transfers); Strickler v. City of Colorado Springs, 16 Colo. 61 (Colo. 1891) (same) McDonald v. Bear River Co., 12 Cal. 220, 232-33 (Cal. 1859) (same); see also Storey, supra note 1, at 211 (“[a]n appropriative right ... is considered a separate property right which can be transferred, sold, or leased apart from the land”).
31 See, e.g., WYO. STAT. § 43-1-104 (permitting transfers without loss of priority so long as other appropriators are protected).
In 1908, the Supreme Court articulated a third water rights doctrine, which has, for a century since, cast long clouds over the waters of the West. In *Winters v. U.S.*, the Court held that the federal government impliedly reserved water rights for tribes when it set aside land from the public domain for Indian occupation. Section A of this Part discusses the *Winters* opinion, and Section B analyzes the Supreme Court’s pronouncement on the quantification standard of the reserved right in *Arizona v. California*, which came more than 50 years after *Winters*. Part C interprets some sparse signals in Supreme Court jurisprudence as expressive of the Court’s interpretation that water brokering is not permitted as a use consistent with the purpose of the reservation, while Part D discusses cases interpreting the intersection of aboriginal hunting and fishing rights and the *Winters* doctrine. Part E provides an in-depth explanation of the so-called *Big Horn* adjudication, which is emblematic of the prevailing state court and the Supreme Court hostility to Indian reserved water rights claims. Part F discusses cases from the U.S. Court of Appeals for the Ninth Circuit, which is a somewhat favorable forum, while Part G briefly explains the jurisprudence relating to federal reserved rights for public land.

A. *Winters v. U.S.*

In *Winters*, the United States, as trustee, brought suit on behalf of the Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation in Montana to enjoin the continued diversion of water from the Milk River by upstream farmers and miners. The upstream settlers had perfected their claims pursuant to Montana law of prior appropriation. In a drought year, the upstream diversions deprived Indians on the Fort Belknap Reservation of any water use from the Milk River.

Henry Winters and the other settlers argued that they held senior title to the water because they diverted Milk River water for consumptive use, and did so at the invitation of the federal government’s homesteading policy. The settlers pressed a theory that Montana’s admission to the union repealed any federally created water rights. The argument rested on the so-called “equal footing” doctrine, in which states gaining entry to the union would receive exclusive rights to all natural resources within their borders, unencumbered by prior federal activity.

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32 *See generally Winters v. United States*, 207 U.S. 564 (1908) (awarding Indian tribes reserved water rights with a priority date senior to most appropriators).
33 207 U.S. at 577. These reserved rights vested to the benefit of tribes whether the reservation was created by treaty, plenary act of Congress or executive order. *Id.*
34 *See infra* notes 38–81, and accompanying text.
35 *See infra* notes 82–122, and accompanying text.
36 *See infra* notes 123–160, and accompanying text.
37 *See infra* notes 161–187, and accompanying text.
38 *Id.* at 565.
39 *Id.* at 567.
40 *Id.*
41 *Winters*, 207 U.S. at 568.
42 *Id.* at 577.
43 *See id.*
Justice McKenna, writing for the Court, ruled that the federal government owned the power to exempt waters from appropriation under nascent state law to benefit Indians, and silenced the equal footing doctrine. The Court further held that the federal government did, in fact, impliedly reserve water for Indians in treaties and other federal grants of land, and those rights are paramount to subsequent state water appropriations. Specifically, the Court wrote that the Fort Belknap Treaty of 1888 was of “greater force” than any reliance interest the settlers placed in the state appropriative system.

In reading reserved water rights into the Fort Belknap Treaty, the Court deployed the so-called Canons of Treaty Construction, which mimic modern rules applicable to adhesion contracts by guaranteeing liberal judicial interpretation in favor of the party with weaker bargaining position. Although the Fort Belknap treaty contained no express decree of water rights, the Court construed a federal intent to reserve rights by examining the broad purposes of the agreement. The Court noted that the Montana Indians ceded vast tracts of their aboriginal homeland to the United States, and in exchange the federal government manifested every intention to equip the tribes with the resources needed to survive on their new reservations.

The Winters Court determined that federal policy, and tribal expression, both reflected a mutual hope that treaty ratification would transform Indians from “nomadic and uncivilized people” to a “pastoral and civilized people.” Since, the Court noted, the arid lands reserved for most tribes were “practically valueless,” the government could not fulfill its policy of encouraging a sedentary and agrarian transformation in a nomadic people without reserving water for agriculture. Nor, would Indians have understood treaty ratification to spell the sacrifice of water and

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44 See id.; U.S. v. Winans, 198 U.S. 371, 383 (1905). The Court again rejected the equal footing doctrine, writing, “[t]he power and rights of the states in and over shore lands were carefully defined, but the power of the United States, while it held the country as a territory, to create rights which would be binding on the states, was also announce.” Id.


46 See id.

47 FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 37 § 2 (1988). The unequal bargaining position of the tribes compared to their federal “conquerors,” as well as the Chief Justice John Marshall’s early pronouncements of a trust relationship between the federal fiduciary and tribal beneficiary, both militated in favor of the development of the universal canons of treaty construction. See id; see also Worcester v. Georgia, 31 U.S. 515, 582 (1832); Choctaw Nation v. United States, 318 U.S. 423, 431–32 (1943); Robert T. Anderson, Moving Beyond the Current Paradigm: Redefining the Federal-Tribal Trust Relationship for This Century, 46 NAT. RESOURCES J. 399, 401–03 (2006). While many treaties expressly confer enumerated rights, other rights arise by implication. The canons of treaty construction have enabled conferral of broad implied rights. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 37 § 2 (1988). The three primary rules of the canons are: (1) All ambiguities in the treaty must be resolved in favor of the Indian parties; (2) Treaties must be interpreted upon judicial review as the Indians, at the time, would have understood their terms; and (3) Treaties must be liberally construed in favor of the Indians. See id.

48 See COHEN, supra note 47, at 37 § 2.

49 See Winters 207 U.S. at 577.

50 See id.

51 Id. at 576–77.

52 Id. at 576.
the means of irrigation to fertilize unproductive lands. Justice McKenna avowed that Indians "had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to the arts of civilization."53 Why, the Justice asked rhetorically, would the Indians then ratify an agreement to "reduce the area of their occupation and give up the waters which made it valuable or adequate?"54 Likewise, the Court was flummoxed by the appropriators' argument that Congress "took from the Indians the means of continuing their old habits, yet did not leave them the power to change to new ones."55 Resolving the ambiguity created by the treaty's silence, the Court chose to grant sufficient reserved water to ensure the Indians could achieve a subsistence lifestyle from the land, without resorting to their former itinerant ways.56 In recognizing implied water rights, the Court chose the inference "which would support the purpose of the agreement" not "impair or defeat it."57

Winters rights depart from state prior appropriation principles in critically important respects. First, reserved rights are not subject to forfeiture under a beneficial use requirement.58 Second, Indians need not perfect their priority rights through notice and actual diversion; the implied rights vested at the time of treaty ratification.59 Third, the quantum of water reserved for Indian tribes is not the amount appropriated for use, but rather as much water as needed to fulfill the purposes for which the reservation was created.60 Reserved rights carry a priority date of, at least the date of the creation of the reservation, and according to some courts, of “time in memorial.”61 Thus, in most western states, where Indian treaties date back to the territorial epoch, the Supreme Court prioritized Indian water rights as senior to nearly all other appropriators.62 In other words, tribes are at the front of the water line.

However, Winters, as many scholars argue, was hardly a vindication of unwavering support for the fertility and productivity of Indian lands.63 As these scholars rightly argue, the federal government was not likely a genuine partner in tutoring Indian pupils in the "arts of civilization," as the Winters decision attests.64 Rather, the decision was consonant with the prevailing desire of western non-

53 Id.
54 Winter, 207 U.S. at 576.
55 Id. at 577.
56 See id.
57 Id.
58 See id; Storey, supra note 1, at 186; David H. Getches, Management of Indian Water: From Conflict to Pragmatism, 58 U. Colo. L. Rev. 515, 519–20.
59 Arizona, 373 U.S. at 600 (stating [w]e … agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created”).
60 Storey, supra note 1, at 186
61 See Arizona, 373 U.S. at 600; but see United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1984) (holding that Klamath Tribe’s water right accompanying its aboriginal right to hunt and fish carried a priority date for appropriation of “time immemorial”).
62 See Arizona, 373 U.S. at 600; Adair, 723 F.2d at 1414.
64 See id.
Indians: sequestration of Indians from interference with white settlement of the West. The *Winters* decision occurred in the midst of rapid settlement of the West, at the invitation and subsidization by the federal government. The Court's euphemistic description of the federal purpose of treaty ratification as one of schooling nomadic Indians in the habits of agriculture, is coded language that belies the dominant primitivism and paternalism behind the country's policy of Western manifest destiny. The "pastoral" purpose of the reservation was merely the Court's ratification of a federal policy of Indian internment, so that Indians' "nomadic" ways did not obstruct Western expansion and disrupt, or worse, compete against the flourishing Western markets in raw materials, animal cultivation and mining.

The *Winters* decision left some critical, and connected, questions unanswered: What metric would be used to measure the quantity of a tribe's reserved right—that is, on a particularized tribe-by-tribe basis, what amount of water would be sufficient to fulfill the "purposes of the reservation?" Were Indians limited only to "pastoral" uses of water, as was hinted by the agrarian vocabulary of *Winters*, or would the decision permit any modern "arts of civilization," aimed at achieving lasting productivity from the Indian homeland? Otherwise put, did *Winters* create frozen water rights, circumscribed by the modest, agricultural purpose of the reservation as it was understood in 1908, or did the Court confer evolving water rights, to accomplish modern industrial purposes, or even, water brokering off-reservation?

B. *Arizona v. California*

These questions have mostly remained unanswered in the century since *Winters*, due to federal indifference toward Indian water rights. In the intervening decades, Congress pursued an aggressive policy of subsidizing settlement of the West and spending untold sums to irrigate its arid lands. The Department of Interior—the very agency entrusted with the solemn fiduciary responsibility toward Indian beneficiaries—through its Bureau of Reclamation constructed massive water diversion projects, a great many on rivers that flowed downstream to reservations. With little exception, this federal largesse benefited Western irrigators and municipalities without any acknowledgment of the priority rights of

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65 See id.
66 See id.
67 See id.
68 See United States Nat'l Water Comm'n, Water Policies for the Future—Final Report to the President and to the Congress of the United States ("hereinafter Water Comm'n Report"), 474–75 (1973) (discussing federal policy of developing large irrigation projects for benefit of non-Indians without consideration of tribal priority rights); Anderson, supra note 47, at 430 (noting "[t]he federal government's zeal to develop non-Indian irrigation interests left tribal needs for irrigation, protection of fisheries and wildlife habitat, and domestic consumption to languish").
69 Anderson, supra note 47, at 430.
70 Id. ("The Bureau of Reclamation and its non-Indian constituents have always commanded the lion's share of resources within the Department of Interior—both in terms of dollars for projects and of attorney staff to advise and defend reclamation programs.")
the projects’ Indian neighbors. Similarly illustrative of the federal fiduciary’s conscious apathy toward the Indian trust property is this: more than 50 years passed before the Supreme Court adjudicated an Indian reserved rights claim, or even looked at the loose ends left by Winters.

In 1963, in Arizona v. California, the issue before the Court was the scope of the Winters right. The Court awarded nearly one million acre-feet of Colorado River water to the Navajo Nation and other tribes over the strenuous objection of Arizona, and other lower basin states. Most of the Colorado River Basin is so parched that human survival is dependent on tightly managed use and storage of river water. For fear that heavily populated lower basin states, namely California, would monopolize the river under the first-in-time, first-in-right principle, the seven basin states formed the Colorado River Compact, which equitably appropriated the river’s water among the states, but ignored tribes. While the Compact allocates water under a riparian-like equitable apportionment scheme, the Court held that under Winters tribes are entitled to the entire quantum of Colorado River water necessary to fulfill the “purposes of the reservation.”

The enduring legacy of Arizona is that the Court, once again, held that the quantity of the perfected right is circumscribed by a narrow agricultural metric in light of the agrarian purpose of the reservation system expressed in Winters. The Court elaborated that the tribes were entitled to “enough water from the Colorado to irrigate the irrigable portions of reserved lands.” The Court adopted what has become known as the practically irrigable acreage (“PIA”) standard. This metric, the Court wrote, granted the Indians “enough water … to irrigate all the practicably irrigable acreage on the reservation.” This measure, Justice Black wrote, is the only “feasible and fair way” to determine reserved rights.

C. The Indian Intercourse Act and Arizona’s ‘Loud’ Silence on Indian Water Brokering

71 WATER COMM’N REPORT, supra note 68, at 474–75.
72 Id. (writing “... more than 50 years elapsed before the Supreme Court again discussed significant aspects of Indian water rights”).
73 373 U.S. at 600–01.
74 Id. at 559.
75 Id. at 555; see David H. Getches, Competing Demands for the Colorado River, 56 COLO. L. REV., 413, 415 (1985).
76 Arizona, 373 U.S. at 595–96.
77 Id. at 597 (holding “[t]he doctrine of equitable apportionment is a method of resolving water disputes between States. ... An Indian Reservation is not a State. ... Moreover, even were we to treat an Indian Reservation like a State, equitable apportionment would still not control since, under our view, the Indian claims here are governed by the statutes and Executive Orders creating the reservations”).
78 Id. at 600–01.
79 Id. at 596.
80 Id. at 600.
81 Arizona, 373 U.S. at 600.
The PIA standard has the potential to substantially limit the quantity of Indian water rights, since as Justice Black underscored, many reservations are “of the desert kind—hot, scorching sands,” and thus, impractical for irrigation.\textsuperscript{82} If irrigable at all, the correlative water right for farming on the parched reservations of the Interior West might be paltry.\textsuperscript{83} At minimum, the PIA standard must prohibit inordinately consumptive or wasteful irrigation as not “practical.”\textsuperscript{84}

Moreover, while \textit{Arizona} deploys an agrarian vocabulary in defining the method of reserved rights quantification, the holding is silent on the scope of permissible uses.\textsuperscript{85} Clearly, the PIA metric is instructive on the question, though not necessarily dispositive as many proponents of an evolving homeland purpose of the reservation argue.\textsuperscript{86} Still, courts appear unwilling to fashion an explanation for the theoretical disjunction that arises if irrigative capacity is the variable controlling quantity, but not use.\textsuperscript{87} Nonetheless, the Special Master whose decree was appealed to the Supreme Court in \textit{Arizona}, wrote that once quantified in the agrarian metric, water might be used for other purposes.\textsuperscript{88} The Court did not pass judgment on that broad question, or the narrower one of whether tribes could export water off-reservation.\textsuperscript{89}

Under current law, any affirmative right to marketability of \textit{Winters} water would likely require express approval by Congress.\textsuperscript{90} Since water rights in the West are a separately cognizable possessory estate, they are inalienable under the Indian Intercourse Act’s proscription on all Indian land conveyances.\textsuperscript{91} In other statutes imposing congressional restraint on the alienability of “land,” western courts have construed the laws to encompass appurtenant waters.\textsuperscript{92} However, Indian tribes may

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\item \textsuperscript{82} Id. at 599.
\item \textsuperscript{83} See id.
\item \textsuperscript{84} See id.
\item \textsuperscript{85} See id; \textit{Storey, supra} note 1, at 190 (observing “[b]ecause only the extent of the right was at issue, the Supreme Court did not discuss the permissible uses to which the Indian water right may be put”).
\item \textsuperscript{86} See id (arguing “Indian water rights may extend to uses unforeseen at the time of the reservation’s creation. … This view would be consistent with the Court’s rulings … which found the reservation’s purpose to include the arts of civilization and the advancement of civilized life”).
\item \textsuperscript{87} In re The General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76, 97, 99 (Wyo. 1988) (hereinafter “\textit{Big Horn I}”) (holding that the reserved rights of the Shoshone and Arapahoe tribes of the Wind River Reservation in Wyoming water may only use reserved water for agriculture or domestic supply); see also \textit{Arizona}, 373 U.S. at 600.
\item \textsuperscript{88} Report of Special Master Rifkind 265-66, \textit{Arizona v. California}, 373 U.S. 546 (1963) (writing “[t]he measurement used in defining the magnitude of the water rights is the amount of water necessary for agricultural and related purposes because this was the initial purpose of the reservations”).
\item \textsuperscript{89} See \textit{Arizona}, 373 U.S. at 600.
\item \textsuperscript{90} See \textit{Indian Intercourse Act}, 25 U.S.C. § 177. The Act provides, in relevant part that “[n]o purchase, grant, lease or conveyances of lands … from any Indian nation or tribe of Indians, shall be of any validity in law or equity” without Congressional assent. \textit{id.}
\item \textsuperscript{91} See id; \textit{Storey, supra} note 1, at 182 n. 18 (“[a]ny conveyance of Indian land or water rights separable from the land would require congressional approval as dictated by the \textit{Nonintercourse Act.”}; \textit{Getches, supra} note 58, at 542 (“Tribes must have congressional permission to market their water because Indians can transfer interests in reservation real property only if Congress consents.”).
\item \textsuperscript{92} See id. at 211, 214 n. 208; see also \textit{Holmes v. United States} 53 F.2d 960, 963 (10th Cir. 1931); North Side Canal Co. v. \textit{Twin Falls Canal Co.}, 12 F.2d 311, 314 (D. Idaho 1926).
\end{itemize}
lease proprietary estates, including land, minerals, and presumably water, for on-reservation economic activity with the approval of the Secretary of Interior.

Whether off-reservation water marketing is a use consistent with the “purpose of the reservation,” is a somewhat different inquiry. Proponents of an expansive “homeland” interpretation of the Winters right support alienability of reserved rights to municipal or industrial users. The “homeland” theory asserts that the purpose of the reservation that, in turn, determines the scope of the Winters right, encompasses any use that advances the continuity and economic viability of a permanent Indian homeland. Homeland theory proponents point to the Winters Court’s affirmation that the policy of the reservation system was to school Indians in the “arts of civilization.” In the modern West, supporters argue, this requires federal policymakers to remove barriers of entry into commercial markets. However, strict textualists and other opponents stress that Winters and Arizona narrowly limit the purpose of the reserved right to crop cultivation and agrarian pursuits. That the Arizona Court quantified the right in irrigable acres—rather than

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93 The United State Court of Appeals for the Ninth Circuit has held that tribes may adopt their own regulations governing the lease of tribal land, with the approval of the Secretary of Interior. Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072, 1075 (9th Cir. 1983). Implicit in the court’s decision is that the Secretary is the guardian against economic “improvidence” and that tribal leases must reflect the congressional purpose behind § 415 to “encourage long-term commercial leases of Indian land and thereby to enhance its profitable development.” Id. at 1074. Whether this vitiated tribes’ ability to lease in the interest of less directly economic pursuits like land conservation or maintenance of return flows in reservation waters is an open question. See id.

94 25 U.S.C. § 415 (“Any restricted Indian lands whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential or business purposes, including the development or utilization of natural resources in connection with operations such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops ....”).

95 See Karen Crass, Eroding the Winters Right: Non-Indian Water Users’ Attempt to Limit the Scope of the Indian Superior Entitlement to Western Water To Prevent Tribes from Water Brokering, 1 U. DENVER WATER L. REV. 109, 120–24 (1997); Storey, supra note 1, at 190–92; Getches, supra note 58, at 543 (“The overall purpose of virtually all Indian reservations is to provide a permanent homeland where a tribe can be economically self-sufficient and govern itself. Consequently, it is reasonable to allow a tribe’s water rights to be put to the highest economic use that the tribe may choose, whether on or off the reservation.”).

96 Getches, supra note 58, at 543.

97 See 207 U.S. at 576; Getches, supra note 58, at 543.

98 Getches, supra note 58, at 543 (“Surely non-Indian society would judge entry into the free market and utilization of tribal resources, including land, minerals, timber and water, as capital assets, to be among the most ‘civilized’ activities a tribe could undertake.”).

99 Big Horn I, 753 P.2d at 97 (holding that Indian treaty establishing a “permanent homeland” created no more rights than the federal set aside of land for the Indians); Jack D. Palma, Considerations and Conclusions Concerning the Transferability of Indian Water Rights, 20 NAT. RESOURCES J. 91, 94 (1980) (“Indian reserved water rights were never intended to serve any function other than adding to the productivity of the reservation. Crops, wildlife, and the inhabitants of the reservation needed water to survive in the desolate and God-forsaken lands upon which the government confined our Native Americans.”).
than, say, an economically beneficial amount— is potent ammunition for the argument that reserved water is singularly for agriculture.\textsuperscript{100}

The Special Master in Arizona endorsed the PIA measure, but disclaimed any concomitant proscription on non-agrarian use, writing the PIA measure “does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agriculture and related uses.”\textsuperscript{101} This explication of the nature of the right militates in favor of the proposition that, at least with federal acquiescence, Winters rights may be conveyed as a salable commodity.\textsuperscript{102} However, the Court’s silence on this aspect of the Special Master’s decree actually gives voice to the contrary interpretation. The non-treatment of the issue suggests that at minimum, the Justices intentionally sought to avoid the question, or further, were disinclined to agree with the Special Master.

D. Fishing Rights Cases and the “Purpose of the Reservation”

Other Supreme Court cases, while not specifically discussing Winters, aid in informing the permissible scope of the “purpose of the reservation.” In many ways, United States v. Winans was a companion case to Winters.\textsuperscript{103} Decided three years earlier, and written again by Justice McKenna, the case held that certain Indian treaties impliedly reserved rights to hunting and fishing at “all the usual and accustomed places,” regardless of whether these places were off-reservation, and subject to controlling state law.\textsuperscript{104} The Court held that treaties with the Yakima Nation contained not a “grant of rights to the Indians, but a grant of rights from them” to cede vast tracts of aboriginal land for white settlement.\textsuperscript{105} As the Yakima understood the bargain, and as liberal construction demands, the treaties reserved hunting and fishing rights, and imposed a servitude upon any ceded parcels necessary for Indians to exercise these aboriginal rights.\textsuperscript{106}

In 1919, in Alaska Pacific Fisheries v. United States, the federal government requested injunctive relief barring commercial fish traps in tidal pools immediately off the island reservation of the Metlakahtla Indians.\textsuperscript{107} Echoing Winans, the Court held that the canons of treaty construction dictated that reservation lands carried with them concomitant hunting and fishing rights in the accustomed places, whether on or off tribal lands.\textsuperscript{108} In abating the use of commercial traps, which interfered with the Indians aboriginal fishing grounds, the Court appeared to espouse a broad homeland theory of the reservation.\textsuperscript{109} The Court wrote: “the purpose of creating the reservation was to encourage, assist and protect the Indians

100 See 373 U.S. at 600; Palma, supra note 99, at 93.
102 See id; Storey, supra note 1, at 211, n 183.
103 See 198 U.S. at 383.
104 Id. at 384.
105 Id. at 381 (emphasis supplied).
106 See id; COHEN, supra note 47, at 37 § 2.
107 248 U.S. 78, 86 (1918).
108 See id. at 89.
109 See id.
in their effort to train themselves to the habits of industry, become self-sustaining and advance to the ways of civilized life.”

The Court continued that the fishing waters off the island “would afford a primary means of subsistence and a promising opportunity for industrial and commercial development.”

Though subtle, this language might be read to depart from Winters inclination toward a frozen agrarian purpose for the reservation, and support evolving commercial uses for reservation resources.

However, the reservation at issue in Alaska Pacific housed a subsistence fishing tribe, which is a key distinguishing factor. Perhaps, under these distinct facts, the Court was merely fashioning the waters for “fish farming” akin to the crop cultivation envisioned in Winters. For most tribes, subsistence fishing and hunting were cognizable purposes of the reservation at the time of treaty ratification.

Thus, water for maintenance of fisheries and wildlife would fall within the ambit of permissible uses of the Winters reserved rights because of the historical recognition and the practical similarity of subsistence fishing to farming. Modern industrial uses of water, however, do not share the same historical pedigree.

In Washington v. Washington State Commercial Passenger Fishing Vessel Association (“Fishing Vessel”), the Supreme Court was called upon to interpret express treaty language securing the right of more than a dozen Pacific Northwest Indian tribes to "... fish, at all usual and accustomed grounds and stations ... in common with all citizens of the Territory." The Court determined that the treaties in question, interpreted as the Indians would have understood them, unambiguously conferred on the tribes not just an “equal opportunity” to try to catch fish, but instead a superior right to harvest a share of each run of anadromous fish that pass through tribal fishing areas.

The Court tempered this exclusive fishing right, by stating that, following the logic of the PIA principle in Arizona, “Indian treaty rights to a natural resource that once was exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living.” When extrapolated to the Winters context, this “moderate living” gloss would restrict the size of the reserved water right to the amount necessary to achieve a self-sustaining livelihood, but not a windfall.

This moderate living constraint presumably would apply regardless of whether the water was put to consumptive on-reservation use or conveyed off-reservation. Given the scarcity of water in the West and the outsized profits senior

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110 Id.
111 Id. at 88.
112 Compare Alaska Pacific Fisheries, 248 U.S. at 88–89 with Winters, 207 U.S. at 577.
113 See 248 U.S. at 86.
114 See, e.g., Winans, 198 U.S. at 383; Adair, 723 F.2d at 1414.
115 Compare Winans, 198 U.S. at 383 with Winters, 207 U.S. at 577.
116 See Palma, supra note 99, at 93–94 (writing “[t]hus, where the tribes found sustenance from agriculture, irrigation water reserved; where fishing was important, fishing rights formed the basis of the Winters right”).
118 See id. at 675–76.
119 Id. at 686.
120 See id.
rights holders could achieve selling water to thirsty cities and industries, water brokering may not comport with this “moderate living” standard.121

E. The Big Horn Adjudication

As practical matter, the so-called McCarran Amendment of 1952 circumscribes the amount of wet water, if not the breadth of the paper right, that tribes will actually receive.122 The amendment expressly waives the federal government’s sovereign immunity from suit challenging federal claims to water, and further, consents to joinder in state court adjudication of federal water rights, including Winters rights.123 In the water-poor West, state courts have proven hostile to Winters claims.124 Where irrigators and rapidly growing municipalities form potent political constituencies, state courts have resisted Indian claims that would otherwise displace powerful appropriators.125

1. Big Horn I

Illustrative of this hostility is the Wyoming Supreme Court’s opinion in In Re General Adjudication of All Rights to the Big Horn River System (“Big Horn I”). Under Wyoming law, the state commenced an action seeking a final adjudication and inventory of all rights on the Big Horn River.126 Wyoming joined the United States as a necessary party in its role as the fiduciary of the reserved rights belonging to the Shoshone and Arapahoe tribes on the Wind River Indian Reservation.127 The Special Master’s decree128 endorsed an expansive “permanent homeland” purpose of the treaty that created the Wind River Reservation.129 Under this broad definition, he

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121 It is important to note that the Winters and Winans doctrines defy rules of general applicability, particularly any broad judicial pronouncement of universal purposes of the Indian reservation system. Rather, the adjudication of Winters water rights or Winans fishing rights require particularized examinations of the terms of individual treaties, executive orders or statutes creating the reservation. Individual treaty language and tribal history are the primary founts of information revealing a reservation’s purpose. Treaty construction, therefore, may forestall attribution of a common purpose for all reservations.
123 Id.
124 See, e.g., Big Horn I, 753 P.2d at 97, 99 (finding only agriculture and domestic use comports with the purpose of the reservation).
125 See id.
126 Id. at 84; see WYO. STAT. ANN. § 1-37-106.
127 Big Horn I, 753 P.2d at 84; see 43 U.S.C. § 666 (McCarran Amendment consenting to joinder in state court adjudications of Indian reserved water rights).
128 The Special Master issued his decree, Report Concerning Reserved Water Right Claims by and on Behalf of the Tribes in the Wind River Reservation, after four years of meetings and public hearings, involving more than 100 attorneys, 15,000 pages of transcript, and 2,300 exhibits. Big Horn I, 753 P.2d at 85.
129 Id. (writing “[t]he report recognized a reserved water right for the Wind River Indian Reservation and determined that the purpose for which the reservation had been established was a permanent homeland for the Indians. A reserved water right for irrigation, stock watering, fisheries, wildlife and aesthetics, mineral and industrial, and domestic, commercial, and municipal uses was quantified and awarded”).
determined that Congress intended to reserve water for an array of commercial water uses, including off-reservation sale.\textsuperscript{130} However, the Supreme Court of Wyoming affirmed lower court rulings invalidating the Special Master’s recommendation.\textsuperscript{131} The court refused to award reserved water rights for any purposes except agriculture and domestic supply.\textsuperscript{132} The majority discussed the legacy of the Shoshone and Arapahoe Indian bands as itinerant hunters who roamed wide swathes of current-day Wyoming, Utah and Colorado and looked to the treaty they signed in 1868.\textsuperscript{133} Though the court noted that Indian treaties may not be “given crabbed or restrictive meaning,” the majority stressed it had “no difficulty affirming the finding that it was the intent at the time to create a reservation with a sole agricultural purpose.”\textsuperscript{134} To underscore this construction, the court pointed to language delineating the allotment of “agricultural reservations,” provision of “seeds and implements,” and stipends to “farming Indians” that were more generous than those paid to “nomadic Indians.”\textsuperscript{135} Though the treaty discusses a “permanent homeland,” the court construed this reference to reflect only the government’s enduring temporal commitment to the land reservation, no more.\textsuperscript{136} The majority noted that the Wind River tribes did not seek permission to export water, and as such, federal law, by default, banned any off-reservation conveyance.\textsuperscript{137} Based on Arizona’s PIA standard, and also the amount of water needed for municipal supply, the court awarded reserved rights of 400,000 acre-feet—a majority of the river’s annual flow.\textsuperscript{138}

Wyoming Justice Thomas’s dissent would have resolved the Wind River quantification with a more nuanced compromise that balanced sympathy for the homeland theory, while still barring off-reservation marketing.\textsuperscript{139} He wrote:

The fault I find [with the limit to agricultural pursuits] is that it assumes that the Indians peoples will not enjoy the same style of evolution as other people, nor are they to have the benefits of modern civilization. I would understand that the homeland concept assumes that the homeland will not be a static place frozen in an instant of time but that the homeland will evolve and will be used in different ways as Indian society develops. The one thing I would not assume is that using the reserved water as a salable commodity was contemplated in connection with the implied reservation of water. I would limit its use to the territorial boundaries of the reservation.\textsuperscript{140}

\textsuperscript{130} Id.
\textsuperscript{131} Id. at 97, 99.
\textsuperscript{132} Id.
\textsuperscript{133}\textit{Big Horn I}, 753 P.2d at 83.
\textsuperscript{134} Id. at 96.
\textsuperscript{135} Id. at 97.
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 100.
\textsuperscript{138}\textit{Big Horn I}, 753 P.2d at 105–06.
\textsuperscript{139}\textit{Big Horn I}, 753 P.2d at 119 (Thomas, J., dissenting).
\textsuperscript{140} Id.
Justice Thomas’s dissent strikes a fair balance between the rights of Indians to use their lawfully conferred water in a modern—and often more conservative manner than highly consumptive irrigative purposes—and environmental concerns that water brokering could be exploited for irresponsible development by western municipalities, home builders, or industries.

The Arizona Supreme Court latched onto Justice Thomas’ dissent as the basis for its opinion in In re the General Adjudication of All Rights to Use Water in the Gila River. There, the Arizona court held that PIA is not the exclusive standard for quantifying Winters rights. Rather, a reviewing court must balance “present and future needs of the reservation as a livable homeland.” The court went on to note that large agricultural projects are “risky, marginal enterprises,” and therefore, the PIA standard creates a perverse incentive for tribes to “concoct inflated, unrealistic irrigation projects, but deters consideration of actual water needs based on realistic economic choices.”

2. Wyoming v. United States

After Wyoming appealed Big Horn I, the Supreme Court granted certiorari to hear Wyoming v. United States, and was on the precipice of considerably eroding the PIA standard. Ultimately, the Court affirmed the Wyoming Supreme Court opinion per curium by a 4-4 margin, and left the PIA metric undisturbed. However, Justice Marshall’s papers, made available upon his death, revealed how close the Justices were to reaching a different outcome. Justice O’Connor circulated a draft opinion, joined by four other Justices that not only upheld Big Horn I’s proscription on non-agricultural uses of reserved water, including off-reservation sale, but also would have dismantled the PIA standard. The majority opinion would have curtailed PIA quantification where “sensitivity to the impact on state and private appropriators” necessitated a lesser award. Justice O’Connor wrote that any conferral of Winters rights must include “a practical assessment—a determination apart from the theoretical and economic and engineering feasibility—of the reasonable likelihood that future [tribal] irrigation projects, will actually be built.” The decision would have spelled a dramatic reduction in the size and scope of Winters rights, and part the “clouds” formed by the Indians paper right to displace junior appropriators.

141 See 35 P.3d 68, 78–79 (Ariz. 2001) (stating “[w]e again agree with the analysis of Justice Richard V. Thomas in Big Horn I”).
142 Id. at 77.
143 Id.
144 Id. at 77.
146 Id.
148 Id. at 684.
149 Id.
150 Id.
151 See id.
At the last minute, Justice O'Connor recused herself because her family ranch was joined in an Indian claim to Winters rights on the Gila River system in Arizona.152

3. Big Horn II

Following the Supreme Court’s deadlocked decision to affirm Big Horn I and leave the PIA metric unscathed, the Wind River tribes adopted a plan to utilize their Winters rights to maintain in-stream flows for fisheries and non-consumptive uses.153 Since Winters rights, in theory, are not forfeited for non-use, the tribes dedicated their Big Horn water for “fisheries restoration ... recreational uses, ground water recharge, and downstream benefits to irrigators and other water uses.”154 However, upstream diversion never allowed the tribe to achieve its desired on-reservation flow.155 The tribe sued to enjoin upstream diversion.156 Again, the case was appealed to the Wyoming Supreme Court. A divided court, in Big Horn II, ruled that the treaty creating the Wind River reservation created water rights for only agricultural diversion.157 Under Wyoming state law, the court held, the tribe could not change the place, purpose, or manner of water use to the injury of other appropriators, even if junior.158 In other words, a change in use “un-perfected” the senior right and, under Wyoming law, subjected it to a rule of reason a la riparian systems.159 The court’s draconian reading begged the question: would an actual tribal diversion for agriculture, which would certainly displace current appropriators, amount to a change in use (from the status quo ante of no Indian use, at all) violative of the no-injury rule?

F. Ninth Circuit Cases

While the Wyoming Supreme Court strained to read state law in a way that proscribed Winters water for maintenance of in-stream flows for fishing, scenery or groundwater recharge, the United States Court of Appeals for the Ninth Circuit has held to the contrary.160 In Adair v. United States, Klamath Indians in Oregon invoked their exclusive treaty rights to “hunt, fish and gather on their reservation,” as support for the use of senior Winters rights for fishery maintenance.161 The Klamath claimed an entitlement to restrain junior upstream appropriators from depleting

152 Id. at 710.
153 In re General Adjudication of All Rights to Use Water in the Big Horn River System, 835 P.2d 273, 275 (Wyo. 1992) ("Big Horn II").
154 Id. at 276.
155 Id.
156 Id. at 277.
157 Big Horn II, 835 P.2d at 280 n. 8; see also Wyo. Stat. Ann. § 41-3-104 (barring change in beneficial use by senior appropriator that injures the expectancy of junior rights holders).
158 Id.
160 See Adair, 723 F.2d at 1414 (holding that Klamath Tribe was entitled to reserved water to maintain in-stream flows for fisheries under its aboriginal hunting and fishing rights preserved by treaty).
161 Id. at 1398.
the river below the in-stream flow rate set by the tribe to preserve indigenous fish and game. The upstream appropriators sued, arguing, *inter alia*, that reserved rights could not be exercised for non-consumptive, non-agrarian uses. The state appropriators also pointed to treaty language expressing a federal intent to “advance [the Klamath] in civilization, and especially agriculture.”

The court held that the original Klamath treaty recognized the Indians’ “uninterrupted use and occupation of its land and water” for hunting, fishing and trapping. In conformity with *Winans*, these “uninterrupted” practices created aboriginal title to hunting and fishing in all the former holdings of the tribe. This title impliedly created “aboriginal” water rights for the amount needed to maintain a subsistence fishing lifestyle, and the court wrote, like all aboriginal title, the reserved water carried a priority date of “time immemorial.” At first glance, the Ninth Circuit’s reading appears not to accord with Justice Black’s statement in *Arizona* that *Winters* rights carry a priority date vesting at the time of creation of the reservation. Immemorial rights, under the Ninth Circuit’s interpretation, it seems, are triggered where entangled with aboriginal fishing rights, as opposed to naked water rights that arise from federal land reservation.

However, the *Adair* court diluted the effects of its holding, stating that the right to immemorial fishing on the rivers of the former Klamath holdings do not create a permanent “wilderness servitude in favor of the tribe” that mandates a “restoration of an 1864 level of water flow.” Invoking *Fishing Vessel*, the Ninth Circuit held that the Klamath were entitled only to the quantity of water necessary to provide a “moderate living,” and not the “same level of exclusive use and exploitation of a natural resource that they enjoyed at the time they entered into the treaty.” Though tempered by *Fishing Vessel’s* moderate income standard, the *Adair* case is potent persuasive authority for the proposition that a Tribe electing to keep *Winters* water in a river, as opposed to diverting it for wasteful consumption, is acting consistently with the purpose of the reservation. A year later, in *Colville Confederated Tribes v. Walton*, the Ninth Circuit again permitted a tribe to conserve its reserved rights for minimum in-stream flows, even though the use competed

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162 Id. at 1397.
163 Id. at 1410–11.
164 Id. at 1409–10.
165 *Adair*, 723 F.2d at 1413.
166 Id.; see also 198 U.S. at 383.
167 *Adair*, 723 F.2d at 1414 (“The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights. ... Furthermore, an 1864 priority date might limit the scope of the Tribe’s hunting and fishing water rights by reduction for any pre-1864 appropriations of water. This could extinguish rights the Tribe held before 1864 and intended to reserve to itself thereafter.”).
168 See supra note 56.
169 *Adair*, 723 F.2d at 1414 (“Thus, we are compelled to conclude that where, as here, a tribe shows its aboriginal use of water to support a hunting and fishing lifestyle, and then enters into a treaty with the United States that reserves this aboriginal water use, the water right thereby established retains a priority date of first or immemorial use.”).
170 Id.
171 Id. at 1414–15.
172 See id.
with downstream appropriators.\textsuperscript{173} Again, the use of the reserved water rights was inextricably tied to a cognizable, aboriginal fishing right secured by the treaty.\textsuperscript{174}

Adair and Colville make for sound environmental policy, and should be followed when tribes elect to maintain in-stream flows, inside or outside the Ninth Circuit. However, the cases should not be read to suggest the permissibility of Indian water brokering. The right to commercial marketing of water is hardly an aboriginal right like the hunting and fishing that survived the treaty exchange.\textsuperscript{175} As a public policy matter, water brokering, unlike maintenance of in-stream flows protected by Adair and Colville, would be environmentally devastating—providing scarce surface water to fuel unsustainable urban growth, and further degrade overall water quality by increasing the output of the energy sector and polluting industries.\textsuperscript{176}

G. Federal Reserved Rights

The concept of federal reservation of water rights from the state appropriative regime is not unique to Indian lands. The Supreme Court has held, against challenge, that when the federal government sets aside public land for protection, it impliedly reserves the quantity of water necessary to fulfill the

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  \item \textsuperscript{173} 647 F.2d 42, 48 (9th Cir. 1981) (We agree with the district court that preservation of the tribe’s access to fishing grounds was one purpose for the creation of the Colville Reservation. Under the circumstances, we find an implied reservation of water from No Name Creek for the development and maintenance of replacement fishing grounds.
  \item \textsuperscript{174} See id.
  \item \textsuperscript{175} See Adair, 467 U.S. at 1414; Colville, 647 F.2d at 48.
  \item \textsuperscript{176} MARK T. ANDERSON, AND LLOYD H. WOOSLEY JR., U.S. GEOLOGICAL SURVEY CIRCULAR 2005, WATER AVAILABILITY FOR THE WESTERN UNITED STATES—KEY SCIENTIFIC CHALLENGES: 1261, 1, 1–23 (2005) (hereinafter “USGS CIRCULAR”). This recent study by the U.S. Geological Survey empirically demonstrated the dire overuse of surface waters and overdraft of groundwater in the West under the strain of rapid population growth:

In the Western United States, the availability of water has become a serious concern for many communities and rural areas. Near population centers, surface-water supplies are fully appropriated, and many communities are dependent upon ground water drawn from storage, which is an unsustainable strategy. Water of acceptable quality is increasingly hard to find because local sources are allocated to prior uses, depleted by over pumping, or diminished by drought stress. Some of the inherent characteristics of the West add complexity to the task of securing water supplies. The Western States, including the arid Southwest, have the most rapid population growth in the United States. The climate varies widely in the West, but it is best known for its low precipitation, aridity, and drought. There is evidence that the climate is warming, which will have consequences for Western water supplies, such as increased minimum streamflow and earlier snowmelt events in snow-dominated basins. Id.

Some studies show that most of the Southwest and Great Basin, which is not coincidentally home to vast Indian reservations, exceeds 100 percent of consumptive use of surface waters as a percentage of renewable supply. THE CONSERVATION FOUNDATION, AMERICA’S WATER: CURRENT TRENDS AND EMERGING ISSUES 1 (1984) (hereinafter “CONSERVATION FOUNDATION REPORT”). This does not even factor in the groundwater overdraft is threatening to deplete the overburdened aquifers of the West far quicker than they can naturally recharge. See id.

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purposes of the designation, whether it be a national park, wilderness area, wildlife refuge or forest. In *Cappaert v. United States*, the Supreme Court enjoined a 12,000-acre cattle ranch from pumping groundwater near the Death Valley National Monument that lowered the table in Devil’s Hole, a limestone cavern that was the last known habitat of the endangered Devil’s Hole Pupfish. At the time of apportionment of water to the ranch, there was no known hydrologic connection to Devil’s Hole, but once pumping began, the fish was quickly imperiled. In affirming the injunction, the Court, reminiscent of *Winters*, cautioned that the reserved water right only entitles the government to “that amount necessary to fulfill the purpose of the reservation, no more.”

The Court retreated even further in *United States v. New Mexico*. There, the government claimed title to reserved rights in the Gila National Forest for maintenance of minimum stream flows to support fish populations, aesthetics and wildlife preservation. In a review of the legislative history underpinning creation of the national forest system, akin to treaty interpretation in *Winters* adjudications, the Court held that Congress reserved national forests for the limited purposes of conservation of water flow and to furnish a continuous supply of timber to the American people. As a result, Justice Rehnquist, held the congressional purpose behind establishment of national forests precluded reservation of water for "secondary purposes" beyond the original intent of the reservation of public land. If the Court were to apply *New Mexico’s* rule to *Winters* rights, water could not be apportioned for anything other than agrarian uses—and possibly hunting and fishing—because evolving uses would likely be "secondary," and thus impermissible. Regardless of interpretation at the outer edges of the “secondary” use principle, any moderately restrictive read of Indian treaties, in light of *New Mexico*, would certainly prohibit water brokering.

III. The Federal Trust Responsibility

The federal relationship with Indian tribes is at once paternalistic and respectful, tortured and cooperative, disjointed and continuous. More than anything, the trust relationship between the United States and its Indians is unique—a *sui generis* legal bond that exists in no other quarter. The United States, despite periods of official abandonment of the ideal, today, as in the 18th Century,

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178 Id. at 133.
179 Id. at 136.
180 Id. at 141.
182 Id. at 704.
183 Id.
184 Id. at 702.
185 See id.
186 See *New Mexico*, 438 U.S. at 702.
187 See *Cherokee Nation v. Ga.*, 30 U.S. 1, 2 (1831) (recognizing Indian sovereignty, but also calling them “domestic dependent nations,” that are in a state “pupilage”).
188 See id.
recognizes the political sovereignty of tribal governments, as well as some measure of cognizable proprietary rights in their reserved lands. And, despite turbulence, the federal government’s fiduciary responsibility to the Indian beneficiaries endures today. Section A of this Part discusses the origins of the fiduciary relationship as espoused in a trilogy of early opinions written by Chief Justice John Marshall. Section B provides an explanation of the sad legacy of federal neglect of Indian water rights, while Section C analyzes the Pyramid Lake line of cases, where the U.S. Court of Appeals for the District of Columbia Circuit and Supreme Court Justices gave conflicting statements on the fiduciary obligation of the government in the context of Winters rights.

A. The Marshall Trilogy

The first rulings on the taxonomy of the rights of indigenous people in the new United States have molded Indian law for three centuries that followed. In Johnson v. McIntosh, the Supreme Court reviewed a land dispute between two parties, one claiming title to the land conveyed by the Illinois and Piankeshaw Indians, the other from a federal patent. Chief Justice Marshall wrote that the sole right of acquiring title to Indian lands was vested in the sovereign “discoverers” of the new territories. In essence, the Court ruled that Indians did freely possess the right to convey their aboriginal lands after the arrival of European colonizers. This notion, though not of statutory origin when the Illinois and Piankeshaw conveyed title to the land at issue in M’Intosh, was codified in the Indian Intercourse of 1790, which remains valid law three centuries later. The restriction on conveyance stems from the formulation in M’Intosh of so-called Indian Title, which confers upon tribes a mere right of occupancy on the reservation, but not the full panoply of property rights. Even so, the Court later held that right of occupancy included ownership of all natural resources in the reservation, and, as discussed, necessary water rights to fulfill the purposes of the reservation. In 1938, in United States v. Shoshone Tribe, the court wrote that although the government has plenary power over Indian property, including mineral and timber interests, “it did not have power to give to others or to appropriate to its own use any part of the land without rendering or assuming the obligation to pay, just compensation to the tribe, for that
would be, not the exercise of guardianship or management, but confiscation.”

The tribe, therefore, owns a compensable interest in its land and resources, including water, which the government may not confiscate.

By splitting title to Indian lands, Justice Marshall appeared to lay the framework for a fiduciary relationship. In *Cherokee Nation v. Georgia*, he explicated a *sui generis*, or even oxymoronic, sovereign status for Indians, denoting them as “domestic dependent nations.” In short, the tribes retained sovereignty as an independent nation, outside the scope of regulation by the states where they were physically located, and managed exclusively by the federal government. In *Worcester v. Georgia*, Justice Marshall emphasized this point: “The whole intercourse between the United States and [the Cherokee] is, by our constitution and laws, vested in the government of the United States.”

These early pronouncements, in both the Marshall Trilogy and the affirmative obligations memorialized in early treaties, spawned the fiduciary relationship that survives today. In bad times, this inextricable federal-Indian relationship has been described pejoratively as a ward-guardian bond or in other nativist dispersions. In more noble times, the Court has said the government has “charged itself with moral obligations of the highest responsibility and trust.” And, as *Shoshone* demonstrates, the corpus of this great trust includes more than Indian soil, but all tribal assets, including the *Winters* water impliedly guaranteed by the same treaties that birthed the government’s fiduciary responsibilities.

In fact, the government acknowledges its trust duties to protect Indian water, despite its abhorrent performance.

B. Federal Mismanagement of Western Water

With respect to protecting Indian water resources, if not the entire Indian corpus, the government’s performance as trustee has been an abject failure. The record is dismal, and the breaches of fiduciary duty, as traditionally understood, are

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199 *Id.* (emphasis supplied).
200 *See id.*
201 *See Seminole Nation*, 316 U.S. at 297.
202 30 U.S. at 2.
204 *Id.*
205 *Seminole Nation*, 316 U.S. at 297.
206 Oneida County v. Oneida Indian Nation, 470 U.S. 226, 258 n. 6 (1985) (Stevens, J., dissenting) (recalling “[i]n the 19th century they were often characterized as wards of the State”); *Shoshone*, 304 U.S. at 117 (writing “transactions between a guardian and his wards are to be construed favorably to the latter”).
207 *Seminole Nation*, 316 U.S. at 297.
208 *Shoshone*, 304 U.S. at 116.
210 *See infra* notes 211–269, and accompanying text.
obvious.211 The Bureau of Reclamation212 and other federal agencies within the Department of Interior—the same agency housing the Bureau of Indian Affairs, which is tasked with the obligation to protect all tribal assets—constructed massive, multibillion-dollar water projects without cognizance of senior Indian rights.213 These colossal construction projects appropriated billions of acre-feet for the sole benefit of irrigators and municipalities.214 In the 20th century, the scorched sands of the West transformed into verdant fields of alfalfa, peaches, corn and sprawling ranchlands. Dry desert outposts from Phoenix and Las Vegas to Bakersfield and Denver turned into steel-and-mirrored oases with golf courses, strip malls, and populations rivaling most cities on the eastern seaboard. The common denominator: cheap water impounded from the once mighty rivers of the West.215 As these waterways transformed from a roaring circulatory system of dynamic ecosystems and watersheds to the trickling faucet of backyard sprinklers and casino fountains, the carrying capacity of western water reached its tipping point.216 Today, aquifers are recharging at rates far outpaced by western water consumption, and most rivers are appropriated to the ceiling of availability.217 Some dated surveys already showed that water use in the Interior West was as high as 304 percent of available surface supplies in average years, and far greater in drought times.218

As Congress and the ever-thirsty Department of Interior created one unquenchable water project after another, federal policy ignored the Indian.219 This competition for resources inside the same federal office created an irreconcilable conflict of interest.220 Were the trust relationship more than a legal fiction, the conflict should have been resolved in favor of the Indian beneficiary.221 The decades-long federal crusade to dam and divert has now resulted in a current level

211 See id.
212 The Reclamation Act of 1902 directed the Secretary of Interior to condemn arid lands in specified western states and “reclaim” those lands through expensive and highly water-intensive irrigation projects. The bill then authorized the secretary to provide for settlement of these newly fertile lands through the controlling homestead laws, and conditions imposed by the Act, itself. See Nevada v. United States, 463 U.S. 110, 128 (1983).
213 WATER COMM’N REPORT, supra note 68, at 474–75; Anderson, supra note 47, at 430 (writing “[s]ince the establishment of the Bureau of Reclamation in 1902, the federal government has enshrined the diversion of Indian water for non-Indian use as federal policy, and simply left the Indian tribes out of the development mix”).
214 Anderson, supra note 47, at 430.
215 See USGS CIRCULAR, supra note 176, at 1–23 (predicting water shortages from misuse of surface water and overdraft of groundwater in fast-growing western states); UNITED STATES WATER RESOURCES COUNCIL, THE NATION’S WATER RESOURCES 3 (1975) (hereinafter “WATER RESOURCES COUNCIL REPORT” (explaining parts of the Southwest are using more than 30 percent of their available surface waters to sustain urban growth)).
216 USGS CIRCULAR, supra note 176, at 1–23; WATER RESOURCES COUNCIL REPORT, supra note 215, at 3; John A. Folk-Williams, The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights, 28 NAT. RESOURCES J. 63, 64 (1988).
217 USGS CIRCULAR, supra note 176, at 1–23; WATER RESOURCES COUNCIL REPORT, supra note 215, at 3; Folk-Williams, supra note 216, at 64.
218 WATER RESOURCES COUNCIL REPORT, supra note 215, at 3; Folk-Williams, supra note 216, at 64.
219 Anderson, supra note 47, at 430
220 Id.
221 Id.
of apportionment that far exceeds the capacity of the West’s delicate hydrologic system.\footnote{USGS CIRCULAR, supra note 176, at 1–23; Folk-Williams, supra note 216, at 64.} Under this current ceiling of appropriation, most tribes of the Interior West will either never realize the water rights reserved to them by treaty, or, less likely, would necessarily displace the rights of powerful constituencies that would respond with political warfare.\footnote{See USGS CIRCULAR, supra note 176, at 1–23, at 3; Folk-Williams, supra note 216, at 68–70.} As Congress has plenary power to abrogate treaty obligations, it would likely intervene to protect western municipalities, industries and agricultural interests.\footnote{Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) (“[w]hen treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress. ...”).} Facing this reality, in 1973, the National Water Commission issued a scathing report on the government’s willful dereliction of its trust responsibility to Indian reserved rights holders:

Following \textit{Winters}, more than 50 years elapsed before the Supreme Court again discussed significant aspects of Indian water rights. During most of this 50-year period, the United States was pursuing a policy of encouraging settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the \textit{Winters} doctrine. With the encouragement, or at least the cooperation, of the Secretary of the Interior—the very office entrusted with protection of all Indian rights—many large irrigation projects were constructed on streams that flowed through or bordered Indian Reservations, sometimes above and more often below the Reservations. With few exceptions the projects were planned and built by the Federal Government without any attempt to define, let alone protect, prior rights that Indian tribes might have had in the waters used for the projects ... In the history of the United States Government’s treatment of Indian Tribes, its failure to protect water rights for use on the Reservations it set aside for them is one of the sorrier chapters.\footnote{WATER COMM’N REPORT, supra note 215, at 474–75.}

As non-Indians, including major cities, build stronger and stronger reliance interests on the water appropriated them over the senior rights of tribes, the remaining salable waters in the West are, literally and figuratively, evaporating.\footnote{USGS CIRCULAR supra note 176, at 1–23, at 3; Folk-Williams, supra note 216, at 64.} It appears \textit{Winters} rights are relegated to languishment or unfair settlement by hostile state courts or unequal negotiations.\footnote{See Anderson, supra note 47, at 430.} Thus, the last best chance for tribes to realize any benefits from \textit{Winters} would be suits for breach of fiduciary seeking monetary compensation for a century of federal mismanagement.\footnote{See id. (“[T]he United States is potentially liable to tribes for money damages based on harm inflicted by federal mismanagement of tribal assets.”).}
C. The Pyramid Lake Cases

The Supreme Court has addressed, albeit obliquely, the extent of the federal government’s trust responsibilities to protect western water, but as is too common in Indian law offered somewhat cryptic responses. Moreover, the Court has not discussed applicable remedies in the event of a breach of fiduciary duty arising from the government’s mismanagement of reserved water rights, or even if Winters created a compensable right.\(^{229}\) In *United States v. Mitchell*, the Supreme Court held that the mere existence of the trust relationship with respect to natural resources does not necessarily give rise to monetary damages when the trustee is in breach.\(^{230}\) There, the Quinault Tribe sued for breach, demanding compensation for mismanagement of timber on trust land held by allottees.\(^{231}\) The Supreme Court ultimately held that the General Allotment Act created only a “bare” trust that could not give rise to compensatory damages, however specific Indian timber management statutes created an enforceable duty.\(^{232}\) The Court reasoned that the United States converts tribal property into a trust corpus when it affirmatively commits to supervision and maintenance of the property in a statute or other “fundamental document.”\(^{233}\) If compensable trust duties arise impliedly from “fundamental documents,” then treaties, statutes or executive orders establishing a reservation also form the basis of an enforceable fiduciary obligation to protect the water rights reserved by those documents.\(^{234}\)

The United States Court of Appeals for the District of Columbia appeared to hold as much in *Pyramid Lake Paiute Tribe of Indians v. Morton*.\(^{235}\) There, the court enjoined the Bureau of Reclamation’s diversion from the Truckee River for irrigation of non-Indian farmland under the Newlands Reclamation Project in northern Nevada.\(^{236}\) The Newlands Project had caused Pyramid Lake, wholly


\(^{230}\) See Mitchell I, 445 U.S. at 546; *Nevada*, 463 U.S. at 128; Mitchell II, 463 U.S. at 225.

\(^{231}\) Mitchell I, 445 U.S. at 537.

\(^{232}\) Mitchell II, 445 U.S. at 224 (holding “[i]n contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States’ fiduciary responsibilities”).

\(^{233}\) Id. (“where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust fiduciary connection.”).

\(^{234}\) See id; Federal Settlement Criteria, 55 Fed. Reg. at 9223 (acknowledging federal trustee status over vested Winters rights).


\(^{236}\) Id. at 258–59.
contained within the boundaries of the reservation, to drop more than 70 feet. The court called the lake a “natural resource of almost incomparable beauty,” and found that as a desert lake with no natural outflow, it depended on the Truckee River to make up for evaporative losses. The court held, consonant with Winter and Winans, that the executive order setting aside public land for the Paiute also created corollary rights to the quantum of water needed to fulfill the purposes of the reservation, including “the maintenance of Pyramid Lake and ... the lower reaches of the Truckee as a natural spawning ground for fish.”

The tribe sued on a creative legal theory, alleging that the Department of Interior regulations allocating water to the Truckee-Carson Irrigation District from the Newlands Project, were “arbitrary and capricious” in violation of the Administrative Procedure Act. The tribe argued the regulations were arbitrary in light of the paramount fiduciary duty owed to tribe to preserve not only Winter water stocks, but aboriginal fishing rights on Pyramid Lake. The Department of Interior countered that the secretary balanced two competing and legally cognizable demands for water, and made a good faith “judgment call.”

The court rejected the false dichotomy presented by the government. First the court wrote that the secretary is charged with a “moral obligation of the highest responsibility and trust” to preserve natural resources in the Indian corpus. The court determined that the department’s actions must be reviewed under “the most exacting fiduciary standards.” The court determined that the secretary acted arbitrarily in not formulating a “closely developed regulation that would preserve water for the Tribe” and admonished that “difficulties ahead could not simply be blunted by a “judgment call” calculated to placate temporarily conflicting claims to precious water.” The court continued: “[t]he Secretary’s action is therefore doubly defective and irrational because it fails to demonstrate an adequate recognition of his fiduciary duty to the tribe.”

In later and closely related litigation, the United States and the tribe sued to overturn the so-called Orr Ditch decree, which adjudicated all rights to the Truckee River in 1913. In the Orr Ditch Litigation, the tribe sued to enjoin enforcement of the decree in 1913 and finally lost in 1944. The decree awarded reserved rights to the tribe, but none for maintenance of fishing stocks in Pyramid Lake as requested. The United States Court of Appeals for the Ninth Circuit set aside the

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237 Id. at 255.
238 Id.
239 See id. at 254–55.
241 Pyramid Lake, 354 F.Supp. at 257.
242 Id. at 255–56.
243 See id. at 256 (“[a] ‘judgment call’ was simply not legally permissible.”).
244 Id.
245 Id.
246 Pyramid Lake, 354 F.Supp. at 257.
247 Id.
248 Nevada, 463 U.S. at 113.
249 Id. at 113–114.
250 Id.
decree, assailing the blatant conflict of interest of the federal trustee in the Orr Ditch Litigation.251 In the multi-party adjudication, the U.S. attorney’s office represented the tribe and Department of Interior’s Newlands Reclamation Project—both direct competitors for the water!252

However, in Nevada v. United States, the Supreme Court reversed on res judicata grounds.253 In dicta, Justice Rehnquist, writing for the Court, reaffirmed “the distinctive obligation of trust incumbent by the Government.”254 Yet, Justice Rehnquist then discussed the trustee responsibility in the specific context of water and in light of the Pyramid Lake case.255 Rather shockingly, he hinted that Congress, merely by delegating conflicting authorities to the Department of Interior may have divested tribes of the fiduciary standard of protection for water:256

[i]t may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands ... [t]he Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests ... [t]he Government does not “compromise” its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.257

Justice Rehnquist’s solicitude to Department of Interior and grossly apologetic stance for the agency’s century of ignoring the senior water rights of tribes all but eviscerates the Pyramid Lake court’s reasoning that federal departments owe paramount consideration to their Indian beneficiaries.258 In contravention of precedent and practice, Nevada may mandate an equal playing-field approach.259 It seems impossible that the mere congressional delegation to a federal department of potentially conflicting tasks could all but dissolve the centuries-old trust.260 It just defies logic. Congress gives orders that hold the prospect of future conflict on such a regular basis that Justice Rehnquist’s reasoning is simple pretext for dissolution of the Indian relationship that he disfavors.261 Nonetheless, tribes can take some solace

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251 Id. at 121.
252 Id.
253 Nevada, 463 U.S. at 121.
254 Id. at 127.
255 See id. at 128.
256 See id.
257 Id.
259 See Nevada, 463 U.S. at 128 (observing government should not be held to fastidious standards of private fiduciary); Seminole, 316 U.S. at 297 (stating the United States “has charged itself with moral obligations of the highest responsibility and trust” as fiduciary to the Indians).
260 See Nevada, 463 U.S. at 128; Seminole, 316 U.S. at 297.
261 See Nevada, 463 U.S. at 128; Seminole, 316 U.S. at 297.
that the holding of *Nevada* barred the tribe’s conflict of interest claim on procedural grounds.  

Still, Justice Rehnquist’s powerful dicta could serve to extinguish any compensable remedies in breach claims for water mismanagement—an alarming but, at least implicit, prospect of the *Nevada* decision.

In a concurring opinion, Justice Brennan sought to blunt the potential future impact of Justice Rehnquist’s assault on the fiduciary bond, and protect the ability of Indians to bring cognizable actions for breach of fiduciary duty. As this Article argues, Justice Brennan stressed "[i]f ... the United States actually causes harm through a breach of its trust obligations the Indians should have a remedy against it." Justice Brennan in his prescience recognized that water shortfalls would mean western tribes, whose reserved rights were ignored for a century, might never receive wet water since the region had reached its ceiling of possible appropriation. To cure this injustice, he stressed, as does this Article, that monetary compensation from the federal government must remain available under traditional fiduciary standards:

The availability of water determines the character of life and culture in this region. Here, as elsewhere in the West, it is insufficient to satisfy all claims. In the face of such fundamental natural limitations, the rule of law cannot avert large measures of loss, destruction, and profound disappointment, no matter how scrupulously even-handed are the law’s doctrines and administration. Yet the law can and should fix responsibility for loss and destruction that should have been avoided, and it can and should require that those whose rights are appropriated for the benefit of others receive appropriate compensation.

Because of the wholesale giveaway of water resources in the West, and fundamental fairness to the Indian, Justice Brennan’s sage concurrence must control any future actions where tribes seek compensation for the sad legacy of federal indifference.

IV. NEGOTIATED SETTLEMENTS AND THE PROBLEM OF “WATER LAUNDERING”

In the years since *Arizona*, litigation has proved a costly, uncertain and ultimately unsuccessful strategy for Indian tribes seeking to secure “wet water” from their inchoate reserved rights. This has led an increasing number of tribes to
pursue settlements—contractual agreements where tribes, states, municipalities, and affected stakeholders, like irrigation districts and other junior appropriators, agree to a final apportionment of a tribe’s rights and an enumeration of permissible uses. Part A of this Section explains why litigation has proven such a futile strategy for Indians. Part B discusses the ill environmental and public policy effects of the negotiated settlements agreed to by the Colorado Ute and the Ak-Chin and Tohono O’odam tribes, with an emphasis on water brokering provisions.

A. The Pitfalls of Litigation

The disadvantages of litigation are overwhelming. First, the Supreme Court has constrained the quantity of the right in setting Arizona’s PIA standard. Particularly for tribes of the barren and unproductive Interior West, this “practically irrigable” requirement threatens to be a severely limiting factor on the value of the reserved right. Moreover, in Wyoming, the Court moved within a vote of overturning the PIA standard in favor of a metric that balances future Indian water use against a “sensitivity analysis” of the impact on “state and private appropriators.” If the Court eventually adopts this importation of a riparian notion of equity into Winters adjudications, the value of the reserved right will dwindle even further. This is especially true since hostile state courts will be tasked with “balancing” the interests of powerful appropriators under the concurrent jurisdiction granted by the McCarran Amendment.

Indian rights and to do justice to reservation Indians. Unfortunately, litigation over Indian rights has proved to be a circuitous and hazard-strewn route to those ends … Once in the proper forum, the parties that the costs of these quantification cases are staggering. Legal fees and the costs of expert witnesses run into the tens of millions of dollars for a single adjudication. Delays of many years precede a decision, and although such a decision may be called “final,” it may be only the beginning of years of conflict and further litigation or negotiation over its meaning.

271 See generally, Folk-Williams, supra note 216, at 75–92 (describing inter alia the negotiated settlements of the water rights of the Navajo Nation, Colorado Ute Tribes in Colorado, Fort Peck Tribe in Montana, Pyramid Lake Paiute in Nevada, Ak-Chin and Tohono O’odam Tribes in Arizona); Peter W. Sly, Reserved Water Rights Settlement Manual 25–30 (1988) (discussing intricacies of settlement process for Ak-Chin, Tohono O’odham and Colorado Ute Tribes). In all, there have been more than twenty negotiated settlements of Indian reserved rights claims. See Anderson, supra note 47, at 437. Of these, 16 tribes won the right to market water off-reservation (Tohono O’odham, Fort Peck, Ak-Chin, Salt River, Colorado Ute, Fallon Paiute-Shoshone, Pyramid Lake Paiute, Fort Hall, Fort McDowell, Northern Cheyenne, Jicarilla Apache, Uintah Ouray Ute, San Carlos Apache, Yavapai-Prescott, Warm Springs, Rocky Boys, Shivwits Paiute) and of these 16, eight are subject to geographic, temporal, or quantitative limitations that appear to benefit local appropriators. See Confederated Tribes of the Chehalis Reservation & Office of Trust Responsibilities, Bureau of Indian Affairs, Indian Water Rights: An Analysis of Current and Pending Indian Water Rights Settlements ch. 4 § 2 (1996) (hereinafter “BIA Settlement Report”).
272 See infra notes 274–287, and accompanying text.
273 See infra notes 288–366, and accompanying text.
274 Arizona, 373 U.S. at 600.
275 See id.
276 See Mergen & Liu, supra 147, at 684–85.
277 See id.
278 See 43 U.S.C. § 666; Big Horn I, 753 P.2d at 97, 99.
Secondly, courts have been reluctant to embrace a broad homeland purpose of the reservation that would, in turn, support new and unfettered uses of water under *Winters*.\(^{279}\) For example, the Wyoming Supreme Court, in *Big Horn I*, denied any permissible uses of *Winters* water beyond the sum of nation’s progress at the time of treaty.\(^{280}\) Other courts, while less draconian, endorse *Cappaert*’s “minimal need” concept and will not award rights to water beyond that needed to achieve subsistence or “moderate livelihood.”\(^{281}\) Third, even successful litigation confers mere “paper water.”\(^{282}\) As the postscript to the sad chapters of the Big Horn litigation illustrates, even when water is awarded, “paper water” cannot be turned into “wet water,” without expensive investment in delivery systems.\(^{283}\) And, if delivered to the reservation, agricultural investments by the tribe have proven unrewarding.\(^{284}\) The reality is that tribes with “wet water” have mostly leased these resources on-reservation to non-Indian farming entities.\(^{285}\) In fact, non-Indians use seventy-eight percent of the irrigated acreage on reservations.\(^{286}\) Fourth, litigation results in a final judgment on the merits, which as *Nevada* forewarns, binds the tribes to results of the adjudication and bars future lawsuits under the principles of *res judicata*.\(^{287}\) This makes litigation an even riskier proposition. Finally, litigation is costly and time-consuming. The Special Master in the Big Horn litigation estimated that the parties spent more than $20 million in the dispute.

**B. Negotiated Settlements and “Water Laundering” as Bad Public Policy**

Today, *Winters* litigation is becoming rarer as tribes recognize the futility.\(^{288}\) In these negotiated settlements, tribes usually waive any future claims to *Winters* water.\(^{289}\) The settlements often involve some combination of allocation of *Winters* waters from existing federal water projects or new water delivery systems constructed with state and federal appropriations, or from junior non-Indian appropriators, who are then compensated by the government.\(^{290}\) Invariably, Congress formally ratifies these negotiated settlements by passing federal

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\(^{279}\) See, e.g., *Big Horn I*, 753 P.2d at 97 (holding that “homeland” reference in treaty controlled to land set aside only, not future uses of the reservation).

\(^{280}\) 753 P.2d at 97–99.

\(^{281}\) 426 U.S. at 141 (holding federal reserved rights set aside the quantum of water needed to fulfill purposes of reservation, no more); *Fishing Vessel*, 443 U.S. at 686; *Adair*, 723 F.2d at 1414–15.

\(^{282}\) See *Big Horn II*, 835 P.2d at 276–80.

\(^{283}\) Id.

\(^{284}\) See Getches, supra note 58, at 544.

\(^{285}\) Id.; see also 25 U.S.C. § 415 (allowing lease of on-reservation property with secretarial approval).

\(^{286}\) Getches, supra note 58, at 544.

\(^{287}\) See *Nevada*, 463 U.S. at 145.

\(^{288}\) Anderson, supra note 47, at 435 (“The uncertainty in the law and complexity of Indian water rights litigation has prompted many tribes to opt for settlement negotiations to quantify their rights.”)

\(^{289}\) See Folk-Williams, supra note 216, at 75–92; Peter W. SLY, supra note 271, at 25–30.

\(^{290}\) See Folk-Williams, supra note 216, at 75–92; Peter W. SLY, supra note 271, at 25–30.
legislation memorializing the agreements, since the waters rights at issue are part of the trust corpus.\textsuperscript{291}

Another reason for congressional codification is that most negotiated settlements include express provisions allowing, at least conditional, off-reservation water marketing.\textsuperscript{292} \textit{Winters} water, as a possessory estate, is inalienable absent congressional decree.\textsuperscript{293} There is incredible incentive for Indians to reach negotiated settlements that allow water brokering. For one, the Indians can turn once illusory paper rights into a salable commodity without, in the words of the Arizona Supreme Court, “concoct[ing] inflated, unrealistic irrigation projects” to satisfy the moving target of the PIA standard.\textsuperscript{294} Moreover, Indian tribes can circumvent both the congressional prohibition on alienability of Indian resources and intransigent courts, none of which have ever held that alienability of water is a use consistent with the reservation’s purpose.\textsuperscript{295} While eliminating the need for often-parsonimous decrees by state courts, the greatest benefit to tribes is that settlements can neutralize the hostility of non-Indian appropriators.\textsuperscript{296} Non-Indian politicians and appropriators often become the most vociferous supporters of negotiated settlements when they piggyback on new diversion projects authorized by the agreements, or at least gain a new source of wet water from tribal marketing.

For states and municipalities there is manifest benefit in negotiating \textit{Winters} settlements, as well. There is little popular support at the national level for large-scale water projects.\textsuperscript{297} The era of excess that witnessed the construction of behemoth dams and buried much of the West under stagnant reservoirs is decidedly, and thankfully, in light of the environmental toll, over.\textsuperscript{298} However, the thirst of fast-growing municipalities in the West has not slaked.\textsuperscript{299} While recent Congresses have not been inclined to build new water delivery projects, lawmakers have always been hesitant to fund tribal water systems.\textsuperscript{300} However, the coalescence of states, municipalities, tribes, and major stakeholders, represents the kind of broad coalition that lawmakers support, and facilitates subsequent federal funding for water projects that enable these consensus agreements.\textsuperscript{301} With all parties on board, the construction of new federal water projects envisioned by the settlements becomes palatable.\textsuperscript{302} Once politically infeasible dams and pumping projects, when
“wrapped in an Indian blanket,” can deliver new water to feed the unchecked growth of the urban West. At risk of using a pejorative, the two fold process is plain-and-simple “water laundering” the negotiated settlement apportioned Winters water to tribes, while allowing water brokering, and then, the tribe sells this water, otherwise politically unavailable, at market rate to the municipality. Some negotiated agreements, like the Colorado Ute settlement, infuse federal money for water projects that benefit not only tribes, but also directly allocate new water to the state and chosen cities.

These agreements, while a seeming win-win are, in fact, devastating public and environmental policy. Negotiated settlements cleverly allow cities to “launder” water, otherwise unavailable, through purchase from the Indian “fence.” Most of the wet water from these settlements is, or will be, sold to advance reckless urban growth, expand heavily polluting industries, or enable more wasteful irrigation. In other words, cities manipulate Winters to procure water to grow beyond the carrying capacity that the political system and, more importantly, the availability of the resource will allow. Fragile riparian ecosystems in the West are disappearing as the rivers slow to a trickle—fish species are imperiled, vegetation is disappearing and desertification is an all-to-real phenomenon. What’s more, cities like Phoenix and Las Vegas that survive on air conditioning, swimming pools and lawn sprinklers are draining the water table, while ensuring their own demise. The carrying capacity of the West is highly circumscribed by its scarce water. Water is a finite resource, and in drought years ahead, the metaphoric well might run dry for oversubscribed cities. As climate change increases drought severity and continues to shrink the annual snowpack in the West, this oversubscription of surface use and groundwater drafting could prove catastrophic.

Moreover, as these unsustainable cities grow, they necessarily industrialize. When Winters water is sold to the oil and gas industry, coal-fire power plants, or industrial manufacturers, the quality of western water is degraded, as the quantity continues to reach the ceiling of availability. More growth means more sewage treatment, more energy generation, more cars, and more water pollution. This is a literal and figurative toxic combination. In a region with so little water, there are no renewable supplies of “clean” replacements for polluted water. The cities and industries that are reaching a quantitative tipping point of

Ute and Ute Mountain Ute Tribes without displacing agricultural and municipal interests); PETER W. SLY, supra note 217, at 161–173 (writing about legislative approval or reserved rights settlements).

303 See Folk-Williams, supra note 216, at 87–89.
304 See id. at 75–92.
305 See id. at 87–89.
307 See USGS CIRCULAR, supra note 176, at 1–23; Shabecoff, supra note 297.
308 See USGS CIRCULAR, supra note 176, at 1–23.
309 See id.
310 See CONSERVATION FOUNDATION REPORT, supra note 176, at 1.
311 See USGS CIRCULAR, supra note 176, at 1–23.
312 See id.
313 See id.
314 See id.
consumption, are also hastening a qualitative demise of remaining water sources. In sum, while negotiated settlements appear to be a consensus solution to a vexing political problem, they are a devil’s deal. The water laundering that enables these agreements is bad public policy. The rest of this Part discusses two negotiated settlements that are emblematic of this environmental problem of “water laundering.”

1. The Colorado Ute Settlement

As the two Colorado Indian tribes—the Southern Ute and Ute Mountain Ute in the southwestern reaches of the state—began pressing their reserved rights claims in the 1970s, panic set in among state officials and irrigators. One ominous estimate predicted that allocation of Ute reserved rights, without a major new water reclamation project, could eliminate all non-Indian agriculture in two drainages and curtail municipal water use in nearby Durango and Pagosa Springs. In 1976, the Ute tribes were drawn from the courtroom to the negotiating table when the U.S. Supreme Court ruled that the state, not federal, courts would assume jurisdiction over the adjudication. Still, with the Utes threatening the political establishment in the Four Corners region, negotiations began involving the State of Colorado, seven irrigation districts, Durango, Pagosa Springs and local real-estate developers. Environmental interest groups and recreational river uses, such as commercial rafting companies and fly-fishermen, requested a participatory role in the negotiations, but were denied.

In April 1986, the coterie of water users forwarded an agreement to the Secretary of Interior that was contingent on $600 million in federal and state appropriation for a massive, and long-envisioned, reclamation on the free-flowing Animas River, called the Animas-La Plata Project (“A-LP”). The project was contemplated to fulfill the senior claims of the Ute tribes without displacing current appropriators. However, the project would have also pumped significant shares of new water to industrial and agricultural users. In all, the 1986 iteration of A-LP would have annually impounded more than 129,000 acre-feet of water, 32,300 for the Ute Mountain Ute; 29,900 for the Southern Ute; 67,460 for municipal, industrial and agricultural users, including large-scale irrigation of the undeveloped “dry side”

315 See infra note 316–366, and accompanying text.
316 See Folk-Williams, supra note 216, at 88.
317 Durango Projects Office & U.S. Bureau of Reclamation, ANIMAS LA-PLATA PROJECT 4 (undated); see Folk-Williams, supra note 216, at 88.
319 See Folk-Williams, supra note 216, at 88–89.
320 Id.
322 See Folk-Williams, supra note 321, at 88–89.
323 Id.
of western La Plata County. The settlement also allocated an additional 69,700 acre-feet of annual water to the two Ute tribes from the existent Dolores Project and rivers flowing through the reservations. Importantly, in exchange the tribes agreed to forfeit their Winters priority date of 1868 and subordinate their rights under Colorado’s appropriative system. The settlement allowed the tribes to “sell, exchange, lease, use or other dispose” water off-reservation, but only within the state of Colorado. Once alienated, the water loses its “reserved” character, and is subject to the state appropriative system, including forfeiture for non-use. The agreement is intentionally silent on out-of-state marketing. Congress memorialized this settlement in 1988.

Thankfully, just before construction, the U.S. Fish & Wildlife Service halted the project by issuing a “jeopardy” opinion under the Endangered Species Act. The service concluded that project would inalterably jeopardize the continued viability of the endangered Colorado Squawfish in the Animas. In 1992, the Sierra Club brought suit to enjoin the project as violative of the Endangered Species, Clean Water and National Environmental Policy Acts. The Bureau of Reclamation voluntarily withdrew its former Environmental Impact Statement (“EIS”) green-lighting the project and began drafting a supplemental review. For years, the project was mired in a tangle of litigation over environmental concerns, and new fears that the project’s contemplated reservoir would destroy Anasazi artifacts. In 1998, Secretary of the Interior Bruce Babbitt proposed a drastic downsizing known as “A-LP Lite,” and the department finalized a supplemental EIS in concert with the new plans. The new project purportedly complied with all environmental laws and arranged to relocate the cultural artifacts to a museum.

In terms of appropriation, AL-P Lite diverts water from a pumping station in Durango to “Lake Nighthorse,” a 120,000 acre-foot reservoir named for the only U.S.

325 See Folk-Williams, supra note 216, at 88–89.
326 See BIA SETTLEMENT REPORT, supra note 271, at ch. 4 § 2.
327 Colorado Ute Indian Water Rights Settlement Act, PL 100-585 (1988) (“The provisions of section 2116 of the Revised Statutes (25 U.S.C. 177) shall not apply to any water rights confirmed in the Agreement and the final consent decree: Provided, That nothing in this subsection shall be considered to amend, construe, supersede, or preempt any State law, Federal law, interstate compact, or international treaty that pertains to the Colorado River or its tributaries, including the appropriation, use, development, storage, regulation, allocation, conservation, exportation, or quality of those waters.”).
328 Id.
329 Id.
330 Id.
331 See BIA SETTLEMENT REPORT, supra note 217, at ch. 4 § 2.
332 See id.; A-LP Timeline, supra note 321.
333 A-LP Timeline, supra note 321.
334 Id.
335 Id.
336 Id.
337 Id.
senator of Indian descent, Ben Nighthorse Campbell, of Colorado. The Southern Ute and the Ute Mountain Ute each receive an annual 33,050 acre-feet, with right of first refusal to 10,460 acre-feet for the State of Colorado, and 5,200 acre-feet to the City of Durango and industrial users. A-LP Lite also awards 4,680 acre-feet to the Navajo Nation, and 20,800 acre-feet to the cities of Aztec, Bloomfield and Farmington, New Mexico, and associated industrial users. Congress passed the scaled back agreement as the Colorado Ute Settlement Act Amendments of 2000. Though the new project’s budget was $278 million, cost overruns led to a final tally far exceeding $500 million, paid mostly in emergency congressional earmarks.

In 2009, Lake Nighthorse was nearly full. Environmental concerns led to the abandonment of the original A-LP’s design to provide water for irrigation, but retained the original settlement’s provisions allowing Indian water brokering. Although A-LP Lite confers water directly to fast-growing municipalities, these cities will also “launder” through legal purchase from the tribes. Moreover, A-LP sits in the San Juan Basin—one of the nation’s most productive natural gas fields. Scarily, as a result of the settlement, the tribes won legal license to sell more water to the highly consumptive, and environmentally troublesome, natural gas industry, if they choose. Notwithstanding the downsizing of A-LP, the project would never have been built in the post-1970s political climate of hostility to large water “boondoggles.” However, by wrapping A-LP in an “Indian blanket,” the cities and industries of arid southwestern Colorado and northern New Mexico tapped an otherwise unavailable water supply. By “laundering” water through tribal neighbors, the thirst for irresponsible development was quenched, for now.

2. Arizona Tribes

Negotiated Settlements become palatable, even welcome, among the non-Indian political class when the ultimate recipients of new water are thirsty municipalities. As such, congressional approval of water marketing, or “laundering,” is the linchpin of most negotiated agreements. In central Arizona, the Ak-Chin and Tohono O’odam tribes have settled their Winters claims through

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338 Rodebaugh, supra note 324, at A1.
342 See Rodebaugh, supra note 324, at A1.
343 Id.
344 See id.; BIA SETTLEMENT REPORT, supra note 271 at ch. 4 § 2.
345 See Rodebaugh, supra note 324, at A1.
346 See id.; BIA SETTLEMENT REPORT, supra note 271, at ch. 4 § 2.
347 See Shabecoff, supra note 297.
348 See Folk-Williams, supra note 216, at 75–92; PETER W. SLY, supra note 271, at 25–30.
349 See Folk-Williams, supra note 216, at 75–92; PETER W. SLY, supra note 271, at 25–30.
negotiated agreements that provide for off-reservation water brokering, and have found eager, and exclusive, customers in the mega-cities of Phoenix and Tucson.\footnote{350 See BIA SETTLEMENT REPORT, supra note 271, at ch. 4 § 1, 12; Folk-Williams, supra note 216, at 77–82.} As groundwater drafting by non-Indians in suburban Phoenix lowered the water table used historically for Ak-Chin farming, the tribe threatened to sue.\footnote{351 Folk-Williams, supra note 216, at 77.} Instead, the tribe, the Department of Interior, the state of Arizona, and a coalition of non-Indian appropriators reached a negotiated settlement, later embodied in federal legislation.\footnote{352 See BIA SETTLEMENT REPORT, supra note 271, at ch. 4 § 1; Folk-Williams, supra note 216, at 77–79.} The Ak-Chin accepted a lower-rung quantification of 75,000 annual acre-feet, and accepted direct cash payments to make up the difference.\footnote{353 See BIA SETTLEMENT REPORT, supra note 271, at ch. 4 § 1.}

The water came from irrigators who retired some of their rights in exchange for above-market financial consideration from the Department of Interior.\footnote{354 Id.} The water is capable of delivery to the tribes through the massive Central Arizona Project (“CAP”), but most of it is just routed to Phoenix.\footnote{355 Id.} The settlement provides an exclusive right of purchase only to enumerated municipal markets in central Arizona.\footnote{356 Id.} This particularity-of-market provision in the settlement assures that the Ak-Chin will always sell their water to Phoenix and its suburbs.\footnote{357 Id.}

The Tohono O’odam Tribe agreed to a similar arrangement when Congress ratified the Southern Arizona Water Rights Settlement Act of 1982.\footnote{358 See P.L. 97–293; BIA SETTLEMENT REPORT, supra note 271, at ch. 4 § 12; Folk-Williams, supra note 216, at 79–82.} The settlement provides the use of CAP delivery systems to the tribe’s three reservations: the Sells, Gila Bend and San Xavier.\footnote{359 BIA SETTLEMENT REPORT, supra note 271, at ch. 4 § 12; Folk-Williams, supra note 216, at 79.} When the water table began depleting due to non-Indian pumping, the Tohono O’odam sued, claiming extensive senior rights to the Tucson aquifer.\footnote{360 Folk-Williams, supra note 216, at 79.} Although courts are split on the question of whether Winters controls only rights to surface water or also groundwater, if the tribes won, fast-growing Tucson would lose dramatic portions of its municipal water supply, which comes from drafting underground sources.\footnote{361 Id. at 80.} The resulting multi-party settlement quantified 66,000 acre-feet in favor the tribe, 37,800 of which was capable of delivery through CAP facilities.\footnote{362 BIA SETTLEMENT REPORT, supra note 271, at ch. 4 § 12.} Another 23,000 acre-feet would be reclaimed effluent sold from Tucson at cost.\footnote{363 Id.} As a condition precedent, the tribe agreed to dramatically curtail groundwater pumping.\footnote{364 Id.} The federal government assumed liability for market-rate replacement costs if it failed to deliver promised water.\footnote{365 Id.} Off-reservation marketing is expressly permitted, but
just in the Tucson area, ensuring that only the fast-growing desert region benefits from a steady supply of tribal water.366

V. A BETTER WAY: COMPENSATION INSTEAD OF WATER BROKERING

There are compelling legal, environmental and social reasons that tribes should not pursue the false promise of water brokering, and more importantly, that the courts and Congress should not permit the practice. This Part proposes that tribes should seek compensation through a breach of fiduciary suit, preferably as a wide class action lawsuit modeled on the successful Cobell litigation over gross federal mismanagement of Indian trust assets.367

This represents a more viable strategy for tribes to receive fair remuneration for their largely inchoate Winters rights in the manner envisioned by Justice Brennan’s concurrence in Nevada.368 Equally important, retiring Winters rights through market-based compensatory damage payments is the simplest way to resolve highly contentious water rights claims without placing further strain on the fast-depleting availability of surface water in the Interior West. At the same time, compensation could forestall the nasty backlash against Indian interests that might arise if a tribal claim displaced junior appropriators. It is conceivable that powerful political constituencies would lobby for, and win congressional intervention to strip tribes of their reserved rights and deprive them of any benefit.369

While negotiated settlements have allowed certain tribes to circumvent the Indian Intercourse Act’s proscription on alienability, these agreements have routinely conferred less water than the theoretical maximum under the PIA standard, and have required tribes to waive future claims to Winters waters.370 What’s more, many agreements impose restraints on alienability so that tribes may only sell their water to fast-growing municipalities nearby.371 Aside from the

366 Id.
367 See infra notes 368–410, and accompanying text.
368 See Nevada, 463 U.S. at 145–46 (Brennan, J., concurring).
369 See Lone Wolf, 187 U.S. at 566 (recognizing plenary authority of Congress to abrogate treaties and dissolve the trust relationship with tribes).
370 See Susan D Brienza, Wet Water vs. Paper Rights: Indian and Non-Indian Negotiated Settlements and Their Effects, 11 STAN. ENVTL. L. J. 151, 192 (1992) (noting as an example of a greater trend that the Tohono O’odham tribe “relinquished claims to potentially larger amounts of water in exchange for a moderate amount of wetwater imported from the Colorado River and made available through the Central Arizona Project”).
371 See BIA SETTLEMENT REPORT, supra note 271, at ch. 4 §§ 1, 12 (describing Phoenix and Tucson’s exclusive rights to purchase Ak-Chin and Tohono O’odham water). Negotiated Settlements also create serious concerns about Indian sovereignty and self-determination. Some settlements subject Indian water rights to state law and the appropriative system, whereas the prior Winters rights were a sui generis class. See Folk-Williams, supra note 216, at 74–92. Some scholars fret that this will create an “increased appetite by state governments to regulate and control Indian land use.” See Reid Peyton Chambers & Monroe E. Price, Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands, 26 STAN. L. REV. 1061, 1062 (1974). Moreover, off-reservation leasing diverts capital from the reservation to cities and towns nearby. This not only empowers and grows the competing non-Indian economies, but brings cities geographically closer to the reservation. See id. Some
concomitant depletion of preciously scarce surface waters, these artificial monopolized markets also trigger a commensurate degradation of water quality.\textsuperscript{372} One commentator has called their tribal water brokering arrangements a “mortgage on Western development.”\textsuperscript{373} If tribes seek money through water brokering, they likely would receive greater payment through a beach of fiduciary duty action seeking compensation for the full measure of the PIA standard, as opposed to a reduced quantum of wet water under a negotiated settlement.\textsuperscript{374} To win the right to sell water to competing economies, tribes sell their rights short of their market value and the quantum allowed under Supreme Court precedent.\textsuperscript{375} Moreover, tribes could colorably demand punitive damages, and payment of accrued interest and a century of lost wages—all of which might boost the sum compensation far higher than payments received for water brokering.\textsuperscript{376} Tribes are negotiating against themselves by involving “middle men,” in the form of junior appropriators to whom they plan to simply sell the water back.\textsuperscript{377} Tribes should leverage both their senior right and the legacy of woeful governmental neglect, by seeking direct payment from the deeper pockets of the federal fiduciary.\textsuperscript{378}

In \textit{Shoshone}, the Supreme Court held that the federal fiduciary may not permissibly “give to others or appropriate to its own use” any tribal land or natural resource without paying just compensation.\textsuperscript{379} Following this settled law, and despite a majority opinion that offered dicta in support of dismantling the fiduciary standard, Justice Brennan in an artful concurrence, acknowledged that the government had appropriated so much water for the sole benefit of non-Indians that too little wet water remained in the dry West to settle Indian senior claims.\textsuperscript{380} To combat this injustice, he declared that the past century of federal water policy amounted to a compensable breach of duty, and concluded that the law demanded “that those whose rights are appropriated for the benefit of others receive appropriate compensation.”\textsuperscript{381}

Following this line of cases, in 1996 a class of 300,000 individual Indian beneficiaries sued the federal government for breach of fiduciary duty over the gross mismanagement of personal accounts held in trust by the Bureau of Indian Affairs and U.S. Department of Treasury.\textsuperscript{382} Most of the plaintiffs owned allotted land, and received payments under the government’s Individual Indian Money trust accounting program.\textsuperscript{383} The Departments of Interior and Treasury are unable to

\textsuperscript{372} See Brienza, supra note 370, at 160.
\textsuperscript{373} Id.
\textsuperscript{374} See Brienza, supra note 370, at 192.
\textsuperscript{375} Id.
\textsuperscript{376} See Anderson, supra note 47, at 431.
\textsuperscript{377} See id.
\textsuperscript{378} See infra notes 378–410, and accompanying text.
\textsuperscript{379} 304 U.S. at 116.
\textsuperscript{380} See \textit{Nevada}, 463 U.S. at 145–46 (Brennan, J., concurring).
\textsuperscript{381} Id.
\textsuperscript{383} Id.
account for hundreds of millions of dollars owed to individual Indian beneficiaries. In fact, former Interior Secretary Bruce Babbitt testified that the government was so grossly derelict in its responsibilities that it could not render any accounting at all for most of the 300,000 beneficiaries, yet alone an accurate one. In 1999, Judge Royce Lamberth of the U.S. District Court for the District of Columbia held that the government breached its solemn fiduciary duty, stressing “[i]f courts were permitted to indulge their sympathies, a case better calculated to excite them could scarcely be imagined. ... [t]he beneficiaries of this trust did not voluntarily choose to have their lands taken from them; they did not willingly relinquish pervasive control of their money to the United States.”

In affirming Judge Lamberth’s finding of breach, the United States Court of Appeals for the District of Columbia Circuit cited Mitchell II for the proposition that the United States must abide by exacting fiduciary standards in the management of all Indian assets, whether money, land or natural resources. The court stressed that the Supreme Court has long recognized the “right of Native Americans to seek relief for breaches of fiduciary obligations, including suits for monetary damages,” and that courts may exercise their broad equitable powers to fashion monetary and injunctive relief.

On remand, Judge Lamberth assumed continuing jurisdiction over the case and appointed a court monitor to review the trust reforms ordered by his injunction. Finding that the government continually defied the court with “recalcitrance,” Judge Lamberth, rather extraordinarily, held Interior Secretaries Bruce Babbitt and Gale Norton, Treasury Secretary Robert Rubin, and other officials in civil contempt at various stages of the litigation. Judge Lamberth fined the government $625,000 and in his contempt order, lambasted the Department of Interior as “truly an embarrassment to the federal government in general and the executive branch in particular. ... [t]he 300,000 individual Indian beneficiaries deserve a better trustee-delegate than the Secretary of Interior.”

Unfortunately, in 2006, the D.C. Circuit reassigned the case from Judge Lamberth, finding that he had lost his objectivity, particularly for his statement that the Department of Interior

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384 Id.
385 Id. (citing Cherokee Nation, 30 U.S. at 1).
386 Id. at 1098 (citing 463 U.S. at 225, RESTATEMENT (SECOND) OF TRUSTS § 2, cmt. 2).
387 See Cobell v. Norton, 240 F.3d at 1108 (citing Mitchell II, 463 U.S. at 227; Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 749 (D.C.Cir.1995)).
388 Id. at 1110.
389 Id. Remarkably, the judge, also invited Interior Secretary Gale Norton and other staffers to “leave the Department forthwith” if they “feel as a result of the Court’s ruling they are unable or unwilling to perform their duties to the best of their ability.” Id. Unfortunately, the Court of Appeals reversed the contempt order as to Secretary Norton and Assistant Secretary Neil McCaleb. Id.
was the government’s "the last pathetic outpost of the indifference and anglocentrism we thought we had left behind."  

In 2009, the administration of President Barack Obama settled the 14-year lawsuit, now *Cobell v. Salazar*. Interior Secretary Ken Salazar and Treasury Secretary Timothy Geithner agreed to create and manage a massive a $1.4 billion trust settlement fund and a $2 billion fund for repurchase of Indian lands alienated under the Allotment Act. The settlement also endows an Indian Education Scholarship fund of $60 million to improve access to higher education for Indians. The more than $3.4 billion settlement is thought to be one of the largest class action awards in U.S. history. In the waning days of the 211th Congress, both chambers approved the $3.4 billion appropriation, and President Obama signed the settlement into law on December 8, 2010. 

The *Cobell* litigation should serve as a template for a tribal class action on a theory that the federal government is liable for breach of fiduciary for its neglect of Indian Winters rights. Plainly, a cognizable breach has arisen from the similarly abject federal mismanagement of Indian reserved water rights. The breach claim is emboldened by the D.C. Circuit’s resounding affirmation of the government’s exacting fiduciary standard in managing tribal assets in *Cobell*, including water rights. Indeed, the government itself acknowledges that it acts as fiduciary over Winters claims, yet the same Department of Interior so thoroughly tarnished in the *Cobell* litigation pursued a relentless century-long policy of appropriating nearly all available western surface waters for the benefit of non-Indians. Justice Brennan in *Nevada* and the D.C. Circuit in *Pyramid Lake*, have already found, in persuasive precedent, that the government breaches its duty as trustee when it appropriates tribal water to junior users. It is hard to envision a clearer conflict of interest. In notable respects, the sad legacy of the federal fire sale of Indian water mirrors the claims stated in *Cobell*—the federal government never attempted to quantify or render any accounting of senior Winters rights when spending untold billions on colossal water projects in the shadows of neglected reservations and the Department of Interior never adopted any water management policies even taking

392 *See* Cobell v. Kempthorne, 455 F.3d 317, 335 (D.C. Cir. 2006).
394 *Id.*
395 *Id.*
396 *See* Nevada, 463 U.S. at 145–46 (Brennan, J., concurring); *Cobell v. Norton*, 240 F.3d at 1108.
397 *See* Nevada, 463 U.S. at 145–46 (Brennan, J., concurring); *Cobell v. Norton*, 240 F.3d at 1108.
398 *Id.* at 1098 (quoting United States v. Cherokee Nation of Okla., 480 U.S. 700, 707 (1987). ("The law is ‘well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity.’").
399 See Federal Settlement Criteria, 55 Fed. Reg. at 9223; (acknowledging federal trustee status over vested Winters rights). WATER COMM’N REPORT, supra note 68, at 474–75 ("In the history of the United States Government’s treatment of Indian Tribes, its failure to protect water rights for use on the Reservations it set aside for them is one of the sorrier chapters.").
400 *See* 463 U.S. at 145–46 (Brennan, J., concurring); 354 F.Supp. at 256–57.
401 *See* Nevada, 463 U.S. at 145–46 (Brennan, J., concurring); *Pyramid Lake*, 354 F.Supp. at 256–57.
cognizance of Indian rights. Most importantly, rarely, if ever, did the Department of Interior meet the exacting fiduciary standard of protecting and preserving the senior Indian rights; instead it enacted a policy of squandering available supplies of water on reclamation and rapacious urban development of the West.

There are indeed risks to the strategy of a tribal class action. It remains unlikely that tribes with inchoate Winters rights would receive the full market value to retire claims to the water, but by the same token, a breach suit—particularly a potent class action—would present a better probability of receiving the highest measure of compensation compared to litigation in hostile state forum or reserved rights settlements that merely “launder” water to competing municipal economies and industries. Moreover, as in Cobell, any settlement or judicial award of compensatory damages is contingent on ratification (and ultimate disbursement) from Congress. There is a realistic possibility that Congress, with its plenary authority, could vindictively dissolve the Indian trust relationship with plaintiff tribes, or simply refuse to pay. This threat of treaty abrogation and dissolution of the trust relationship stands as an ever-present and ominous threat, which underscores the importance of the class action modeled on Cobell. While the plaintiffs in Cobell were individual beneficiaries, the litigants in a water rights lawsuit would be tribes qua tribes. To employ a tired cliché, a “strength in numbers” approach that could repel a vindictive response from Congress. Moreover, Congress and the relevant executive branch agencies are highly protective of the powerful political constituencies that appropriate water in the West. A lump-sum settlement to retire senior Indian rights would resolve the century of uncertainty created by Winters and remove the “cloud” of senior Indian rights over the junior appropriators. This could be a potent incentive for Congress to approve a settlement or leave a judicial award of damages undisturbed. If the payment is just and full, this could represent a “win-win” for tribes and the non-Indian political class in the West. Lastly, direct compensation—as opposed to diversion for highly consumptive agricultural uses on-reservation or off-reservation brokering under negotiated settlements—is the only option that protects the environment from further water quality degradation and over-appropriation in a region rapidly pumping past its carrying capacity of water.

CONCLUSION

403 See 240 F.3d at 1098; WATER COMM’N REPORT, supra note 68, at 474–75.
404 See Nevada, 463 U.S. at 145–46 (Brennan, J., concurring); Pyramid Lake, 354 F.Supp. at 256–57; WATER COMM’N REPORT, supra note 68, at 474–75.
405 Big Horn I, 753 P.2d at 97, 99; Brienza, supra note 370, at 192 (noting that negotiated settlements rarely confer the full measure of tribal water theoretically available under the PIA standard); Getches, supra note 58, at 520–21 (“Unfortunately, litigation over Indian rights has proved to be a circuitous and hazard-strewn route to those ends. . .”).
407 See Lone Wolf, 187 U.S. at 566 (recognizing plenary authority of Congress to abrogate treaties and dissolve the trust relationship with tribes).
408 See 240 F.3d at 1097–98.
409 See id.
410 See WATER COMM’N REPORT, supra note 68, at 474–75.
The Interior West is at a tipping point. Rapacious urban development continues to drain the region’s precarious surface and groundwater supplies beyond the carrying capacity. At the same time, the agrarian beneficiaries of a relentless federal reclamation campaign advance this unsustainable depletion with massively consumptive irrigation efforts and residential construction. Despite decade-after-decade of neglect of Indian senior water rights, now, as the pace of development and the available water supply reach dangerous imbalance, these Winters rights are in their greatest jeopardy. State courts have proven hostile to senior Indian water claims in an effort to shield powerful non-Indian appropriators from displacement, while the Supreme Court diluted the quantity of the Winters right in imposing the PIA standard. In fact, had Justice O’Connor not recused herself at the eleventh hour, the Court was poised to abolish even that restrictive metric, and divest Indian tribes of the senior character of their right in favor of a “sensitivity analysis” on junior appropriators. Other courts refuse to recognize “secondary uses,” beyond agriculture for Indian water, or limit the quantity of the right under a “moderate livelihood” standard.

In order to avoid the pitfalls and costs of litigation, Indian tribes have increasingly settled their Winters claims through negotiation with states, municipalities and other stakeholders. The benefits of these negotiations have proven illusory. While tribes win “wet water,” they are often shortchanged, and bound by exclusive marketing agreements where they agree to sell water to competing municipal economies off-reservation. The linchpin of most negotiated settlements is federal investment in otherwise politically unpalatable water delivery projects, so not to upset junior appropriators. As tribes sell large quantities of this water to cities, developers and industries, these settlements often just memorialize “water laundering” arrangements. As cities piggyback onto Indian water rights, the West continues its march to quantitative shortfall and qualitative degradation.

Negotiated settlements are bad public and environmental policy. Capitalizing off the relative success of the recent Cobell class action litigation, tribes that have not waived their Winters claims in unwise settlements should sue the federal government for breach of fiduciary duty. For years, several courts have remarked that the past century of federal water policy in the West is a manifest breach of trust. A class action approach would minimize the risks, and maximize the likelihood that, finally, Indian tribes receive fair compensation for decades of breached promises and sad neglect.