THE FUTURE OF QUANTIFYING TRIBAL WATER RIGHTS IN NORTH DAKOTA

"When we talk about water, we call it mni wiconi, and that means water is life."[1]

I. INTRODUCTION

While there is no doubt that water is a cornerstone of life,[2] water to many North Dakotans has often been both a blessing and a curse.[3] From floods, droughts, and the failure of municipal water systems, to arguments both for and against the diversion of water from some of the state's major bodies, North Dakota is not a stranger to water conflict.[4]

The disputes have involved the Devils Lake outlet,[5] proposals to divert water from the Missouri River to supply the Red River Valley,[6] and addressing issues of water shortage in the western part of the state.[7] The debates have occurred between neighbors,[8] between North Dakota and

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1. *Hearing on H B. 1025 Before the H. Comm. on the Judiciary*, 2007 Leg., 60th Sess. 20 (N.D. 2007) [hereinafter *Hearing on H.B. 1025*] (statement of Jessie Taken Alive, Standing Rock Sioux Reservation). "Mni wiconi" derives from the Dakota, Lakota, Nakota Sioux language. *Id.*

2. *See* DAVID H. GETCHES, WATER LAW IN A NUTSHELL 6 (3d ed. 1997) ("Water is necessary to survival.").

3. *See, e.g.*, *Water Supply Issues in the Arid West: Hearing Before the Comm. on Energy and Natural Res.*, 108th Cong. 51-52 (2004) [hereinafter *Hearing on Water Supply Issues in the Arid West*] (statement of Tex Hall, President of Nat'l Cong. of Am. Indians and Chairman of Mandan, Hidatsa and Arikara Nation) (detailing the effects of a drought in western North Dakota during flooding in eastern North Dakota).

4. *See id.* (stating droughts in the western part of North Dakota were having a drastic effect, with one result being that the communities of Parshall and Garrison, North Dakota experienced emergencies due to municipal water shortages).

5. *See* People to Save the Sheyenne River, Inc. v. N.D. Dep't of Health, 2005 ND 104, ¶ 2-7, 697 N.W.2d 319, 323 (holding that the Devils Lake outlet project could continue to divert water into the Sheyenne River). In *Sheyenne River*, two citizen groups teamed with the Canadian Government and opposed a permit granted to the North Dakota Water Commission to divert water from Devils Lake into the Sheyenne River. *Id.* ¶ 1. The groups had concerns regarding the spread of pollution and invasive species and potential flooding to land near the Sheyenne River. *Id.* ¶ 6-7, 697 N.W.2d at 324.

6. *See* N.D. CENT. CODE § 61-24.7(01)-(05) (2007) (appropriating funds for the Red River Valley Water Supply Project); Dakota Water Resources Act of 1999, H.R. 106-203, 106th Cong. (1999) (providing for the study of possible alternatives to supply the Red River Valley with water, one of which was diverting water from the Missouri River in North Dakota).

7. *See Hearing on Water Supply Issues in the Arid West*, *supra* note 3, at 51-52 (detailing the effects of the drought and mismanagement of the Missouri river resulting in water shortages).

8. Graber v. Logan County Water Res. Bd., 1999 ND 168, ¶ 2, 598 N.W.2d 846, 847. *Graber* involved a request for an injunction to stop a neighbor from using a drainage ditch and other water diversion methods that were forcing water onto adjacent land causing flooding and transfer of livestock pollution into nearby waters. *Id.* ¶ 2-3.

Canada,[9] and between North Dakota and other states downstream on the Missouri River.[10] With all of this discussion about water, to whom it belongs, and where it should and should not go, one important party has continually been missing.[11] Collectively this party has a right that arguably will outweigh all others in the state in priority, volume, and consequences,[12] but has seen little or no water or recognition of water rights.[13] Over the decades, it has been the Indian tribes[14] that have not been involved in deciding how state water should be used, despite the likelihood that a large volume of that water belongs to them.[15]

To tribes, water cannot be owned.[16] It is sacred and a part of tribal culture, custom, and ceremonies.[17] Water is viewed as a living being not

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9. *See supra* note 5 and accompanying text (discussing the lawsuit commenced by Canada and other related parties regarding the Devils Lake outlet).

10. *See, e.g.*, E.T.S.I. Pipeline Project v. Missouri, 484 U.S. 495, 495-96 (1988) (stating that the dispute is between the upper basin states on the Missouri River and the lower basin state of Missouri).

11. *See* Elizabeth Checchio & Bonnie G. Colby, *The Context for Indian Water Settlements*, *in* WATER LAW TRENDS, POLICIES, AND PRACTICE 179, 179 (Kathleen Marion Carr & James D. Crammond eds., 1995) ("Indian tribes control large amounts of land in many western states and vast entitlements to western water resources.").

12. COMPTROLLER GENERAL'S REPORT TO THE CONGRESS, RESERVED WATER RIGHTS FOR FEDERAL AND INDIAN RESERVATIONS: A GROWING CONTROVERSY IN NEED OF RESOLUTION 18 (1978) [hereinafter COMPTROLLER GENERAL'S REPORT]. Significant water will be required for many reservations to satisfy their purposes. *Id.* Additionally, many western states have over-appropriated water sources to non-Indian users which, consequently, may lose their rights when Indian tribes begin to exercise the rights delineated by the federal government. Susan M. Williams, *Panel III: Missouri River Dialogue: Tribal and Conservationist Perspectives*, 7 GREAT PLAINS NAT. RESOURCES J. 35, 37 (2002).

13. *See Hearing on Water Supply Issues in the Arid West*, *supra* note 3, at 54 (statement of Tex Hall, President of Nat'l Cong. of Am. Indians and Chairman of Mandan, Hidatsa and Arikara Nation) ("Despite historical and legal rights to the water, Missouri River Basin tribes have been excluded from the benefits of the Missouri River water resources and its tributaries.").

14. KENNETH BOBROFF ET AL., COHEN'S HANDBOOK ON FEDERAL INDIAN LAW 135 (Robert T. Anderson et al. eds., 2005). The federal government, courts, and commentators consistently use the terms "Indian tribe" and "Indian" in the field of water law. *Id.* "For federal purposes, the term 'Indian Tribe' or 'Indian nation' refer[s] to an indigenous North American group with which the United States has developed a legal relationship." *Id.* "Tribe" is the term often used to describe indigenous entities that are political entities for the purpose of negotiated treaties. *Id.* In this note, water rights belonging to American Indians will be referred to as "tribal water rights" because those rights flow out of the creation of reservations by treaty. *See* Winters v. United States, 207 U.S. 564, 577-78 (1908) (stating that water rights were created when tribes signed treaties relinquishing land in return for small, reservation land and federal monies). Whenever referring to indigenous people, the term American Indian will be used. *See, e.g.*, LLOYD BURTON, AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF LAW 4 (1991) (using the term "American Indian"). "American Indian" is preferred because this term is the choice among indigenous people for the fact it is more accurate than the term "Native American." *Id.* "Native American" suggests a similar experience for all tribes, which historically was not the case. *Id.*

15. *See* COMPTROLLER GENERAL'S REPORT, *supra* note 12, at 18 (stating that tribes are suspected to hold water rights to a significant amount of water).

16. Williams, *supra* note 12, at 36.

17. *Id.*

subject to ownership or control.[18] To states, however, water is public property to which rights of ownership exist.[19]

In western states, rights to water are determined by the prior appropriation doctrine.[20] Although this doctrine may vary slightly in implementation from state to state, it provides that the first party to divert water and put it to a beneficial use holds a water right.[21] The water rights holder that diverts water first will hold the superior right and any subsequent parties diverting water will have a water right that is junior to the first party diverting.[22]

Water rights fall under the jurisdiction of the states.[23] Typically, the perfection of a water right will include filing for a permit along with diverting the water for a beneficial use.[24] Permits are granted by a water commission or department that is given the duty to handle water administration.[25] In North Dakota, the North Dakota Water Commission administers water rights.[26]

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18. *Id*.

19. *Id*.

20. GETCHES, *supra* note 2, at 6. The prior appropriation doctrine reserves water rights to the first person to put the water to a beneficial use. *Id*. This doctrine is used in the western part of the United States where water is scarcer. *Id*.; ALASKA STAT. § 46.15.050(a) (2008); ARIZ. REV. STAT. ANN. § 45-151E (2006); COLO. REV. STAT. § 37-92.301(3) (2007); IDAHO CODE ANN. § 42-106 (2007); KAN. STAT. ANN. § 82a-717a (2006); MONT CODE ANN. § 85-2-401 (2007); NEV. REV. STAT. § 533.040(2) (2007); N.D. CENT. CODE § 61-04-06.3 (2007); OR. REV. STAT. § 537.120 (2007); WYO. STAT. ANN. § 41-4-317 (2007). Although jurisdictions vary slightly, all have some variation of three basic elements to establish appropriation. GETCHES, *supra* note 2, at 88. "[G]enerally water must be *diverted* with an *intent* to appropriate it for a *beneficial use*." *Id*. The individual who first puts that water to beneficial use holds water rights superior to anyone who later makes beneficial use of water from the same source. *Id*. at 101. Once putting the water to beneficial use, the "first in time, first in right" individual must follow any requirements in state law necessary to reserve the water and to perfect their right. *Id*. at 6. Typically, states require rights holders to file a permit with the state detailing their use and the priority date. *Id*. at 89. North Dakota determines water rights through the prior appropriation doctrine. N.D. CENT. CODE § 61-04-06.3. Under North Dakota law, the priority date is determined to be the date on which a permit is filed. *Id*. § 61-04-02. After obtaining a water right, that right is valid for as long as the right holder puts that water to a beneficial use. GETCHES, *supra* note 2, at 6.

21. GETCHES, *supra* note 2, at 88. Anyone who first puts water to a beneficial use has superiority to a party that next puts water from the same body to use. *Id*. at 6. In prior appropriation states, water rights depend on water usage rather than where one lives. *Id*. at 4. In riparian states, water rights are granted to those with land adjacent to water bodies, meaning that location, rather than use, is the focus. *Id*. at 3, 6. The riparian doctrine is commonly used in eastern states and delineates water rights to landowners who border bodies of water or waterways. *Id*. at 3.

22. *Id*. at 6.

23. *See, e.g.*, N.D. CENT. CODE § 61-02-01.1 (creating the North Dakota Water Commission to develop and manage water in the state); S.D. CODIFIED LAWS § 1-40-11 (2007) (creating the Department of Environmental and Natural Resources to regulate water in the state of South Dakota).

24. *See, e.g.*, N.D. CENT. CODE § 61-02-03 (stating that to perfect a water right, individuals must apply for a permit with the state and have that permit granted).

25. *Id*. § 61-02-01.1.

26. *Id*. § 61-02-14.

However, Indian tribes' right to water is different because it arises out of federal rather than state law.[27] Federal law provides that when the government reserved land for Indian reservations, the government also reserved enough water for the present and future needs of the tribe.[28] Since the recognition of Indian water rights by the United States Supreme Court, a cloud of confusion has surrounded the laws regarding those rights.[29] The United States Supreme Court has done little to clarify key issues such as the quantity of water to which tribes are entitled, the means to arrive at that quantity, and the logistics of how water will be managed between the state and tribal governments.[30]

Little predictability exists in the area of Indian water rights for several reasons.[31] First, the complicated relationship between a tribe's reserved water rights and state water laws, along with a lack of guidance from the United States Supreme Court, has led to the creation of court made systems as diverse as the states.[32] Further, a long history of conflict between tribes and state and federal governments has added a political element to these

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27. *Hearing on Water Supply Issues in the Arid West*, *supra* note 3, at 54.

28. Winters v. United States, 207 U.S. 564, 577 (1908).

29. *See* Checchio & Colby, *supra* note 11, at 183 (stating that the blending of multiple legal principles has caused diverse interpretations in state courts leading to confusion regarding tribal water rights).

30. *See generally* Gina McGovern, *Settlement or Adjudication: Resolving Indian Reserved Rights*, 36 ARIZ. L. REV. 195, 195 (1994) (discussing the complex history that led to the current complexities of tribal water rights); *see also* Col. River Water Conservation Dist. v. United States, 424 U.S. 800, 811 (1971) (providing that state courts can hear tribal water adjudications even though the right is a federally created right); Arizona v. California, 373 U.S. 546, 600 (1963) (stating that the purpose of the tribe is agriculture and that a quantified water right will be determined by computing the acreage of the reservation that can be practically irrigated); *Winters*, 207 U.S. at 576-78 (holding that when land was set aside for reservations, a right to water to support that land was also reserved); *In re* Gen. Adjudication of all Rights to Use of Water in the Gila River Sys. & Source, 35 P.3d 68, 74 (Ariz. 2001) (holding that the purpose of a reservation was not agriculture, but to provide a homeland to tribes).

31. *See* Grover et al., *Tribal—State Dispute Resolution: Recent Attempts*, 36 S.D. L. REV. 277, 277 (1991) (describing the relationship between federal, state, and tribal governments to be "adversarial" and "discouraging" leading to a "[deepened] mutual dislike and mistrust"). The adversarial relationship often mentioned in discussions of quantification of tribal water rights began with decades of Indian water rights being ignored by state and federal governments. Susan Brienza, *Wet Water vs. Paper Rights: Indian and Non-Indian Negotiated Settlements and Their Effects*, 11 STAN. ENVTL. L.J. 151, 157 (1992). The federal government continued to develop water projects in the West that created a long list of users that now are staking claims to the water that likely belongs to tribes. *Id.* States are challenged with balancing the opposing interests where, on one hand, current rights holders are faced with losing water they have relied upon for years and, on the other hand, tribes are demanding recognition of their longstanding federal right. *Id.* at 158. It seems that appropriating a great deal of water that likely belongs to Indian tribes has put the states in a compromising position. *Id.* Many tribes believe that this will lead to windfalls for their tribe. *Id.* State courts are faced with a decision between honoring the right granted under *Winters* and compromising federal, state, and local developments that have been ignoring tribal rights for years. *Id.* at 160.

32. Brienza, *supra* note 31, at 164-66.

decisions, meaning that the nature of relationships between the tribe and state has contributed to the diversity in results regarding tribal water rights.[33] Both the political relationships and spiritual connection to the water are as important in this discussion as are the tribes and their needs.[34]

Among the parties involved in this process are the Indian tribes of North Dakota.[35] The state is home to four federally recognized Indian tribes: Spirit Lake Tribe, Standing Rock Sioux Tribe (Standing Rock), Three Affiliated Tribes of the Fort Berthold Reservation (Fort Berthold), and Turtle Mountain Band of Chippewa Indians (Turtle Mountain).[36] Each of these tribes holds a right to water in the state that has yet to be exercised or recognized; therefore, the result has been that no delivery of actual "wet" water to the tribe has occurred.[37] In North Dakota, like many other states across the western United States, it is likely that tribal water rights will be asserted in the near future.[38] North Dakota leaders have found themselves where many leaders of other states have been before them—staring in the face of one of the most "major resource challenges facing the American West."[39]

To understand the questions North Dakota tribal and state leaders will encounter in determining the actual quantity tribes are entitled to, it is first important to understand quantification.[40] Part II of this note explains tribal water rights including a look at the complex historical and judicial

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33. *Id*. at 161.

34. *Id*. at 176.

35. *See* GETCHES, *supra* note 2, at 330 (noting that adjudication and quantification of tribal water rights occurs between the state, Indian tribes, and the federal government).

36. Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs: Notice, 72 Fed. Reg. 13648-652 (Mar. 22, 2007).

37. *See Hearing on S B. 2115*, 2005 Leg., 59th Sess. 1-2 (N.D. 2005) (statement of Dave Ripley, Director of Water Appropriations Division, North Dakota Water Commission) ("[C]urrent state law does not contain a procedure allowing the state to negotiate with tribes or the federal government to quantify reserved water rights."). This note refers to the concept of "paper water" and "wet water" that are used throughout writings regarding the quantification of tribal water rights. DANIEL MCCOOL, NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA 101 (2002). "Paper water" refers to the *Winters* rights held by Indians that exist only on paper and, without quantification, will result in no actual "wet" water. *Id*.

38. *See June 6, 2006, Minutes of Interim Comm. on Agriculture and Natural Res*., 2005 Leg., 59th Interim Sess. 6 (N.D. 2005) [hereinafter *June 6, 2006, Minutes*] (statement of Tom Davis, Water Resource Director, Turtle Mountain Band of Chippewa Indians) (stating that unless the state takes action towards quantification, the Turtle Mountain Band of Chippewa Indians will pursue quantification by commencing a lawsuit).

39. Checchio & Colby, *supra* note 11, at 179; *see also Hearing on H B. 1025, supra* note 1, at 1 (statement of Chet Pollert, Member, N.D. House of Representatives) (noting that the Turtle Mountain Band of Chippewa Indians would like to assert tribal water rights and quantify those rights).

40. *See* discussion *infra* Part II (discussing the historical background of Indian water rights, the process of quantification through negotiation, and the benefits and risks of quantification).

development of this area of law, the process of quantifying the right, and the positive and negative aspects of quantification for states and tribes.[41] Part III examines the attempts of the North Dakota Legislature to create legislation that will guide negotiations between the state and tribes to quantify tribal water rights.[42] Further, Part III addresses Montana's method of quantification as a model for creating legislation in North Dakota by examining the historical development of that system and the creation of a commission to negotiate tribal water rights.[43] Finally, Part III considers whether the Montana model can be effective in North Dakota.[44] In conclusion, Part IV focuses on the future of the quantification of tribal water rights in North Dakota.[45]

II. WHAT IS QUANTIFICATION?

Quantification is a process whereby a fixed amount of water is assigned to a holder of a water right.[46] For the purpose of quantification, water is generally measured in acre-feet.[47] The quantification of water rights usually takes place in a process called general stream adjudications, or a determination of all rights to one source of water whether a lake, river, or underground aquifer.[48] Quantification is triggered by one party asserting a water right.[49] When that right is asserted, the court or other regulatory body orders an examination of all other rights on that body of water.[50] In order to quantify one holder's right, all other rights must also be quantified.[51]

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41. *Id*.

42. *See* discussion *infra* Part III.A (examining Senate Bill 2115 and House Bill 1025, previous attempts by the North Dakota Legislature to create a statutory guideline for quantification).

43. *See* discussion *infra* Part III.B (considering the Montana method of negotiation).

44. *See* discussion *infra* Part III.C (examining the benefits and risks to using the Montana model of quantification in North Dakota).

45. *See* discussion *infra* Part IV (discussing the future of tribal water rights and quantification in the state of North Dakota).

46. GETCHES, *supra* note 2, at 330-44.

47. GERALD L. WESTESEN & MICHELLE BRYAN, WADING INTO MONTANA WATER RIGHTS 11 (1997), *available at* http://water.montana.edu/topics/policy/manuals/rights.pdf. One acre-foot is equal to 325,851 cubic feet. *Id*.

48. McGovern, *supra* note 30, at 195. Courts are charged with presiding over general stream adjudications. *Id*. at 197. Historically, general stream adjudications were the only way tribal water rights were quantified; however, today tribal water rights are often quantified through negotiation. *Id*.

49. *See id*. (indicating that water rights are settled in general stream adjudications whereby states come up with a "hydrologically sound method of quantification" upon the assertion of the tribes' water rights). *But see* MONT. CONST. art. IX, § 3 (mandating quantification of all federal water rights in the state, therefore making Montana different in the way that the state government requires quantification and it is not started by a party asserting a right).

50. *See* Dana Smith, *Doctrinal Anachronism?: Revisiting the Practicably Irrigable Acreage Standard in Light of International Law for the Rights of Indigenous Peoples*, 22 ARIZ. J. INT'L &

General stream adjudications often involve the quantification of both federal and state water rights.[52] Water rights held under federal law are called federal reserved water rights because those rights arise from the federal government setting aside land for a federal purpose.[53] Lands set aside for Indian tribes as reservations are entitled to enough water to fulfill the purpose of that land, as are lands set aside for other federal reserves including national parks, monuments, and preserves.[54] However, quantifying federal reserved water rights is more difficult than state rights because courts or decision makers must decide what amount of water will fulfill the current and future needs of the reserved land.[55] Tribal water rights are often even more difficult to determine because of the nature of the relationship between the federal government and federally recognized Indian tribes and the complex and continuing development of tribal water law.[56] To better understand the path that led to the complexities in this area of law, an ination of the historical background of tribal water rights is necessary.[57]

A. HISTORICAL BACKGROUND

It would be impossible to understand the concept of tribal reserved water rights without first understanding the historical and judicial occurrences that developed and confused this area of law.[58] In the 1800s, the

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COMP. 691, 701 (2005) (stating that the United States can only be named a party to a comprehensive proceeding—one including all of the parties necessary to a controversy).

51. *Id*.

52. McGovern, *supra* note 30, at 195. Most water rights are state rights, with the exception of federal reserved water rights. NATHAN BROOKS, INDIAN RESERVED WATER RIGHTS: AN OVERVIEW 2 (2005) (Cong. Res. Service Rep. For Cong.). Federal reserved water rights are held by tribes and other federal entities. *Id*.

53. BROOKS, *supra* note 52, at 2 (citing Cappaert v. United States, 426 U.S. 128, 138 (1976)).

54. *Id*. For the purpose of distinguishing the federal reserved water rights of tribes and non-tribal reserves, water rights belonging to American Indians will be referred to as "tribal water rights." *See supra* note 14 and accompanying text (explaining the use of the term "tribal water rights").

55. *See* Arizona v. California, 373 U.S. 546, 600 (1963) (recommending the practicably irrigable acre as a standard to determine quantified tribal water rights), *overruled on other grounds by* Arizona v. California, 376 U.S. 340 (1964), *amended by* 383 U.S. 268 (1966); Winters v. United States, 207 U.S. 564, 577-78 (1908) (holding that tribes are entitled to enough water to fulfill the purpose of the reservation). "Decision makers" refers to the notion that in a negotiation, the individuals determining a quantified amount of water to fulfill present and future needs will be state and tribal officials rather than judges or courts. BROOKS, *supra* note 52, at 14.

56. Checchio & Colby, *supra* note 11, at 183.

57. *See* discussion *infra* Part II.A (delineating the historical background, including *Winters v. United States* and *Arizona v. California*, that contributed to the complexity of in this area of law).

58. *See* Jessica Bacal, *The Shadow of Lone Wolf: Native Americans Confront Risks of Quantification of Their Reserved Water Rights*, 12 U. BRIDGEPORT L. REV. 1, 7 (1991) (stating that an understanding of the historical development of the quantification of tribal water rights is necessary to understand the concept).

federal government and many Indian tribes signed treaties providing that the tribes would surrender most of the land under tribal control in exchange for smaller parcels of land called reservations.[59] Many of the tribes believed that these treaties would preserve tribal rights on the reservations, unless expressly excluded in the agreements.[60] Among the rights believed to be preserved were the rights to natural resources, namely water, within and adjacent to the newly reserved lands.[61] However, years later, disputes would arise regarding whether the tribes abandoned the right to water by not specifically reserving water in the treaties formulated between the tribal and federal governments.[62]

Although tribal water rights arose out of the treaties of the 1800s, *Winters v. United States*[63] was the first formal recognition of those rights.[64] The significance of this case led to tribal water rights often being referred to as "*Winters* rights."[65] In this 1908 landmark decision, the Supreme Court created the reserved water rights doctrine, holding that when Congress set aside land for a reservation, it also impliedly reserved water to help transform the tribe into a "pastoral and civilized people."[66] The dispute in *Winters* arose over diversions being made from the Milk River by non-Indian users, causing insufficient water for a tribal irrigation project.[67] The non-Indian users argued that the waters in dispute had been given up along with land in the treaty, and that subsequently, the non-Indian users' right to

59. Act of May 1, 1888, ch. 213, 25 Stat. 113 (1888). *See* Checchio & Colby, *supra* note 11, at 182 (stating that after the Act of May 1, 1888, tribes began surrendering land through treaties in return for reserved land).

60. BOBROFF ET AL., *supra* note 14, at 1183.

61. Checchio & Colby, *supra* note 11, at 182.

62. *See* Winters v. United States, 207 U.S. 564, 576 (1908) (arguing against the tribe by saying that the land formerly under their control was exchanged for arid land and that the tribes knowingly did not reserve water to irrigate the land or preserve hunting, agriculture, or civilization).

63. 207 U.S. 564 (1908).

64. *See Winters*, 207 U.S. at 577 (holding that when the United States government set aside land for reservations, water was also set aside to support those reservations).

65. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 431 (4th ed. 2004).

66. *Winters*, 207 U.S. at 576. The disagreement in the *Winters* decision arose out of treaties between the federal government reserving land that became known as the Fort Belknap Reservation (Ft. Belknap). *Id.* at 567. The federal government argued that, because the Indians of Ft. Belknap did not reserve water from the Milk River, in the treaty in question, along with the land, no right to the water existed. *Id.* at 566. The Court, viewing the interpretation of the agreement and resolving all ambiguities in favor of the American Indians as required by law, resolved that a reservation of water was implicit in the federal government's land reserve. *Id.* at 576. This quantity of water was defined as water adequate to fulfill the purpose of the reservation of the land, "to change [the] habits [of the Indians] to become a pastoral and civilized people." *Id.*

67. *Id.* at 566-67.

water could only be perfected under the state prior appropriation doctrine.[68] The Court disagreed, stating:

> The Indians had command of the lands and the waters,—command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? . . . If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the [g]overnment or deceived by its negotiators.[69]

The Court further stated that for the purpose of prior appropriation, the priority date of *Winters* rights was the same as the date the reservation was established, meaning the reservation's water rights would predate nearly all other water rights.[70] Further, because the water rights recognized in *Winters* were not created under state law, the requirement of continued beneficial use was not applicable.[71] In short, under *Winters*, tribes owned a water right senior to all other rights that entitled tribes to enough water for present and future use.[72] No continued beneficial use is required to maintain that right.[73]

While the *Winters* decision changed the face of tribal water rights and the rights of current appropriators under state law, the actual implications of the *Winters* holding did not surface until decades later.[74] The United States sought litigation in federal court as a trustee for the tribes only in a few cases.[75] The result of those suits ended in shortfalls for the tribes.[76] The

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68. *Id*. at 567. *See supra* text accompanying note 20 (explaining the prior appropriation doctrine).

69. *Winters*, 207 U.S. at 576 (quoting Act of May, 1888, ch. 213, 25 Stat. 113 (1888)).

70. *Id*. at 577; *see* Checchio & Colby, *supra* note 11, at 182 (stating that the priority date established by treaty formation predates almost all priority dates assigned to non-Indian water users).

71. *See* BOBROFF ET AL., *supra* note 14, at 1184 ("Indian water rights are not quantified by the amount actually and continuously diverted to a beneficial use.").

72. *Winters*, 207 U.S. at 576-77.

73. BOBROFF ET AL., *supra* note 14, at 1184.

74. Steven J. Shupe, *Water in Indian Country: From Paper Rights to a Managed Resource*, 57 U. COLO. L. REV. 561, 563 (1986). Tribal water rights were changed because the *Winters* Court recognized that tribes held a right superior to that of current appropriators. *Id*. Even though the non-Indian water users had diverted the water first, *Winters* rights were not subject to state law and superseded water rights under state jurisdiction. *Id*. For a period of time, few cases were heard where tribal water rights were asserted, but as tribal leaders began to ask for these rights to be quantified, states were caught in a difficult position. *Id*. Water users had been diverting water for decades and water projects had been developed despite the knowledge that the water may be reserved under *Winters* for a nearby tribe. *Id*. This led to heated adjudications, where states could only aid one party at the expense of the other. *Id*. at 567-68.

75. *Id*. at 563.

shortfalls caused tribes to be reluctant to assert water rights. Additionally, states continued to appropriate water with little or no consideration of *Winters* rights.[77] Further, the federal government took little action in its role as trustee for the tribes.[78] After *Winters*, the federal government continued to appropriate money to non-Indian water development projects while making no attempt to define or ensure tribal water rights.[79]

The recognition of tribal water rights in *Winters* did little to advance the water interests of American Indians.[80] Parties resisted quantifying water rights in federal court because of the failure of the federal government in the role of trustee and the Court's lack of clarification regarding *Winters* rights.[81] However, nearly fifty years later, the face of tribal reserved water rights changed drastically.[82]

In 1952, Congress passed the McCarran Amendment further complicating the adjudication of federal reserved water rights.[83] Previously, both the tribes and the federal government were protected by the doctrine of sovereign immunity, and therefore neither was subjected to state proceedings regarding *Winters* rights.[84] The McCarran Amendment, however,

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76. *Id*. Because reserved water rights were a result of federal law, for nearly fifty years following the *Winters* decision, federal reserved water rights were heard in federal court. Michael C. Blumm et al., *The Mirage of Indian Reserved Water Rights and Western Streamflow Restoration in the McCarran Amendment Era: A Promise Unfulfilled*, 36 ENVTL. LAW 1157, 1160 (2006). For those cases that were pursued federally, receiving less than "the full entitlement" in these adjudications may be one of the reasons that *Winters* rights were so rarely sought after *Winters*. *Id*.

77. Williams, *supra* note 12, at 38.

78. *See* Shupe, *supra* note 74, at 564 (citing a letter from the Solicitor of the Department of the Interior to President Nixon which concluded that federal water project dollars "[had] been spent for ill-advised irrigation projects which have benefited the whites rather than the Indians, without the consent of the tribe").

79. *Id*. at 563.

80. *Id*.

81. McGovern, *supra* note 30, at 196.

82. *See* Public Lands Act, 43 U.S.C. § 666 (2000) (waiving the sovereign immunity previously protecting the United States from being sued regarding federal reserved water rights); Col. River Water Conservation Dist. v. United States, 424 U.S. 800, 811 (1976) (interpreting 43 U.S.C. § 666 as a waiver on federal and tribal immunity and therefore providing for the adjudication of federal water rights in state court).

83. 43 U.S.C. § 666.

84. BROOKS, *supra* note 52, at 4. Sovereign immunity is the immunity held by federal, state, and tribal governments that prevents those governments from being sued without their consent. BLACKS LAW DICTIONARY 766 (8th ed. 2004). Indian reserved water rights are a product of federal creation and definition. *See* Winters v. United States, 207 U.S. 564, 577 (1908) (holding that Indian reserved water rights arose out of treaties between the federal and tribal governments creating reservations). Therefore, adjudication of these rights fell under federal jurisdiction. *See* 28 U.S.C. § 1331 (2008) (stating that the federal district courts have jurisdiction over all disputes arising under the Constitution, laws, and treaties of the United States); 28 U.S.C. § 1362 (stating that federal district courts have jurisdiction over all lawsuits brought by an Indian tribe when the dispute involves the United States Constitution, laws, or treaties between Indian tribes and the

waived the sovereign immunity previously protecting the United States in any adjudication:

> (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under [s]tate law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such a suit.[85]

The McCarran Amendment's impact on federal reserved water rights did not take full effect until a 1976 Supreme Court decision, *Colorado River Water Conservation District v. United States*.[86] The court in *Colorado* interpreted the amendment as allowing state courts to adjudicate tribal water rights when the federal government has been joined in the litigation as trustee for the tribe.[87] The United States Supreme Court granted state courts procedural jurisdiction to adjudicate the federal reserved water rights according to federal law.[88] Because the development of water law falls under state power, no federal substantive water law exists, and water adjudication would be in the hands of state courts with little or no guidance from the Supreme Court or the federal government.[89] For many tribes, state courts were considered "hostile territory."[90] Tribal leaders were no more willing to risk tribal water rights in state court than they had been in federal court prior to the amendment.[91]

In 1963, *Arizona v. California*[92] offered further clarification regarding the quantification of tribal water rights.[93] In *Winters*, reservations had been

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United States). A lawsuit regarding Indian water rights would involve both the federal government in its role as trustee for the tribes and the tribal government, both of which are immune from suit unless Congress authorizes the suit or the tribe waives its immunity. Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998); Three Affiliated Tribes of the Fort Berthold Reservation v. World Eng'g, P.C., 476 U.S. 877, 890-91 (1986).

85. 43 U.S.C. § 666(a). With regard to Indian water rights, the McCarran Amendment was a congressional authorization for Indian water rights to be heard in state courts and sovereign immunity to be waived on behalf of both the federal and tribal governments. *Id.*

86. 424 U.S. 800, 811 (1976) [hereinafter *Colorado*].

87. *Colorado*, 424 U.S. at 812; *see* 43 U.S.C. § 666(a) (codifying the McCarren Amendment, which was interpreted to be a waiver of federal and tribal sovereign immunity).

88. *Colorado*, 424 U.S. at 811.

89. McGovern, *supra* note 30, at 201-02.

90. BOBROFF ET AL., *supra* note 14, at 1211.

91. *See* BROOKS, *supra* note 52, at 4 (stating that the state court was viewed as "hostile territory" and many tribes chose to pursue negotiated settlements to avoid state courts).

92. 373 U.S. 546 (1963).

93. *See Arizona*, 373 U.S. at 599, *overruled on other grounds by* Arizona v. California, 376 U.S. 340 (1964), *amended by* 383 U.S. 368 (1966) (establishing agriculture as the purpose of a reservation and the practicably irrigable acreage standard as a means to quantify tribal water rights).

assured enough water to fulfill the purpose for which the land was set aside.[94] Making the most "significant contribution to the quantification debate," the *Arizona* Court held that the purpose of the reservation was agriculture.[95] The Court created a formula to quantify tribal water rights called the practicably irrigable acreage standard.[96] Under the formula, *Winters* rights were determined to be equal to the amount of water it would take to irrigate the land within a reservation that could be practicably irrigated.[97] The practicably irrigable acreage standard only pertained to reservations that were established for the purpose of agriculture.[98] However, until recently, courts have deemed the purpose of *all* reservations to be agriculture.[99] From a practical standpoint, practicably irrigable acreage had become *the* standard in quantification.[100]

Courts continue to prefer to use the practicably irrigable acreage standard when quantifying tribal water rights, despite the fact that the standard has undergone sharp criticism.[101] Critics argue that the standard does not take into account the fact that many tribes no longer or may never have had an agricultural purpose and that modern times call for water needs as diversified as reservations' geographies and purposes.[102] One court agreed, holding that the purpose of a reservation is not agriculture, but rather to establish a "permanent home" for American Indians.[103]

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94. Winters v. United States, 207 U.S. 564, 577 (1908).

95. *Arizona*, 373 U.S. at 600; BROOKS, *supra* note 52, at 6.

96. BROOKS, *supra* note 52, at 6. The Supreme Court did not give a specific formula for determining practicably irrigable acreage, but lower courts created a process to determine the practicably irrigable acreage of a reservation. *Id*. To determine irrigable acreage, soil scientists begin by formulating the amount of land that could be irrigated on a reservation. *Id*. at 6-7. Next, engineers consider the water supply available along with the amount of land that can be successfully irrigated to develop an amount of land that could be irrigated in a practical manner. *Id*. at 7. Finally, the benefits to agriculture created by an irrigation project on that land, crop patterns, yields, and profits are all considered as a part of the larger scheme as to what land could reasonably be used for agricultural purposes. *Id*.

97. *Arizona*, 373 U.S. at 601.

98. *Id*. at 600-01.

99. BROOKS, *supra* note 52, at 5. *But see In re* Gen. Adjudication of all Rights to Use of Water in the Gila River Sys. & Source, 35 P.3d 68, 74 (Ariz. 2002) (holding that the purpose for one tribe was to provide a "permanent home and abiding place" rather than for agriculture).

100. BROOKS, *supra* note 52, at 7. The practicably irrigable acreage standard is "by far the favorite judicial method for quantifying Indian reserved water rights." *Id*. at 6.

101. *See id*. (stating that the practicably irrigable acreage standard is preferred by courts); McGovern, *supra* note 30, at 205-08 (predicting that the practicably irrigable acreage standard may become a part of the past rather than the future of quantifying tribal water rights, due to its inability to adapt to changing times and purposes of reservations).

102. BROOKS, *supra* note 52, at 7.

103. *In re Gen. Adjudication of All Rights to Use of Water in the Gila River Sys. & Source*, 35 P.3d at 74.

Although the practicably irrigable acreage standard continues to be the principal method of quantification of tribal water rights, there has been sharp criticism and debate regarding its use.[104] For tribes negotiating water rights, the standard is often used as a bargaining tool in the negotiation process.[105] If state leaders resist making what tribes consider to be a fair agreement over water, the threat of proceeding with litigation where the practicably irrigable acreage standard will be used may persuade state officials to reconsider.[106] Under the standard, states in arid western regions could see significant quantities of water claimed by American Indians.[107]

Arizona became the conduit to the extensive adjudication, negotiation, and management efforts that began what is called the "modern era" of tribal water rights.[108] Although this modern era consisted primarily of litigation in the beginning, eventually both tribes and states began pursuing negotiated settlements.[109] Settlements proved to be a more viable option for many reasons, one of which was that settling water disputes provided a forum for

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104. McGovern, *supra* note 30, at 205. The practicably irrigable acreage standard has been criticized as both overgenerous and insufficient. *Id.* at 207-08. Before application of the standard, an analysis of the tribe's purpose is required to determine if the standard will even apply. *Id.* at 208. Determining the purpose of the tribe is difficult because it requires considering the relationship of agriculture to other purposes and a determination of what constitutes the "purpose." *Id.* For many years, courts held that the purpose of all tribes was agriculture; however more recently there has been a trend towards identifying other purposes. *See In re Gen. Adjudication of All Rights to Use of Water in the Gila River Sys. & Source*, 35 P.3d at 74 (holding that the purpose of an Indian reservation was not agriculture, but instead to provide a "permanent home and abiding place"). In the event that a non-agricultural purpose is identified, the practicably irrigable acreage standard does not apply at all and courts are left to determine a water quantity with no guidance. *See Arizona*, 373 U.S. at 600 (holding that tribal water rights for agrarian tribes can be measured by the practicably irrigable acreage standard and that although the water quantified may be used for non-agriculture purposes, practicably irrigable acreage does not apply if the non-agriculture purposes are deemed to be the tribe's primary purpose). Further, when the standard is used, it altogether ignores municipal water needs, population, industry, and development, all of which necessitate water. BROOKS, *supra* note 52, at 7. Because of this, it can be argued that this standard does not honor Congress' intent—an intent that included enough water for current and future uses with no mention of the need for that water to be tied to a purpose. *See* Winters v. United States, 207 U.S. 564, 577 (1908) (defining the amount of water to be adequate for both present and future needs, with no recognition that not all of these needs tie to agriculture).

105. McGovern, *supra* note 30, at 206.

106. *See id.* (asserting that the practicably irrigable acreage standard puts tribes in a "powerful bargaining position" regarding reserved water rights).

107. *See* Williams, *supra* note 12, at 38 (stating that the practicably irrigable acreage standard could benefit tribes in arid regions because the amount of land that is irrigable may be greater than the needs of the tribe).

108. Shupe, *supra* note 74, at 564.

109. *See* Checchio & Colby, *supra* note 11, at 184 (stating that general stream adjudications are often started because of the intense amount of demands on western water and that those adjudications facilitated the trend toward negotiated settlements).

a meeting of the minds between state and tribal leaders and required less resources than adjudication.[110]

Litigation had proven to be a costly endeavor both in time and money.[111] Water adjudications in state courts took years and resulted in the expenditure of millions of dollars by both states and tribes.[112] Furthermore, the years spent in state courtrooms often resulted in damaged relationships between tribal and state governments.[113] Litigating tribal water rights caused a great deal of turmoil without advancing the goals of either party.[114] In litigation, parties did not talk about issues other than arriving at a quantity of water that belonged to the tribe.[115] The management, regulation, and preservation of water were not considered to be a part of the adjudication.[116]

In addition to the shortfalls of litigation, the federal government began encouraging parties to negotiate settlements of *Winters* rights.[117] Now, most water adjudications end up in state court only as a last resort.[118] Both the state and tribes believe the risks and expenditures of litigation are too great.[119] This belief has caused a trend in states and Indian parties choosing to quantify water rights by negotiating an agreement.[120]

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110. *Id*. *See, e.g.*, *In re* Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 835 P.2d 273 (Wyo. 1992); *In re* Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 803 P.2d 61 (Wyo. 1990), *rehearing denied,* Wyoming v. United States, 492 U.S. 406 (1989); *In re* Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 753 P.2d 76, 83 (Wyo. 1989) (beginning the adjudication of the Big Horn River in state court), *cert. granted*, Wyoming v. U.S., 488 U.S. 1040 (1989), *aff'd*, 492 U.S. 406 (1989), *rehearing denied*, 492 U.S. 938 (1989). The Gila River adjudication lasted for nearly twenty years. Brienza, *supra* note 31, at 167. There were over 20,000 parties and costs of over $13 million in the first decade. *Id*.

111. BOBROFF ET AL., *supra* note 14, at 1211.

112. *Id*.

113. *Id*.

114. *See id*. at 1215 (stating that goals such as the use of groundwater, the administration of water, and a management plan were not a part of litigation).

115. *See id*. at 1184 (inferring that other issues were not settled in court disputes by saying that one of the reasons for the shift towards negotiated settlements is the fact that negotiators are able to address issues other than quantity, such as "promises of assistance in delivering the water to the reservation").

116. *See id*. at 1215 (stating that litigation only accomplishes arrival at a specified quantity of water, whereas negotiated settlements will allow for issues such as the delivery, development, and management of water to also be addressed).

117. *Id*. at 1214.

118. BROOKS, *supra* note 52, at 14.

119. *See supra* notes 115-16 and accompanying text (stating that today quantification is achieved through negotiated settlements).

120. *Id*.

B. NEGOTIATING TRIBAL WATER RIGHTS

Today, the quantification of tribal water rights occurs primarily at a negotiating table, rather than in a courtroom.[121] Many states and tribes prefer to negotiate rather than adjudicate Indian water rights for a variety of reasons.[122] First, negotiation allows tribes more involvement and flexibility.[123] Tribes can seek quantification with the specific needs of their tribe in mind. For example, a tribe might focus on municipal water needs, developing projects that may require water, agricultural needs, economic development, or a combination of these and other needs.[124]

Second, negotiation addresses the specific needs of the involved parties in a way that adjudication was unable to do.[125] In a courtroom, there is a lack of guidance regarding the quantification of Indian water rights except for a few vague rules.[126] When looking to other states for persuasive authority, courts find directly conflicting holdings, confusing processes, and political climates that may have affected the rules.[127] However, negotiation allows all parties much wider latitude to pursue common goals occurring within the borders of the state.[128]

Many issues are still unsettled in the arena of Indian water rights, including: (1) whether *Winters* rights include a right to ground water; and, (2) whether tribes, the state, or a combination of the two will manage water resources after quantification.[129] To date, four compacts have demonstrated the acceptance that Indian tribes possess a right to groundwater by

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121. Shupe, *supra* note 74, at 562.

122. *See* discussion *supra* Part II.A (discussing the reasons tribes prefer to negotiate rather than litigate *Winters* rights).

123. *See* McGovern, *supra* note 30, at 197 (elaborating on additional terms that tribes can negotiate as part of settlement to tailor the agreement to their specific needs). Some settlements have addressed issues that are unresolved in law such as groundwater and management. BOBROFF ET AL., *supra* note 14, at 1214-15.

124. *See* McGovern, *supra* note 30, at 197 (stating that tribes can negotiate with the "particular needs and circumstances" specific to that tribe in mind).

125. *See supra* note 116 and accompanying text (communicating that, because negotiation allows tribal governments the ability to focus on the particular water needs of their individual tribes, many tribes are choosing negotiation rather than litigation).

126. *See* Arizona v. California, 373 U.S. 546, 601 (1963) (stating that tribes are entitled to enough water for future and present use, and if the purpose of the reservation is agriculture, quantification of the water should be formulated with the practicably irrigable acreage standard); Winters v. United States, 207 U.S. 564, 577-78 (1908) (stating that tribes are entitled to water to satisfy the purpose of the reservation).

127. *See generally* BROOKS, *supra* note 52, at 5-8 (detailing the maze of court decisions that left tribal water rights in a state of confusion); *see also* Brienza, *supra* note 31, at 172 (describing that negotiation better allows for the preservation of relationships between the state and tribal leaders).

128. BOBROFF ET AL., *supra* note 14, at 1211.

129. *See supra* note 116 and accompanying text (articulating the reasons tribes prefer to negotiate rather than litigate *Winters* rights).

including a tribal right to groundwater in settlements.[130] In the negotiations of those four compacts, the parties were able to settle an issue courts have been unable to resolve.[131] With common goals and compromise, negotiated settlements often lead to better results than courtroom adjudications.[132]

Preparing for a negotiation of federal reserved water rights requires the consideration of many factors.[133] In order to begin a negotiation, states must first identify the person or persons that will negotiate on behalf of the state, the resources that will facilitate a negotiation and handle the necessary preliminary analyses, and form working relationships with the entities involved.[134] Although there is no wrong way to conduct a negotiation, consideration must be given to factors such as the relationships and motivation of the parties.[135] It is these intangible factors that are often the source of failure.[136] For the parties, it is necessary to understand both the risks and benefits of quantification because, whether through adjudication or the negotiation of a water settlement, the results of quantification are permanent and there are no second chances.[137]

C. THE RISKS AND BENEFITS OF QUANTIFICATION

North Dakota leaders have started to work toward developing a process to negotiate water settlements with Indian tribes. However, consideration should be given to whether the timing is right and whether both parties possess the necessary resources to accomplish the task.[138] Quantification should take place "when the situation ripens by the presence of a strong desire to settle water rights in a basin, a sense of urgency is present, and the key players are involved."[139] Leaders of Turtle Mountain have a strong

130. BOBROFF ET AL., *supra* note 14, at 1215.

131. *See Jan. 12, 2006, Minutes of Interim Comm. on Agriculture and Natural Res.*, 2005 Leg., 59th Interim Sess. 2-3 (N.D. 2006) [hereinafter *Jan. 12, 2006, Minutes*] (statement of Clive J. Strong, Idaho Chief Assistant Att. Gen.) (stating that negotiating to achieve common goals advances the interests of both parties).

132. BOBROFF ET AL., *supra* note 14, at 1211.

133. *See Jan. 12, 2006, Minutes*, *supra* note 131, at 2-3 (statement of Clive J. Strong, Idaho Chief Assistant Attorney General) (explaining that when preparing to negotiate, one must decide who will negotiate, identify the resources, consider the relationships, and develop protocols and goals, along with other considerations in preparation for quantification).

134. *Id.*

135. *Id.*

136. *Id.*

137. *See* discussion *infra* Part II.C (explaining the risks and benefits of quantifying tribal water rights).

138. *See* Williams, *supra* note 12, at 37 (stating that South Dakota, as a western state, should carefully consider whether it has the proper resources for quantification).

139. *Jan. 12, 2006, Minutes*, *supra* note 131, at 1 (testimony of Clive J. Strong, Chief Assistant Attorney General, Idaho Attorney General's Office).

desire to quantify tribal water rights and feel that the need for quantification for their tribe is urgent.[140] However, other tribes have not been quick to follow Turtle Mountain and view quantification as premature at best.[141] Without the other tribes' support, it has become apparent that a process to adjudicate water rights may only be a dream.[142]

Although the leaders of Turtle Mountain see the quantification of the tribe's water rights as the mechanism through which it can become self-sustaining, the remaining North Dakota tribes do not feel prepared to quantify water rights and face the dangers that come with the process.[143] Quantification is daunting for tribes because no ability to revisit the amount of water arrived at exists.[144] Once tribes have made an agreement with the state regarding water, it is final and cannot be amended according to changing needs.[145] Tribal governments struggle with quantifying an amount of water to serve the tribe for all time because, amongst tribal members, there is a sense that all of the water in or near the reservation belongs to the tribe.[146]

Further, quantification can lead to disputes or disparities regarding the management of water resources following quantification, often leaving the tribe without a means to transport or utilize the water that has just been quantified.[147] North Dakota leaders are concerned about the management of water after quantification.[148] Tribal leaders are also concerned, but their apprehension involves whether quantification could actually result in a

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140. *See Hearing on H.B. 1025*, *supra* note 1, at 12-14 (statement of Tom Davis, Water Resources Director for Turtle Mountain Band of Chippewa Indians) (testifying that water problems in Rollette County have forced Turtle Mountain to request quantification of the tribe's water rights).

141. *See* discussion *infra* Parts III.A.1-2 (discussing the sentiment of the Missouri River tribes that neither Standing Rock nor Fort Berthold are considering quantification).

142. *See* discussion *infra* Parts III.A.1-2 (demonstrating that without tribal support, legislation will not pass).

143. *See* McGovern, *supra* note 30, at 207-12 (stating that quantification must be comprehensive, and addressing it in court will likely leave unresolved issues such as how the resource will be managed).

144. *See* Williams, *supra* note 12, at 37 (noting that tribal water rights are quantified "for all time").

145. *Id.*

146. *See id.* (stating that elders are often reluctant to use the "white man's system" to quantify water rights because the tribe will end up with "drops of the water that really all belongs to the tribal people").

147. BOBROFF ET AL., *supra* note 14, at 1219.

148. *Jan. 12, 2006, Minutes*, *supra* note 131, at 3 (testimony of Clive J. Strong, Chief Assistant Attorney General, Idaho Attorney General's Office).

shortfall for their tribes and whether the tribes will ever attain the right to regulate their own water.[149]

Quantification of federal reserved water rights is quintessential to the management of water for both North Dakota and the affected tribes.[150] Left unquantified, tribes in the state do not actually have "wet" water and instead will be left with only the "paper" water rights granted to them under the *Winters* doctrine.[151] For states, quantification will make the water entitlement of tribes static and allow the state to continue to develop water regulation and new projects.[152]

North Dakota tribes will be able to use the water for the needs of the reservation, and if excess exists, sell it to other users.[153] Tribes also see water as imperative to creating thriving tribal economies.[154] Receiving "wet" water may allow tribes the ability to manage the reservation's water resource in a way that best represents tribal customs and goals.[155] Further, quantification will provide protection for the tribes from the federal government.[156] Quantification forces the government to formally recognize water as tribal property and allows for non-tribal use only upon tribal agreement and the development of a contract.[157]

For the state of North Dakota, quantification of federal reserved water rights will allow for the future management of water resources.[158] After quantification, the amount of water belonging to Indian tribes and other federal reserved water rights holders will be solidified and permanent, giving

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149. *Hearing on S B. 2115*, *supra* note 37, at 14 (statement of Tom Davis, Water Resources Director for Turtle Mountain Band of Chippewa Indians). "Three Affiliated Tribes are very cautious about blessing any process concerning the quantification of their water rights." *Id*. "Water is something that can do wonders for the tribe. [We] want to become self sufficient. [We] need to be able to move waters to accommodate this." *Id*.

150. *See* MCCOOL, *supra* note 37, at 101 (stating that without quantification all tribes have is the promise of water, but no actual water); *see also supra* note 37 and accompanying text (explaining the concept of "paper" and "wet" water).

151. MCCOOL, *supra* note 37, at 101.

152. *See* Williams, *supra* note 12, at 37 (stating that quantification is permanent). Quantifying water rights will protect tribes by preventing non-tribal use, but it will also protect the states by precluding them from appropriating water for development that may later be ruled property of Indian tribes. *Id*.

153. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS 248 (3d. ed. 2002).

154. *See* Jane Marx et al., *Tribal Jurisdiction Over Reservation Water Quality and Quantity*, 43 S.D. L. REV. 315, 316 (1998) ("Tribal governments understand all too well that the availability of good water and ability of the tribes to control its use and protect it from degradation is *absolutely* necessary for viable tribal economies.") (emphasis added).

155. *Id*.

156. PEVAR, *supra* note 153, at 248.

157. *Id*. at 247-48.

158. McGovern, *supra* note 30, at 196.

the state the ability to more adequately plan future water development.[159] Furthermore, states like North Dakota continue to issue permits to appropriators causing the eventual assertion of tribal water rights to increasingly become a source of conflict.[160]

Until tribal water rights are quantified, junior users will not be able to rely upon state water rights granted under prior appropriation.[161] Although quantification will provide permanence that will allow both the state and tribes some sureties, quantification itself is a risk for junior rights holders.[162] The quantified amount of water arrived at may be so large that it displaces those with a perfected right under state law.[163]

Junior rights holders losing the right to water has a great impact on a state like North Dakota.[164] Agriculture is the number one industry in the state.[165] Agrarians from the state are dependent on water to grow crops, raise livestock, and maintain operations.[166] If even some of the water available to the agriculture community was no longer available after quantification, the impact on North Dakota's economy would be devastating.[167] The reality for many farmers is that if the resources currently availed to them are lost, they would be unable to withstand the financial burden of diverting water from another source or purchasing water from neighboring tribes.[168]

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159. *Id.*

160. PEVAR, *supra* note 153, at 248.

161. 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. DENV. WATER L. REV. 109, 114 (1997). State appropriation systems suffer from being in a state of uncertainty due to the inability to account for tribal water rights that have not been asserted. *Id.* This leaves a great deal of risk for non-Indian rights holders because their dependency on currently appropriated water could be discontinued due to the assertion of superior tribal water rights. *Id.*

162. Bacal, *supra* note 58, at 21-22. Water rights appropriated after land was set aside for a reservation would fall subsequent to the rights held by the tribe. *Id.* For those who established a water right under state law, there is a risk of being displaced when tribes assert their *Winters* rights. *Id.*

163. *Id.*

164. *Id.*

165. Christene A. Beaupre, Note, *Product Safety—Food and Drug Laws: How* Bates *Changed the Face of Preemption*, 82 N.D. L. REV. 579, 602 (2006). Agriculture makes up 25% of the state's economic base and 24% of employment is agricultural in nature. *Id.* In 2002, agriculture brought over $3.6 billion in revenue to the state. *Id.* at 603.

166. *See* Chad A. West, *For Body, Soul, or Wealth: The Distinction, Evolution, & Policy Implications of Water Ethics*, 26 STAN. ENVTL. L. J. 201, 221 (2007) (delineating the tie between water and agriculture). Eighty-five percent of fresh water consumption is agricultural. *Id.*

167. *See* PEVAR, *supra* note 153, at 248 (discussing the impact that the depletion of water resources could have on ranching and agriculture).

168. *Id.*

Another negative aspect of quantification, whether by litigation or negotiation, is the intense demand it puts on state and tribal resources.[169] The scope of quantifying water rights is both enormous and expensive.[170] For example, the quantification of water on the Gila and Little Colorado Rivers in Colorado has lasted over eight decades and involves approximately 27,000 parties and a price tag totaling millions of dollars.[171]

III. NORTH DAKOTA CONSIDERS NEGOTIATED SETTLEMENTS

Historically, the state of North Dakota has not seen a lawsuit regarding a tribal water rights claim.[172] However, problems ranging from flooding, drought, and failure of municipal water systems over the past ten years have assured that tribal water rights would become an issue.[173] This section examines quantification in the state of North Dakota, beginning with the state's previous attempts at enacting legislation to guide quantification.[174] Further, this section considers the way the neighboring state of Montana handles the quantification of tribal water rights to see if that process might act as a model for North Dakota.[175] Finally, the following question is asked: Will the Montana model work in North Dakota?[176]

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169. *See* BOBROFF, *supra* note 14, at 1219 (stating that litigation takes a great deal of time and money).

170. PEVAR, *supra* note 153, at 249.

171. *See id*. at 249 (stating that the Gila River adjudication lasted over eight decades); *see also* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 812 (1971) (providing that state courts can hear tribal water adjudications even though the right is a federally created right); Arizona v. California, 373 U.S. 546, 600 (1963) (stating that the purpose of the tribe is agriculture and that a quantified water right will be determined by computing the acreage of the reservation that can be practically irrigated); Winters v. United States, 207 U.S. 564, 576-78 (1908) (holding that when land was set aside for reservations, a right to water to support that land was also reserved for the support of land); *In re* Gen. Adjudication of all Rights to Use of Water in the Gila River Sys. & Source, 35 P.3d 68, 74 (Ariz. 2002) (holding that the purpose of a reservation was not for agriculture, but instead to provide a homeland to tribes).

172. *See Hearing on S B. 2115, supra* note 37, at 18 (testimony of Dave Ripley, Director of Water Appropriations Division, North Dakota Water Commission) (informing the Senate Natural Resources Committee that the Turtle Mountain Band of Chippewa Indians had requested to begin a negotiation process, but to date no tribes have made attempts to quantify tribal water rights).

173. *See supra* note 4 and accompanying text (discussing the drought in the western part of North Dakota and flooding in eastern North Dakota since the late nineties); *Fort Yates Water Drinkable—Finally,* BISMARCK TRIB., Dec. 3, 2003, at 1A (reporting that the Standing Rock Sioux Reservation ran out of water just days before Thanksgiving).

174. *See* discussion *infra* Part III.A (examining Senate Bill 2115 and House Bill 1025).

175. *See* discussion *infra* Part III.B (considering the Montana model of quantification).

176. *See* discussion *infra* Part III.C (addressing the possibility that the Montana model may work in North Dakota).

A. PREVIOUS ATTEMPTS AT LEGISLATION GOVERNING NEGOTIATED SETTLEMENTS

In 1998, Turtle Mountain wrote a letter to the North Dakota State Water Commission asking that the state participate in a water rights settlement with the tribe.[177] Turtle Mountain leaders approached the commission because of two primary concerns: (1) a depleting underground aquifer and (2) a recent three-year period of flooding in the area where the reservation is located.[178] The leaders of Turtle Mountain concluded that the quantification was the only way to address the water problems facing the reservation.[179] The request made by Turtle Mountain was met with the drafting of Senate Bill 2115.[180]

1. *Senate Bill 2115*

Senate Bill 2115 provided a mechanism through which Turtle Mountain could negotiate the tribe's reserved water rights with the State of North Dakota.[181] Section one of the bill provided that the state engineer would negotiate tribal water rights on behalf of North Dakota with representatives of the federally recognized tribe and the federal government in the capacity of trustee.[182] The bill also provided that the state engineer would negotiate with the federal government regarding federal, non-tribal water rights.[183] Additionally, this section provided that public notice of all

177. Meeting Minutes of the North Dakota Water Comm. 1 (Dec. 10, 1998).

178. *See Hearing on S B 2115, supra* note 37, at 10 (stating that the Turtle Mountain Reservation obtains water from an underground aquifer measuring fifty-five square miles); *see also Hearing on H B. 1025, supra* note 1, at 12 (reporting on the water situation at Turtle Mountain). The Turtle Mountain Reservation was experiencing extensive flooding and was declared an emergency area five out of six years since the year 2000. *Id.* The damage done to Rollette County and the reservation included millions of dollars in damage to roads and other infrastructure. *Id.* Aside from flooding, the Turtle Mountain Reservation is concerned about the quantity of water that will be available in the future. *Id.*

179. *See Hearing on H B. 1025, supra* note 1, at 14 (statement of Tom Davis, Water Resources Director for Turtle Mountain Band of Chippewa Indians) (providing that Turtle Mountain needs to protect and manage water in order to advance agriculture, feed the reservation's people, and become self sufficient).

180. S.B. 2115, 2005 Leg., 59th Sess. (N.D. 2005).

181. *See Hearing on S B. 2115, supra* note 37, at 18 (statement of Dave Ripley, Director of Water Appropriations Division, North Dakota Water Commission) (stating that in the event tribes want to quantify tribal water rights, Senate Bill 2115 will establish a process under which quantification can take place).

182. S.B. 2115 § 1(1).

183. *Id.* Non-tribal federal reserved water rights consist of lands reserved by the federal government for purposes other than the establishment of a American Indian reservation. Cappaert v. United States, 426 U.S. 128, 138 (1997). Examples of non-tribal entities that own a right to water are national parks, monuments, and reserves. *Id.*

negotiations was required and the public would have an opportunity to provide input.[184]

Section two of Senate Bill 2115 dealt with the process the state would follow after an agreement had been formulated between the tribes and the state in order to create a formal, enforceable treaty to water rights.[185] After an agreement was drafted, it would be given to the governor for his or her signature.[186] Following the governor's signature, the agreement would be forwarded to the state engineer and authorized representatives of the agreeing tribe and the federal government as trustee for signature.[187]

However, if any holders of water rights object to the agreement, an exception can be filed with the state engineer detailing that individual's objection.[188] Then, the state engineer would notify all owners of water permits affected by the new agreement through written notice.[189] Those rights holders would then have the opportunity to file an exception to the agreement under the requirements set forth in section four of the bill.[190] According to section four, before an agreement can take effect, several steps must be taken.[191]

First, the state engineer must allow the time period allotted for exceptions to be filed to lapse.[192] Upon the filing of an exception, an administrative law judge would be appointed by the state engineer to hear the exception.[193] The state engineer would file the agreement without changes if the judge overruled the exceptions.[194] However, if the administrative judge agreed with the exception filed by a state water right holder, the agreement would be remanded to the negotiating parties for further

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184. S.B. 2115 § 1(2).

185. *Id.* § 2.

186. *Id.* § 2(1).

187. *Id.* This section of Senate Bill 2115 also stated that the same signature process would be used for federal, non-Indian reserved water rights by providing that the agreement would require approval by the governor and signatures of both the state engineer and authorized representatives of the federal government. *Id.* § 2(2).

188. *Id.* § 3.

189. *Id.*

190. *Id.* § 4(1). The state engineer will also provide time and form requirements for the exception along with information on how to obtain a copy of the recently signed agreement. *Id.* § 3. Further, notice will be given by mail to the "last reasonably ascertainable address" of the water rights holder. *Id.* Notice will be conducted following the North Dakota Rules of Civil Procedure. *Id.*; *see* N.D. R. Civ. P. 4(d)(1)-(3) (2007) (detailing the process whereby notice is given including delivery to a person of suitable age or an agent thereof).

191. S.B. 2115 § 4(1)-(4).

192. *See id.* § 4(1) (stating that the state engineer must allow owners of water rights, both conditional and unconditional, to file exceptions).

193. *Id.* § 4(2). The state engineer can also request that the office of administrative hearings designate a judge in the event he or she has conflicts with appointing a judge. *Id.*

194. *Id.* § 4(3).

negotiation.[195] In the event the agreement is remanded, the state engineer is required to file an amended form of the agreement with the appointed administrative law judge, whereby the judge either dismisses the proceedings without prejudice or asks for a continuance to negotiate.[196] If an amended agreement is reached, the state engineer would again be required to notify all affected water rights owners and allow them the chance to review the amended agreement and pose exceptions.[197]

Senate Bill 2115 quickly met backlash from the Standing Rock leaders and other tribal leaders in the state.[198] While North Dakota tribal leaders supported the development of a negotiation process for Indian water rights for Turtle Mountain, the state's leaders expressed concern regarding the process of developing Senate Bill 2115.[199] Leaders of tribes other than Turtle Mountain expressed disappointment that they had not been included in the process of developing the bill and had not even received a copy of the legislation until just days before the first committee hearing.[200] However, it was not only the neglect to include tribes other than Turtle Mountain in the development of a process, but also the components of the bill that dismayed tribal leaders.[201]

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195. *Id*. § 4(4). Any additional negotiations that occur as the result of a sustained exception must be done in accordance with sections one through five of the bill. *See supra* notes 182-94 and accompanying text (discussing sections 1-5 of the bill).

196. S.B. 2115 § 5(1)-(3).

197. *See id*. § 5(1) (stating that an amended agreement must comply with section three and four of the act requiring that notice be given to affect water rights owners and that the exceptions be heard and ruled upon by the administrative law judge). In the event the judge sustains exceptions on the amended agreement, it will again be presented for additional negotiation. *See id*. § 4(4) (requiring further negotiation on sustained exceptions to the agreement).

198. *See Hearing on S B. 2115*, *supra* note 37, at 16-22 (testimony by Thomas M. Disselhorst, Attorney, United Tribes Technical College; Tex Hall, Chairman, Mandan, Hidatsa and Arikara Nation; and Charles W. Murphy, Chairman, Standing Rock Sioux Reservation) (expressing concern regarding Senate Bill 2115 and asking that the bill not be passed). Leaders from the Spirit Lake Sioux Nation did not participate in discussions of tribal water quantification on Senate Bill 2115. *See generally id*. at 1-36 (containing no testimony from Spirit Lake Reservation leaders).

199. *See id*. at 16-17 (testimony of Tex Hall, Chairman of the Mandan, Hidatsa and Arikara Nation) (stating that the Mandan, Hidatsa and Arikara Nation supports legislation to negotiate tribal water rights, but cannot be supportive of a bill that was not created with tribal input).

200. *Id*. at 21-22 (letter from Charles W. Murphy, Chairman, Standing Rock Sioux Tribe) "[T]he bill does not proceed on a government-to-government basis. [The Standing Rock Sioux Tribe has] in place an accord with the State of North Dakota that says this kind of legislation should be developed in consultation with our Tribe, which did not occur in this case." *Id*.

201. *See id*. at 16-17 (testimony of Tex Hall, Chairman, Mandan, Hidatsa and Arikara Nation) (outlining the components of the bill that the Mandan, Hidatsa and Arikara Nation do not support). Mr. Hall also objected to section four of the bill, which required an administrative proceeding to resolve the issue of exceptions. *Id*. Further, Mr. Hall suggested that the bill require ratification by the state legislature of any agreement between the State of North Dakota and a tribal nation. *Id*. He also noted the bill's failure to mention approval of a Tribal Council and approval by the United States Congress, as a required part of the trust relationship. *Id*.

Three other major concerns arose during the hearing on Senate Bill 2115.[202] The first was that the negotiator for the state was the state engineer.[203] Although tribal leaders understood the importance of having the state engineer and staff of the water commission involved, many noted that a negotiation would benefit from having other individuals involved as well.[204] Because the quantification of tribal and other federal reserved water rights will have an effect on people across the state, involving additional representatives would create a process whereby the outcome would involve input from the different interests.[205] Interests might include those already using the water, developers in need of a water source, the tribes, agrarians, and municipalities.[206] Tribal leaders suggested using a commission that included representatives of the parties affected by the adjudication.[207]

Second, even though the legislation did not require tribes to adjudicate water rights, tribal leaders were concerned about the development of any legislation that would form a precedent that tribes other than Turtle Mountain would have to follow.[208] Leaders from both the Standing Rock and Fort Berthold Reservations believed their tribes were a long way from being prepared to quantify tribal rights and therefore were unable to commit to the proposed method delineated in Senate Bill 2115.[209] The Standing Rock and Fort Berthold Reservations wanted to preserve the ability to

202. *Id.*

203. *Id.* at 17 (statement of Tex Hall, Chairman, Mandan, Hidatsa and Arikara Nation).

204. *Id.* Mr. Hall did not mention the parties he felt should be involved in order to guarantee a more fair process. *Id.* at 16-17.

205. *See supra* note 35 and accompanying text (stating that tribes, junior rights holders, and state administrators have an interest in the results of quantification); *see also* notes 165-67 and accompanying text (relaying the interest in the results of quantification for farmers).

206. *See* note 35 and accompanying text (describing the interests for junior rights holders, state administrators, and the tribes); *see also* notes 165-67 and accompanying text (noting the interest in the results of quantification for farmers because they rely upon water for their business).

207. *See Hearing on S B. 2115*, *supra* note 37, at 17 (statement of Tex Hall, Chairman, Mandan, Hidatsa and Arikara Nation) ("The [t]ribes' initial thought is that it may be better to negotiate with a body or perhaps a commission that would be fairly representative of the State rather than with just one individual.").

208. *See id.* at 21 (statement of Charles Murphy, Chairman, Standing Rock Sioux Tribe) ("While I realize at least one North Dakota tribe is in favor of this process, this bill poses grave risks for all North Dakota tribes that do not believe it is necessary at this time to quantify our reserved water rights.").

209. *See id.* (stating that Standing Rock Reservation is not interested in pursuing the quantification of their tribal water rights at this time); *id.* at 17 (statement of Tex Hall, Chairman, Mandan, Hidatsa and Arikara Nation) (requesting that the committee recommend a "DO NOT PASS" on Senate Bill 2115).

develop legislation that addressed the needs of the tribe—needs that they felt were different from the needs of Turtle Mountain.[210]

Third, tribal leaders did not approve of the use of an administrative law judge to rule on exceptions filed to a negotiated agreement.[211] The Chairman of the Mandan, Hidatsa and Arikara Nation, Tex Hall, suggested that it was contrary to North Dakota law to involve the administrative process and that tribes had the right to have disagreements heard in state court.[212] Still uncomfortable with the prospects of a state court's inability to balance state and tribal needs, the chairman further suggested that the tribe pursuing quantification and the state appoint a "Special Master" to hear the dispute and enter a final order regarding the agreement.[213]

As a result, Senate Bill 2115 was amended into a bill ordering the North Dakota Legislative Council (hereinafter N.D.L.C.)[214] to study the issue of tribal water rights during the interim legislative session.[215] The legislature asked N.D.L.C. to develop a proposal that would better suit the

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210. *See id.* at 21-22 (statement of Charles Murphy, Chairman, Standing Rock Sioux Tribe) (stating that the position of Standing Rock is different because the needs of Standing Rock include a working municipal water system). *But see Hearing on H B. 1025*, *supra* note 1, at 12 (statement of Tom Davis, Water Resources Director for Turtle Mountain Band of Chippewa Indians) (reporting that the problems on the Turtle Mountain Reservation stem from flooding); *id.* (statement of Archie Full Bear, member of the Standing Rock Sioux Tribe) (stating that the Turtle Mountain problem deals with an underground aquifer as a water source); *Hearing on S B. 2115*, *supra* note 37, at 16 (statement of Tex Hall, Chairman, Mandan, Hidatsa and Arikara Nation) (detailing that the Missouri River, rather than an aquifer, and its mismanagement have caused water problems for the Standing Rock Sioux Reservation).

211. *Hearing on S.B. 2115*, *supra* note 37, at 17 (statement of Tex Hall, Chairman, Mandan, Hidatsa and Arikara Nation).

212. *Id.*

213. *Id.* The term "Special Master" was used in Mr. Hall's testimony. *Id.* The "Special Master" would be chosen by the tribe and state together to hear any adjudicative proceedings related to water disputes arising during quantification. *Id.* Mr. Hall proposed a "Special Master" because of concerns that the state court would be more deferential towards the state's wishes than those of the tribes. *Id.* Mr. Hall believed that a "Special Master" to be chosen by both bodies would result in a more fair process. *Id.*

214. North Dakota Legislative Council Home Page, http://www.legis.nd.gov/council/ (last visited Jan. 23, 2007) (follow the "General" hyperlink; then follow the "Overview" hyperlink). The N.D.L.C. is composed of seventeen legislators, including the majority and minority leaders of both houses. *Id.* Additionally, six representatives are chosen in the senate by its leader, the President of the Senate. *Id.* The lieutenant governor chooses three members of the majority and three of the minority to sit on the Council. *Id.* The Speaker of the House chooses three minority members and two majority members to serve on the Council. *Id.* This group is assisted in studying issues by the N.D.L.C. staff, and is composed of nonpartisan employees with backgrounds in law, policy, and economics. *Id.*

215. 2005 N.D. LAWS ch. 510 § 1. The bill was amended to read: "The legislative council shall consider studying, during the 2005-06 interim, the process to negotiate and quantify reserved water rights. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixtieth legislative assembly." *Id.*

needs of the tribe and state.[216] Both state and tribal leaders supported the amendment to study quantification.[217] Senate Bill 2115 as amended passed the North Dakota Legislature on March 21, 2005.[218] In 2006, the Agriculture and Natural Resources Interim Committee studied the issue of quantifying tribal water rights in North Dakota.[219]

In an effort to understand the considerations involved in developing legislation to govern water negotiations, Agriculture and Natural Resources Interim Committee members heard testimony from experts employed with the North Dakota Water Commission.[220] Additionally, the interim committee received information from an expert in the field who had assisted in the adjudication of water in Idaho.[221] Turtle Mountain and Fort Berthold leaders also addressed the committee with their concerns regarding the development of a quantification process.[222]

The 2005-2006 interim committee considered the issue of whether it would be better to have a single negotiator or a group of individuals act on behalf of the state.[223] Representation from the Fort Berthold Reservation

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216. *Id.*

217. *See Hearing II on S B. 2115 Before the H. Comm. on Natural Res.*, 2005 Leg., 59th Sess. 36 (N.D. Mar. 4, 2005) [hereinafter *Hearing II on S.B. 2115*] (statements of Tex Hall, Chairman, Mandan, Hidatsa and Arikara Nation) (reporting that, like other tribes, the Fort Berthold Reservation is in favor of studying the issue of quantification); *see id.* at 35-36 (statement of Dave Ripley, Director of Water Appropriations Division, North Dakota Water Commission) (relaying that the state is in support of studying the issue of quantification).

218. 2005 N.D. LAWS ch. 510 § 1; J. of N.D. H.R. 42 (Mar. 21, 2005).

219. *Sept. 15, 2006*, *Minutes of Interim Comm. on Agric. and Natural Res.*, 2005 Leg., 59th Interim Sess. (N.D. 2005) [hereinafter *Sept. 15, 2006, Minutes*]; *Jan. 12, 2006, Minutes*, *supra* note 131; *June 6, 2006, Minutes*, *supra* note 38; *Aug. 3, 2006, Minutes of Interim Comm. on Agric. and Natural Res.*, 2005 Leg., 59th Interim Sess. (N.D. 2006) [hereinafter *Aug. 3, 2006, Minutes*]; *Sept. 21, 2006, Minutes of Interim Comm. on Agric. and Natural Res.*, 2005 Leg., 59th Interim Sess. (N.D. 2006) [hereinafter *Sept. 21, 2006, Minutes*].

220. *See Aug. 3, 2006, Minutes*, *supra* note 219, at 2-3 (testimony of John Patch, Assistant Division Director, Water Appropriation Division, State Water Commission) (providing information regarding creating a commission to negotiate Indian water rights similar to the State of Montana); *see also Sept. 15, 2005, Minutes*, *supra* note 219, at 4 (testimony of Robert Shaver, Director, Water Appropriations Division, State Water Commission) (detailing information on the historical and judicial development of reserved water rights).

221. *Jan. 12, 2006, Minutes*, *supra* note 131, at 1-3 (testimony of Clive J. Strong, Chief Assistant Attorney General, Idaho Attorney General's Office) (offering information regarding the process of quantification, the preparation of quantification, and the elements that will make a negotiation successful as consideration for developing legislation).

222. *Sept. 15, 2005*, *Minutes*, *supra* note 219, at 4 (statement from Gene Laducer, Tribal Water Planner, Turtle Mountain Band of Chippewa Indians); *June 6, 2006*, *Minutes*, *supra* note 38, at 6 (statement of Steve Kelly, Attorney, Three Affiliated Tribes).

223. *See Sept. 15, 2005*, *Minutes*, *supra* note 219, at 4 (statement of Tom Davis, Water Resources Director for Turtle Mountain Band of Chippewa Indians) (asking the state to look at how Montana handles *Winters* rights negotiations); *June 6, 2006*, *Minutes*, *supra* note 38, at 6 (reviewing legislation drafted with the governor as negotiator for the state); *Sept. 21, 2006*, *Minutes*, *supra* note 219, at 3 (discussing the reasoning behind choosing legislation with the governor as the chief negotiator).

noted that creating a bill using a group of representatives to negotiate on behalf of the state would more likely pass the legislature. Members of the committee, however, felt that the governor would be an appropriate figure to negotiate and could call upon others in the event the governor needed assistance.[224] Some members of the legislature felt that involving a commission composed of legislators or citizens may not benefit the process because those individuals may not possess the requisite expertise needed to create an agreement that is beneficial to both the state and tribe.[225] Turtle Mountain agreed to create legislation appointing the governor as the negotiator. However, Turtle Mountain leaders had asked that the legislation be tribe specific and name Turtle Mountain as the only tribe to fall under this negotiation legislation.[226] Leaders of Turtle Mountain did not want to force other tribal leaders into adopting a process that may not suit the needs of their tribes.[227] The committee rejected Turtle Mountain's request on the grounds that the bill would state that quantification was optional, and therefore there was no need to exclude the other tribes.[228] As a result of these discussions, the North Dakota Legislative Council introduced House Bill 1025, which designated the governor as lead negotiator for the state.[229]

2. *House Bill 1025*

House Bill 1025 was introduced on January 3, 2007 and included two changes from Senate Bill 2115.[230] First, in response to suggestions offered during the hearings on Senate Bill 2115, House Bill 1025 provided that negotiated water agreements between North Dakota and a tribe would require ratification by the legislature.[231] The second and key change to the

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224. *See Aug. 3, 2006*, *Minutes*, *supra* note 219, at 3 (statement from Steve Kelly, Attorney, Three Affiliated Tribes) (expressing the desire that the Montana model be considered as a method for negotiation); *see also id.* at 2-3 (reviewing the reasoning for a single figure negotiator).

225. *Id.* at 2-3. The committee had decided the new bill would be drafted with permissive language, meaning that quantification was not mandated by the legislation. *Id.*

226. *Sept. 21, 2006*, *Minutes*, *supra* note 219, at 3 (statement of Tom Davis, Water Resources Director for Turtle Mountain Band of Chippewa Indians).

227. *Id.*

228. *See id.* (statement of Sen. Bowman) (informing that the bill "should not be limited to a single tribe[,] but drafted as discretionary [allowing] those tribes that wish to negotiate their reserved water rights an opportunity to do so").

229. *Id.*

230. *See* J. of the N.D. H.R. 34 (Jan. 3, 2007) (introducing House Bill 1025).

231. *See* H.B. 1025 § 2(7), 2007 Leg., 60th Sess. (2007) (stating that after an agreement is signed, it would be presented to the legislature for ratification by passing a concurrent resolution by a majority vote of both chambers); *see also Hearing on S.B. 2115*, *supra* note 37, at 17 (statement by Tex Hall, Chairman, Mandan, Hidatsa and Arikara Nation) (conveying that any negotiated agreement "should be subject to ratification by the State legislature and signed by the governor").

bill was that the governor, or his or her designee, rather than the state engineer, would negotiate reserved water rights on behalf of the state.[232] However, the state engineer was not without a role.[233]

The North Dakota Legislative Council deemed the state engineer as the individual who would rule on the validity of an exception to an agreement negotiated between a tribe and the state.[234] Little response was given to the reservations of the tribal leaders regarding the use of an administrative law judge.[235] In the event that the ruling of the state engineer was contested, the same process as set forth in Senate Bill 2115 would be followed.[236] Thus, an administrative law judge would make a ruling and the agreement would either be remanded for further negotiation or submitted for signatures if an exception was overruled.[237] Although an additional person was added to the process of considering exceptions, it is unlikely that involving another state official along with an administrative law judge afforded the protection that North Dakota tribal leaders sought.[238]

Perhaps adding a two-part process to hearing exceptions was in response to tribal requests for the involvement of more individuals in the process of quantification.[239] The two-part process of hearing exceptions proposed by this bill consisted of a hearing by: (1) the state engineer initially, and (2) in the event that is unsatisfactory, an administrative law judge. However, when tribal leaders sought a negotiation process with the involvement of additional people, it is unlikely that additional involvement of the state's executive branch was what tribal leaders had in mind.[240] Tribal

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232. H.B. 1025 § 1(1), 2007 Leg., 60th Legis. Assem. (N.D. 2007).

233. *See id*. § 2(3) (stating that the state engineer would rule on exceptions filed by current water rights holders affected by the negotiated agreement).

234. *Id*.

235. *See id*. § 2(4) (including an administrative law judge in House Bill 1025 even after concerns were raised regarding the use of an administrative judge with the previous bill).

236. *See* discussion *infra* note 237 and accompanying text (repeating the steps proposed in Senate Bill 2115 that would also be followed in House Bill 1025).

237. *See* S.B. 2115 § 4-5, 2005 Leg., 59th Sess. (2005) (delineating the process through which an administrative law judge will be appointed by the state engineer, that the proceedings will fall under North Dakota Century Code section 28-32 regarding the sustaining or rejection of an exception, and the remand of the agreement for further negotiation); *see also* H.B. 1025 § 2(3)-(6) (instituting the same process of administrative proceedings as S.B. 2115 following any objection to the ruling made by the state engineer to the original exception).

238. *See Hearing on S B. 2115*, *supra* note 37, at 17 (statement of Tex Hall, Chairman, Mandan, Hidatsa and Arikara nation) (stating that the Mandan, Hidatsa and Arikara Nation would prefer that a "Special Master" be appointed by the tribe and state to hear disputes in state court regarding exceptions).

239. S.B. 2115 § 3; *Hearing on S.B. 2115*, *supra* note 37, at 17 (statement of Tex Hall, Chairman, Mandan, Hidatsa and Arikara Nation) (asking for the involvement of more individuals so that water interests of all individuals are recognized and protected).

240. *See Hearing Before the U.S. Sen. Comm. on Indian Affairs*, 108th Cong. 203 (Oct. 27, 2003) (statement of U.S. Sen. Kent Conrad) (relaying the tribes' distrust of executives). The

leaders repeatedly suggested a body or commission that would contain representatives that were reflective of the different geographic areas and water interests in the state.[241] The suggestions of tribal leaders were ignored by the legislators drafting and amending the bill.[242] Therefore, it was of little surprise that House Bill 1025 was met with a similar response as its predecessor.[243]

Although Turtle Mountain supported having the governor negotiate in an effort to address the problems facing the tribe, support was quickly withdrawn from the bill.[244] Tom Davis, Water Resources Director for Turtle Mountain Band of Chippewa Indians, expressed his frustration stating: "It is unfortunate that you have such little understanding of my people, or no understanding of how we can move forward. I see that often when I come here and it is an unfortunate thing."[245] Mr. Davis asked the committee to consider a model of negotiation similar to that of the State of Montana.[246] He notified the committee that North Dakota tribes were in agreement with that method because it would provide a fair way to negotiate.[247]

On January 18, 2007, only fifteen days into the Sixtieth Legislative Session, House Bill 1025 failed to pass the North Dakota House of Representatives by a vote of eleven to eighty-three.[248] The message from the legislature was clear: without tribal input and support, legislation guiding negotiation would not pass.[249] The legislature was left with a question

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tribes have "a sneaking suspicion [that the quantification of reserved tribal water rights will] be adjusted against them. Their experience is, every time they win ground, they get shorted." *Id.*; *see also* Jerry Reynolds, *Analysis: Missouri River Reservoir Manual Comes Under Fire,* INDIAN COUNTRY TODAY, Oct. 28, 2003, at A1 (reporting on a hearing that addressed the Missouri River Master Manual).

241. *Hearing on S B. 2115*, *supra* note 37, at 17 (statement of Tex Hall, Chairman of the Mandan, Hidatsa and Arikara Nation).

242. *See, e.g.*, *id.* (asking that legislation not include an administrative law judge and that a board or group representative of interests negotiate on behalf of the state); *Sept. 21, 2006*, *Minutes*, *supra* note 219, at 3 (asking that legislation be tribe-specific).

243. *See* J. of the N.D. H.R. 185 (Jan. 18, 2007) (reporting the failure to pass House Bill 1025).

244. *Hearing on S B. 1025*, *supra* note 1, at 13 (statement of Tom Davis, Water Resources Director for Turtle Mountain Band of Chippewa Indians) ("This bill, in its present form, if no change can be made to accommodate the Turtle Mountain Tribe, as you sit down with us government to government, and have a relationship with us, and the other tribes can participate, then I would ask not to pass this.").

245. *Id.* at 14.

246. *Id.*

247. *Id.*

248. *See* J. of the N.D. H.R. 185 (Jan. 18, 2007) (providing the roll call vote for House Bill 1025).

249. *Id.*; *see Hearing on S B. 2115*, *supra* note 37, at 35-40 (recording the failure of amendments to the bill until all parties finally agreed to study the issue of quantification).

posed just days earlier in committee: "I am hoping you will ask yourselves whether in fact this is the way that you want to deal with your tribal neighbors?"[250]

B. CONSIDERING THE MONTANA MODEL OF NEGOTIATED SETTLEMENTS

With two failed attempts at legislation to guide quantification of tribal water rights behind the North Dakota State Legislature, it has become increasingly important that the state and tribes work together to develop a process under which all parties are able to work.[251] Further, the tribes have made it clear that without tribal involvement, any proposed legislation would be met with strong opposition.[252] For the last two sessions, tribal leaders have made suggestions that would rectify some of the concerns they have had with the prior bills.[253] Tribal leaders have asked the legislature to form a board consisting of representatives from parties affected by the negotiation processes, and often the State of Montana was mentioned as the source of this idea and a guideline for the development of such a board.[254]

The approach taken by Montana with regard to reserve water rights merits consideration.[255] To best understand the development of Montana's process, the adjudication of Montana water rights and the historical perspective that led to the current quantification process is addressed.[256] Additionally, the Reserved Water Rights Compact Commission, a statutorily

250. *Hearing on H B. 1025*, *supra* note 1, at 18 (statement of Steve Emery, Attorney, Standing Rock Sioux Reservation).

251. *See June 6, 2006, Minutes*, *supra* note 38, at 6 (questioning whether the legislature intends to create legislation that the individual tribes can agree to or whether Turtle Mountain Reservation should file suit for the quantification of *Winter* rights).

252. *See Hearing on S B. 2115*, *supra* note 37, at 33-37 (consisting of proposed amendments to the bill by tribal leaders). Senate Bill 2115 was amended into a study in order to facilitate legislation more conducive to tribes, and it passed. *See* J. of the N.D. H.R. 185 (Jan. 18, 2007) (defeating House Bill 1025).

253. *See supra* note 239-43 and accompanying text (discussing concerns with House Bill 1025 that tribal leaders would like addressed).

254. *June 6, 2006, Minutes*, *supra* note 38, at 6 (statement of Steve Kelly, Attorney, Mandan, Hidatsa and Arikara Nation); *Hearing on S B. 2115*, *supra* note 37, at 16-17 (statement of Tex Hall, Mandan, Hidatsa and Arikara Nation); *Hearing on H B. 1025*, *supra* note 1, at 12-13 (statement of Steve Emery, Attorney, Standing Rock Sioux Tribe).

255. *See* discussion *infra* Part III.C (discussing how the Montana model may be beneficial in North Dakota); *see also* discussion *infra* Part IV (finding that the Montana model of quantification may circumvent some of the problems the state has seen with regard to tribal opposition and failed legislation).

256. *See* discussion *infra* Part III.B.1 (reviewing the history of tribal water adjudication and negotiation in Montana).

mandated board now used to negotiate tribal water rights in Montana is analyzed.[257]

1. *Adjudication of Montana Water Rights: A Historical View*

In 1972, water became one of the focuses of a constitutional convention held in Montana.[258] Before 1972, Montana did not have a developed process to regulate water usage, record current water usage, or regulate and administer water rights.[259] This caused great concern for the delegates of the convention.[260] Subsequently, changes were made to the constitution to expand upon former water protections with the idea that additional provisions would protect Montana's water from out-of-state interests.[261] In order to protect these interests, Montana enacted a comprehensive system of water administration and record keeping.[262] The Montana Water Use Act (M.W.U.A.) asserted that all water in Montana was the state's property and, from that point forward, would be administered and quantified under the M.W.U.A.[263] The M.W.U.A. ignored the holding in *Winters*, disregarding that a portion of that water belonged to the Indian tribes rather than the state.[264] Later that year, however, the Montana Supreme Court again recognized tribes' water rights.[265]

The M.W.U.A. provided that *all* existing rights would be adjudicated in Montana's eighty-five water basins.[266] Statewide adjudication of water rights in Montana was an enormous undertaking that involved over a thousand claims per basin and continues to this day.[267] In order to deal with the extensive number of claims and issues that arose from this undertaking, the Montana legislature created the Montana Water Court to adjudicate existing water rights.[268]

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257. *See* discussion *infra* Part III.B.2 (reviewing the Rural Water Compact Commission and its creation).

258. John B. Carter, *Indian Aboriginal and Reserved Water Rights, An Opportunity Lost*, 64 MONT. L. REV. 377, 381 (2003).

259. *Id*. *See generally* LEGISLATIVE HISTORY OF MONT. CONST. art. IX, § 3 (1972) (codified at MONT. CODE. ANN. § 85-2-701) (discussing the background of the situation in Montana regarding water rights).

260. Carter, *supra* note 258, at 381.

261. *Id*.

262. Montana Water Usage Act, MONT. CODE ANN. §§ 85-2-101-907 (2007).

263. *Id*.

264. Carter, *supra* note 258, at 381.

265. *Id*.

266. WESTESEN & BRYAN, *supra* note 47, at 11.

267. *Id*.

268. MONT. CODE ANN. § 3-7-101-502 (2007).

Montana's first adjudication concerned the Powder River Basin.[269] The Montana Department of Natural Resources and Conservation (D.N.R.C.) reviewed all claims to water within the basin and conducted investigations to determine the validity of the asserted claims.[270] For six years, the D.N.R.C. was in the field visiting water sites, taking photographs, and interviewing claimants before state leaders realized that, under this process, the quantification of eighty-four basins would take far too long.[271] After this trial run at adjudication, it became evident that the system set up under the M.W.U.A. would not adequately quantify Montana water in a timely fashion.[272]

In 1979, the Montana Legislature addressed the problem pointed out by the adjudication of the Powder River Basin with Senate Bill 76.[273] This bill changed the Montana Water Court by dividing the state into four water divisions: the Yellowstone River, the Lower Missouri River, the Upper Missouri River, and the Clark Fork River.[274] Also, the bill provided that each water division would have a water judge who could appoint water masters to aid in the process of quantifying water rights.[275] A "chief water judge" and the Montana Supreme Court would oversee the "division judges."[276]

The Montana Legislature also created a board called the Reserved Water Rights Compact Commission (R.W.R.C.C.) in anticipation of a movement toward the negotiation of reserved tribal water rights.[277] The R.W.R.C.C. is a statutorily mandated board consisting of several members of the state government, agency heads, and citizens that meet with tribal governments, typically comprised of the tribal council in its entirety or in part and other reserved water rights holders to quantify water rights.[278] Since its creation in 1979, the R.W.R.C.C. has completed ten compacts, four of which were with federally recognized Indian tribes.[279]

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269. Carter, *supra* note 258, at 380-81.

270. WESTESEN & BRYAN, *supra* note 27, at 13.

271. *Id.* If it took six years to simply investigate one basin in Montana, quantifying eighty-four basins would take a considerable amount of time. *Id.*

272. *Id.*

273. S.B. 76, 1979 Leg., 45th Sess. (Mont. 1979).

274. MONT. CODE ANN. § 3-7-101-102 (1979).

275. *Id.* § 3-7-201.

276. *Id.* §§ 3-7-204, 221.

277. *Id.* § 2-15-212.

278. *Id.* § 85-2-702.

279. *See id.* §§ 85-20-401, 501, 701, 801 (referencing non-tribal reserved water rights compacts formed in Montana); *id.* § 85-20-201 (codifying the Fort Peck Indian Reservation agreement); *id.* § 85-20-301 (codifying the Northern Cheyenne Indian Reservation agreement); *id.* § 85-20-601 (codifying the Rocky Boys Indian Reservation agreement); *id.* § 85-20-901

2. *The Rural Water Rights Compact Commission and Quantifying Tribal Water Rights*

Montana's R.W.R.C.C. is composed of four legislators whom are appointed by the President of the Senate and Speaker of the House, one republican and one democrat from each chamber.[280] The governor and the attorney general appoint the remaining five members of the board.[281] Currently serving on the R.W.R.C.C is an appointed representative of the Attorney General's office and four "citizen members."[282] The citizen members are appointed because of their work in state agencies affected by the quantification of federal reserved water rights such as Montana's Water Resources Division and State Forest Service.[283] Additionally, nine full-time employees work for the R.W.R.C.C in support and legal roles, most with backgrounds in natural resources and conservation.[284]

The nine members of the board are then assigned to negotiation teams of two or three.[285] A technical team leader from the United States Fish and Wildlife Service or the United States Forest Service leads each team.[286] Because reservations are entitled to enough water to fulfill the purpose for which the reservation was established, the R.W.R.C.C. together with its technical staff, begins by determining the purpose for the reservation.[287] After a purpose is established, negotiating parties must come to an agreement regarding the amount of water necessary to achieve that purpose.[288] Both at the beginning of negotiations and after forming an agreement, citizens of Montana are invited to contribute to the process of quantification through public meetings.[289]

After a negotiation is completed, the R.W.R.C.C., the involved tribe, and any necessary federal officials must sign the agreement.[290] The

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(codifying the Crow Indian Reservation agreement); *id*. § 85-20-1001 (codifying the Fort Belknap Indian Reservation agreement).

280. State of Montana Home Page, http://leg.mt.gov (last visited Sept. 5, 2007).

281. *Id*.

282. Reserved Water Rights Compact Commission Home Page, http://dnrc.mt.gov/rwrcc/default.asp (last visited Oct. 10, 2007).

283. *Id*.

284. *Id*. (follow the "about us" hyperlink; then follow the "staff" hyperlink).

285. *Id*.

286. *Id*.

287. *See* WESTESEN & BRYAN, *supra* note 47, at 29-30 (describing the process of negotiation in the state of Montana beginning with the determination of the purpose of the reservation); *see also Jan. 12, 2006, Minutes*, *supra* note 131, at 1-2 (stating that negotiating parties must first determine the purpose of the reservation).

288. WESTESEN & BRYAN, *supra* note 47, at 29-30.

289. Montana Department of Natural Resources, http://dnrc.mt.gov/rwrcc/about_us/commissioners.asp (last visited Oct. 10, 2007).

290. MONT. CODE ANN. § 85-2-702(3) (2007).

agreement then must be ratified in the Montana Legislature and presented to Montana's Water Court so that it may be incorporated into a final decree regarding all quantification of that specific body of water.[291] Montana law provides that if approval of the legislature and a tribe does not occur before July 1, 2009, any claims that are not solidified under the compact will be filed with the R.W.R.C.C. and used in the formulation of preliminary decree.[292]

C. WILL THE MONTANA MODEL WORK IN NORTH DAKOTA?

The Montana model for negotiation has surfaced repeatedly during discussions of Indian water negotiations in North Dakota, but to the dismay of tribal leaders, the North Dakota State Legislature has instead continued to pursue bills modeled after Oregon's method.[293] However, with tension rising between tribal leaders and the state over this issue and the situation at the Turtle Mountain Reservation becoming more serious, it is time for North Dakota leaders to listen to their tribal neighbors and consider the Montana method to quantify federal reserved water rights.

Upon first glance, there are aspects of the M.W.U.A. that cannot be transplanted to North Dakota because of differences in the political climate and a lack of resources.[294] For example, Montana law mandated a statewide adjudication, meaning that *all* water rights on *all* basins in the state had to be quantified.[295] A mandated statewide adjudication does not appear to be the path that tribal or state leaders want to take with regard to the quantification of water in North Dakota.[296] Several of the tribes do not

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291. *Id.*

292. *Id.*

293. *See* OR. REV. STAT. ANN. §§ 539.310, 539.320, 539.330, 539.340, 539.350 (2007) (stating that federally recognized tribes may negotiate water settlements with the "Water Resources Director"). This legislation follows the same process as Senate Bill 2115. *See supra* Part III.A.1 (explaining the process that Senate Bill 2115 proposes, whereby one person negotiates federal reserved water rights on behalf of a state).

294. *Compare* MONT. CODE ANN. § 85-2-701 (2007) (codifying that adjudication will occur statewide), *with Hearing on H.B. 1025*, *supra* note 1, at 17 (statement of Steve Emery, Attorney, Standing Rock Sioux Reservation) (stating that the tribe is not ready to negotiate reserved water rights and that tribes should be reluctant to accept House Bill 1025 despite the permissive nature of the bill because it will bind them to a similar style of quantification).

295. MONT. CODE ANN. § 2-15-212 (2007). Montana was continuing the process of creating a statewide system of water regulation and administration, requiring all rights in the state to be claimed and adjudicated. *See* discussion *supra* Part III.B.1 (explaining the process begun by the 1973 Constitutional Convention).

296. *See Hearing on H.B. 1025*, *supra* note 1, 17 (statement of Steve Emery, Attorney, Standing Rock Sioux Reservation) (informing the committee that the Standing Rock Sioux tribe does not desire to quantify water rights at this time); *see also Hearing on S.B. 2115*, *supra* note 37, at 16 (statement of Tex Hall, Chairman, Mandan, Hidatsa and Arikara Nation) (stating that he "appreciates the permissive nature of the bill" and that it does not mandate quantification).

desire and are not prepared to adjudicate water rights.[297] Similar to Senate Bill 2115 and House Bill 1025, a lack of tribal support will likely result in arriving at another dead end.[298] Further, mandated statewide adjudication is also currently not a reality for the state of North Dakota.[299] In order to mirror Montana's system, the North Dakota Legislature would need to create a water court to hear the disputes regarding quantification and set down final decrees of water rights.[300] Creating a water court would require additional money and personnel resources to create a board similar to the R.W.R.C.C.[301] The R.W.R.C.C. is served by a staff of nine full time employees.[302] While representatives of the North Dakota Water Commission believe that adequate resources to handle negotiations between Turtle Mountain and the state exist, those representatives also note that if any other tribe elects to quantify, additional staff would be needed.[303]

Although it is unlikely that North Dakota will take on the daunting task of a statewide adjudication, the concept of using a board or commission to negotiate is not fatally flawed.[304] While a full time board like the

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297. *See Hearing on H B. 1025*, *supra* note 1, at 17 (statement of Steve Emery, representative of the Standing Rock Sioux Tribe) ("We have not consented to meet with anyone to quantify [Indian water rights] and we are not looking to quantify them at the moment. If and when our Government changes that position, we will be the first to let you know."); *see also id*. at 38 (statement of Tex Hall, Chairman, Mandan, Hidatsa and Arikara Nation) (stating that although the Mandan, Hidatsa and Arikara Nation of Fort Berthold understands quantification will achieve "maximum certainty for water users," the tribe is not ready to "[bless] any process concerning the quantification of their water rights").

298. *See id*. at 17 (statement of Steve Emery, representative, Standing Rock Sioux Tribe) (stating that the bill should remain permissive and language mandating quantification should not be added unless the legislature is looking for tribal opposition to the bill); *Hearing on S B. 2115*, *supra* note 37, at 16 (statement of Tex Hall, Chairman, Mandan, Hidatsa and Arikara Nation) (asking that the legislature maintain the permissive nature of the bill and refrain from mandating quantification for all North Dakota tribes).

299. *See Aug. 3, 2006, Minutes*, *supra* note 219, at 3 (statement of Dave Ripley, Director of Water Appropriations Division, North Dakota Water Commission) (reporting that the North Dakota Water Commission has enough resources to handle negotiations with Turtle Mountain).

300. *Id*. However, if more than just the Turtle Mountain Band of Chippewa Indians wanted to negotiate, the North Dakota Water Commission is unlikely to have adequate resources. *Id*.

301. *Id*.

302. *Id*.

303. *Id*.

304. *See id*. at 3 (statement of Dave Ripley, Director of Water Appropriations Division, North Dakota Water Commission) (stating that the North Dakota Water Commission does not have enough resources to quantify rights with tribes other than Turtle Mountain at this time); *see also June 6, 2006*, *Minutes*, *supra* note 38, at 6 (statement of Steve Kelly, Attorney, Three Affiliated Tribes) (requesting that the legislature consider the Montana model of quantification); *Sept. 15, 2005, Minutes*, *supra* note 219, at 5 (statement from Gene Laducer, Tribal Water Planner, Turtle Mountain Band of Chippewa Indians) (expressing the desire for North Dakota to pursue Montana's model of negotiating tribal water rights). While North Dakota may not be prepared to handle a quantification of all statewide resources, a board could still benefit in the situation with Turtle Mountain and could operate on a more part time basis. *Hearing on H B.*

R.W.R.C.C with permanent staff may not be required, a similar commission could be used that operates with volunteers or appointees and a smaller staff.[305] One of the major advantages of a board handling negotiation is that it brings an element of fairness to the process whereby parties with a stake in the negotiation are represented.[306] A board that includes elected officials brings political accountability into the process.[307] Further, having elected representatives serve on the board will also create a situation where those representatives can act as liaisons to the legislature, whereby they can inform and educate other representatives as to the negotiation process thereby making it more likely that an agreement will withstand legislative ratification.[308]

Using Montana as a guide, a North Dakota commission would also have representatives from the North Dakota Water Commission (Water Commission).[309] Involvement of the Water Commission would provide local expertise regarding water systems, regulation, and needs.[310] Further, the Water Commission has record of all rights holders currently using water in each basin.[311] North Dakota tribes including Turtle Mountain have been using water under the permit system. Records of that usage may provide a starting point for negotiations.[312]

1025, *supra* note 1, at 3-5 (statement of Dave Ripley, Director of Water Appropriations Division, North Dakota Water Commission).

305. *See Aug. 3, 2006*, *Minutes*, *supra* note 219, at 3 (statement of Dave Ripley, Director of Water Appropriations Division, North Dakota Water Commission) (stating that the Water Commission has the resources available to assist or facilitate a quantification negotiation with Turtle Mountain).

306. *See Hearing on S B. 2115*, *supra* note 37, at 17 (statement of Tex Hall, Chairman, Mandan, Hidatsa and Arikara Nation) (noting that having a participatory board would make the process more "fair").

307. *See* MONT. CODE ANN. § 2-15-212 (2007) (including two members from each chamber of the Montana Legislature). The voters of Montana elect the members in both the Montana State Senate and House of Representatives. MONT. CONST. art. V, § 3 (2007) (stating that Montana House of Representative Members are elected for two years and Montana Senators are elected for four years).

308. *See Jan. 12, 2006*, *Minutes*, *supra* note 131, at 2 (statement of Clive J. Strong, Idaho Chief Assistant Attorney General) (having legislators to facilitate the process is one reason Montana chose a commission rather than Oregon's approach of an individual negotiating).

309. *See id.* (creating the R.W.R.C.C. with members from the Montana Department of Natural Resources, the equivalent to North Dakota's Water Commission).

310. *See* N.D. CENT. CODE § 61-01-01 (2008) (charging the North Dakota Water Commission with the responsibility of collecting data, maintaining records, and supervising the usage of water in the state).

311. *Id.* The North Dakota Water Commission maintains records of permits in the state. *Id.* § 61-02-03.

312. *See Aug. 3, 2006*, *Minutes*, *supra* note 219, at 3 (statement of Gene Laducer, Tribal Water Planner, Turtle Mountain Band of Chippewa Indians) (stating that Turtle Mountain currently diverts water under permits obtained from the state water commission).

In addition to creating a body where interested parties could work together, the Montana model provides that after quantification, the tribe will administer water rights.[313] Although states have never had the jurisdiction to administer tribal water rights, leaving tribal water rights unquantified, in effect, gives states that ability.[314] Many tribes seek quantification for the very purpose of managing the tribe's resources independent from state control.[315] In Montana, all control of water after quantification rests with the tribe.[316] Tribes are then charged with developing water codes to regulate and administer water within the reservation borders.[317] Although these codes are subject to the final approval of the U.S. Department of the Interior as trustee, this department has not issued approval for water codes of quantified water rights in nearly two decades.[318] Many tribes and states incorporate language providing for the tribal management of water into the agreement and implement the agreement and subsequent water code without the approval of the Department of the Interior.[319]

The Montana model of quantification allows for the input of representatives who understand the stakes of an unfair or unjust water agreement.[320] Further, three of four federally recognized tribes in North Dakota have expressed support for pursuing legislation modeled after Montana.[321] Tribal support along with the unarguable premise that

313. MONT. CODE ANN. §§ 85-20-201, 301, 601, 901, 1001 (2007).

314. *See* BOBROFF ET AL., *supra* note 14, at 1202 (stating that the federal government has not given states the jurisdiction to regulate tribal water). However, as seen by states like North Dakota and Montana, until water is quantified, state administrative departments *do* regulate those resources. *See Sept. 15, 2005, Minutes*, *supra* note 219, at 3-4 (clarifying that Turtle Mountain Reservation is currently using water under the state permitting system); Carter, *supra* note 258, at 381 (stating that until Montana water is negotiated with tribes, it is under state administration).

315. BOBROFF ET AL., *supra* note 14, at 1212.

316. *See* MONT. CODE ANN. § 85-2-702(3) (2007) (detailing that after ratification, water management will be the right of the tribes).

317. BOBROFF ET AL., *supra* note 14, at 1204.

318. *Id.* at 1205.

319. *Id.* In the mid-1980s, the Secretary of the Interior ordered that any water codes submitted to the Department of the Interior be returned to tribes without approval. *Id.* at 1205 n.274.

320. *See supra* note 308 and accompanying text (noting that reasons exist for considering Montana's quantification methods).

321. *See generally Hearing on S B. 2115*, *supra* note 37, at 1-17 (providing statements from leaders expressing support for the Montana model of quantification); *Hearing on S B. 1025*, *supra* note 1, at 4-20 (repeating the statements from these meetings where a representative from each tribe expressed interest in the Montana method). The Spirit Lake Nation did not offer formal testimony regarding the position of their tribe during these hearings. *See id.* (noting no testimony from Spirit Lake leaders); *Hearing on S B. 2115*, *supra* note 37, at 1-17 (recording no Spirit Lake testimony).

additional representation may create a more fair process certainly warrants consideration of similar legislation.[322]

IV. CONCLUSION—THE FUTURE OF TRIBAL WATER IN NORTH DAKOTA

Quantification of tribal water rights has become a complex field of varying law and varying results.[323] Many states have waited for tribal water rights to further develop before beginning quantification.[324] Without quantification, however, tribes watch as more and more water is appropriated to non-Indian water users and the possibility of losing rights in the face of equitable distribution of water has prompted many tribes to choose negotiation.[325] Meeting government-to-government to resolve Indian water rights seems like the only logical option for North Dakota tribes.[326] Negotiation allows tribal leaders the opportunity to walk away from the negotiating table if fair treatment of Indian water rights is not afforded.[327]

The goal of tribal leaders is simple.[328] Steve Emery, an attorney for the Standing Rock Sioux Reservation stated: "We want to make sure that because our homeland isn't going to move, we have enough water forever."[329] Achieving this goal is not as simple.[330] After nearly a decade of looking at quantification and hearing the request of North Dakota tribes, it seems clear that the future of tribal water rights is pursuing a model of negotiation that allows a board to participate similar to that of Montana.[331]

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322. *See Hearing on S.B. 2115*, *supra* note 37, at 17 (testimony of Tex Hall, Chairman, Mandan, Hidatsa and Arikara Nation) (stating that the process would be more fair with additional involvement).

323. BOBROFF ET AL., *supra* note 14, at 1212-13.

324. Williams, *supra* note 12, at 37. These states are hoping that through additional development, reliability and continuity will be added to the process. *Id.*

325. *Id.*

326. *See Hearing on S B. 2115*, *supra* note 37, at 10-18 (expressing hope that agreements can be made government-to-government).

327. *See Hearing on H.B.* 1025, *supra* note 1, at 2 (statement of Dave Ripley, Director of Water Appropriations Division, North Dakota Water Commission) (stating that negotiated agreements would be willing parties to reach an agreement).

328. *See supra* note 297 and accompanying text (mentioning the goals of North Dakota leaders).

329. *Hearing on H B. 1025*, *supra* note 1, at 18-19 (statement of Steve Emery, Attorney, Standing Rock Sioux Tribe).

330. *Id.*

331. *See id.* (citing multiple requests from tribal leaders to pursue Montana-modeled legislation and a statement from the Water Commission that it is worth consideration).

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