

INDIAN RESERVED WATER RIGHTS:
IMPENDING CONFLICT OR COMING RAPPROCHEMENT
BETWEEN THE STATE OF NORTH DAKOTA AND
NORTH DAKOTA INDIAN TRIBES

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EDITOR’S NOTE

This article contains many citations to letters and memoranda. Copies of these documents, as well as some of the other non-traditional sources cited, are on file with the author. The article also cites a number of sources, such as biennial reports, state water plans, meeting minutes, and state water permits, which are available at the state water commission’s website, www.swc.state.nd.us.

I. INTRODUCTION

One hundred years ago the Supreme Court decided *Winters v. United States*.¹ The decision is seminal. It is one the Court’s foremost Indian law decisions and a landmark for water law in the West. The Court held that when an Indian reservation is established, water rights accompany creation of the Indian homeland; water rights are reserved for the tribe.² The priority date for a *Winters* water right—also known as the Indian reserved water right—is the date the reservation was created.³

Indian reservations in North Dakota were created in the 1800s.⁴ Thus, water rights reserved to North Dakota tribes pre-date and are superior to water rights held under state law. Should tribes claim their water, the claims may implicate water that flows to non-Indian farms and ranches where fields have been irrigated and stock watered for generations. State water rights held by industrial facilities, businesses, and communities are

1. 207 U.S. 564 (1908).

2. *Winters*, 207 U.S. at 575-76.

3. *Arizona v. California*, 373 U.S. 546, 600 (1963).

4. See *infra* at notes 49, 82-83 and accompanying text (discussing treaties and executive orders under which the reservations were established).

insecure.⁵ Also, uncertainty about the quantity of water that Indian tribes will control when their rights are quantified compromises the state engineer's ability to manage water resources.⁶

Indian water rights have been litigated throughout the West and a number of Congressional acts have settled the water claims of some tribes.⁷ But in North Dakota neither litigation nor in-depth negotiation has occurred. At times, disputes over water between a tribe and the state flare-up but get resolved through an informal understanding, fade away, or linger to fester. At times, the state and tribes have embarked on ambitious cooperative endeavors but failed to conclude them with a meaningful result,⁸ and have been unable to use the cooperation as a foundation for fundamental changes in the relationship between the tribes and the state. Tribes occasionally express interest in quantifying their water rights through negotiation, but have second thoughts and pull back.⁹ One hundred years after the Supreme Court declared the Indian reserved water right, water rights held by North Dakota tribes remain unquantified.

Were the tribes to assert their water rights, present water use under state law could be disrupted and the state might have to change how it manages water resources and administers water rights. An assertion of Indian water rights could stymie development. On the other hand, discussions on the subject could result in arrangements that protect non-Indian interests and secure to tribes their legal, historical, and moral right to water. The discussion could, depending upon the skill and good will of tribal and state leaders, mark a defining and enlightened chapter in their relationship.

This article summarizes the foundation of North Dakota water law, that is, the prior appropriation doctrine. It then reviews the path by which non-

5. See *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981) (stating that "open-ended water rights are a growing source of conflict and uncertainty in the West" and that until they are settled "state-created water rights cannot be relied on by property owners" (citations omitted)); N.D. STATE WATER COMM'N, 1983 STATE WATER PLAN, at I-43 (stating that "reserved water rights create uncertainty," and, consequently, "water rights under State law cannot be guaranteed"); FINAL ENVIRONMENTAL IMPACT STATEMENT, RED RIVER VALLEY WATER SUPPLY PROJECT, Appx. J at 16-17, available at <http://www.rvwsp.com> (noting that quantifying tribal water rights could affect the Corps of Engineers' operations and the volume of water available to non-Indian users).

6. N.D. STATE WATER COMM'N, NORTH DAKOTA STATE WATER MANAGEMENT PLAN, at 65 (1992) [hereinafter 1992 STATE WATER PLAN].

7. *Conference Transcript: The New Realism: The Next Generation of Scholarship in Federal Indian Law*, 32 AM. INDIAN L. REV. 1, 133 (2007) (statement of Robert Anderson) (stating that twenty Indian water rights settlements have been congressionally-approved).

8. See discussion *infra* Part V.D. (discussing an unsuccessful water study involving the Standing Rock Sioux, the federal government, and the state government).

9. See discussion *infra* Part V.B.-V.C. (discussing aborted Three Affiliated and Turtle Mountain quantification initiatives).

Indians took homesteads on North Dakota Indian reservations, which in turn explains, first, the significant modern-day presence of non-Indian residents and non-Indian-owned land on reservations; second, the state's effort to control some on-reservation water and its use; and third, it explains a fundamental source of tension between tribes and the state. The article recounts tribal assertions of jurisdiction over on-reservation water resources and their adamant rejection of North Dakota water law. It then reviews the 1908 *Winters* decision and its development during the past few decades, with an emphasis on the standard by which Indian reserved water rights are often measured, that is, practicably irrigable acres. How this standard might apply on North Dakota reservations, and if it should apply, are also addressed. The article concludes with an overview of the relationship between the tribes and the state regarding water.¹⁰

II. PRIOR APPROPRIATION: THE FOUNDATION OF NORTH DAKOTA WATER LAW

A. DEVELOPMENT OF PRIOR APPROPRIATION AND ITS ADOPTION BY NORTH DAKOTA

Not long after Dakota Territory was organized the Territorial Legislature considered the most appropriate water rights system for Dakota. It had two regimes from which to choose—the well-developed riparian system or the nascent prior appropriation system.¹¹ The riparian system had been adopted by eastern states.¹² Under it, a water right is founded on title to riparian land and entitles its holder to the amount of water needed to develop the riparian land, subject to the reasonable needs of other landowners along

10. This article does not cover the Sisseton-Wahpeton Sioux Tribe. While the tribe has a North Dakota presence, its predominant relationship with a state is with South Dakota. The 1867 treaty creating its Lake Traverse Reservation placed only a sliver of land in what would be North Dakota, and in 1891 when Congress opened the reservation to non-Indian settlement it disestablished the reservation. *DeCoteau v. Dist. County Court*, 420 U.S. 425, 428-29 (1975). Although the tribe operates a casino in North Dakota on that slice of former reservation, the tribal government operates out of South Dakota and most tribal members live there. Because of the Sisseton-Wahpeton Sioux Tribe's limited North Dakota presence, this article does not address its water rights.

Regarding tribal names, for well over 100 years the tribe at Fort Totten was known as the "Devils Lake Sioux," but recently changed its name to the "Spirit Lake Nation." This article uses the terms "Spirit Lake Nation" and "Spirit Lake Reservation." Indians at Fort Berthold have been traditionally known as the "Three Affiliated Tribes" but today are sometimes referred to as the "Mandan, Hidatsa, and Arikara Nation." This article uses the traditional name.

11. See generally A. DANIEL TARLOCK, *LAW OF WATER RIGHTS & RESOURCES* chs. 3, 5 (Environmental Law Series ed., 2001) (discussing the two systems); Vincent R. Larson, *A Local View: The Development of Water Rights and Suggested Improvements in the Water Law of North Dakota*, 38 N.D. L. REV. 243, 245-49 (1962) (discussing the two systems).

12. Larson, *supra* note 11, at 247.

the stream.¹³ The right does not depend on diverting and putting water to a specific use.¹⁴ It is not acquired by use nor lost by nonuse and it is not linked to a specific quantity.¹⁵

The prior appropriation system is much different. It is not tied to owning riparian land. Prior appropriation allows anyone to acquire a water right by diverting water and putting it to a beneficial use, whether the use is on land adjoining the stream or far from it.¹⁶ The right is defined by the quantity of water needed for the beneficial use.¹⁷ It is subject only to rights acquired by earlier appropriators.¹⁸ “First in time, first in right” expresses the prior appropriation system.¹⁹

Selecting a water rights system is driven by the natural environment. In an area of plentiful rain, most needs, even those of nonriparians, will be met and if additional water is required the abundance of streams and lakes allow reasonable access to riparian land and hence to water. Thus, in the eastern states the riparian system was adopted.²⁰ But on America’s western frontier, some believed that the riparian water rights system hindered development.²¹ A system based on owning land next to water was compromised by the general lack of water and the unique nature of land ownership. In the 1800s, little private land existed in the West; the federal government—or Indian tribes—owned it all. But settlement and development required water and the West’s settlers, early miners, and Mormon pioneers diverted water from the few streams available. Driven by the West’s societal and economic needs, frontiersmen developed a new water rights system: the person who first appropriated water to a beneficial use acquired a water right. The Nebraska Supreme Court explained:

[The prior appropriation doctrine] was a crude attempt to preserve order and the general peace, and to settle customary rights among a body of men subject to no law, under which so many and so val-

13. *Id.* at 245-46.

14. TARLOCK, *supra* note 11, at § 3:52.

15. *See id.* at §§ 3:54-:56.

16. *Id.* § 5:43.

17. A. Dan Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric?*, 76 N.D. L. REV. 881, 882 (2000) [hereinafter Tarlock, *Prior Appropriation*].

18. *Id.*

19. *Arizona v. California*, 373 U.S. 546, 555 (1963); *see also* N.D. CENT. CODE § 61-04-06.3 (2003) (“Priority in time shall give the superior water right.”); Tarlock, *Prior Appropriation, supra* note 17, at 881.

20. Larson, *supra* note 11, at 247.

21. *Id.* at 248-49.

uable rights arose that when the law stepped in it was obliged to recognize them.²²

The customs of settlers and miners ripened into law,²³ a law first formally recognized in 1855.²⁴

Thus, the Dakota Territorial Legislature had a choice between two regimes. In 1866 it chose the riparian water rights system.²⁵ It soon had second-thoughts and in 1881 enacted a statute that seemed to recognize prior appropriation.²⁶ The uncertainty was put to rest in 1905 when the North Dakota Legislature amended the territorial statute—which the state had adopted upon entering the Union—and unequivocally recognized prior appropriation.²⁷ It did not, however, repeal the riparian water rights statute or eliminate rights acquired under it. Thus, for many years North Dakota operated a dual system.²⁸ Not until 1963 did the legislature repeal the riparian rights statute.²⁹ As a result, riparian water rights can no longer be acquired, but those existing in 1963 and not otherwise lost are recognized.³⁰

22. *Meng v. Coffey*, 93 N.W. 713, 716 (Neb. 1903).

23. *See, e.g., Jennison v. Kirk*, 98 U.S. 453, 457 (1878) (stating that miners “were emphatically the law-makers”); *Bailey v. Tintinger*, 122 P. 575, 579 (Mont. 1912) (noting that prior appropriation “had its origins in the customs of miners and others”); 1 WELLS A. HUTCHINS, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES* 159-65 (1971) (discussing the origins of the prior appropriation doctrine).

24. *Irwin v. Phillips*, 5 Cal. 140, 147 (1855).

25. TERR. DAK. LAWS, CIVIL CODE § 256 (1865-1866) (later codified as DAK. CIVIL CODE § 255). *See* 3 WELLS A. HUTCHINS, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES*, 407-23 (1977) (giving a brief history and overview of North Dakota water rights); Robert E. Beck & John C. Hart, *The Nature and Extent of Rights in Water in North Dakota*, 51 N.D. L. REV. 249, 250-75 (1974) (providing a history of private water rights in North Dakota); Larson, *supra* note 11, at 258-74 (discussing law and water problems in North Dakota).

26. TERR. DAK. LAWS, ch. 142, § 1 (1881).

27. 1905 N.D. Laws ch. 34, § 1. The Reclamation Act of 1902, Pub. L. No. 161, 32 Stat. 388, offered states the opportunity to develop water resources. The Reclamation Service, however, feared that state law would allow riparian rights and undocumented water rights to control large amounts of water in federal projects. To protect its interests, the Reclamation Service drafted a model state water code, the Bien Code, which North Dakota adopted in 1905 nearly without amendment. 1906 N.D. STATE ENG’R SECOND BIENNIAL REP., at 42-43. North Dakota and other states adopted it to ensure that state law would not impede obtaining federal water projects. John E. Thorson, et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. DENV. WATER L. REV. 355, 413-14, 422 (2005).

28. *See generally* Wells A. Hutchins, *A Regional View: Riparian-Appropriation Conflicts in the Upper Midwest*, 38 N.D. L. REV. 278 (1962) (discussing dual water rights systems); Frank J. Trelease, *Coordination of Riparian and Appropriative Rights to Use of Water*, 33 TEX. L. REV. 24 (1955) (stating that the Dakotas have recognized both riparian law and prior appropriation).

29. 1963 N.D. Laws ch. 419, § 7. Legislation in 1955 had limited the riparian water right. 1955 N.D. Laws ch. 345, § 1; Beck & Hart, *supra* note 25, at 258.

30. *See generally*, Beck & Hart, *supra* note 25, at 260 (discussing the effect of the 1963 riparian rights statute repeal). A water right may also be acquired by prescription. *Id.* at 272-75; N.D. CENT. CODE § 61-04-22 (2003).

To regulate water rights North Dakota adopted a comprehensive administrative regime.³¹ The state engineer oversees the program, which has been in place since 1905.³² Approximately 4,700 water permits have been issued and 80% remain in effect.³³ Under the permit system the state authorizes the consumptive use of about 382,000 acre-feet annually.³⁴ Most of this—60%—is for irrigation.³⁵ About 20% is used for domestic and small business purposes, 12% is used for industrial purposes, and 8% for livestock.³⁶ Small appropriations for domestic, livestock, and recreational uses do not require a state permit but are enforceable water rights.³⁷ Thousands of such uses exist.³⁸ The amount of water used by these small, non-permitted uses is difficult to estimate, but could be about 30,000 acre-feet annually.³⁹ The state also requires permits for dams that retain more than 12.5 acre-feet, and the state engineer has issued about 330 dam permits.⁴⁰

B. APPLICATION OF PRIOR APPROPRIATION ON NORTH DAKOTA INDIAN RESERVATIONS

The state asserts authority over non-Indian farmers and ranchers wanting to develop water resources on land within Indian reservations.⁴¹ And it asserts authority over water appropriations by reservation towns, at least those incorporated under North Dakota law.⁴² These assertions of jurisdic-

31. N.D. CENT. CODE ch. 61-04 (2003); N.D. ADMIN. CODE 89-03 (2004).

32. 1905 N.D. Laws ch. 34. The first state engineer was appointed in 1904 by the governor. 1904 N.D. STATE ENG'R FIRST BIENNIAL REP., at 7. The following year the legislature formally established the position. 1905 N.D. Laws ch. 34, § 5. In 1937 the legislature created the state water conservation commission. 1937 N.D. Laws ch. 255, § 3.

33. Interview with Robert B. Shaver, Dir., Water Appropriations Div., N.D. State Eng'r's Office, in Bismarck, N.D. (June 11, 2008) [hereinafter Shaver Interview].

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*; see also N.D. CENT. CODE § 61-04-02 (2003) (exempting wells that annually appropriate less than 12.5 acre-feet from the state permitting requirement).

38. Shaver Interview, *supra* note 33.

39. *Id.*

40. *Id.*

41. *E.g., id.*; N.D. STATE WATER COMM'N, NORTH DAKOTA STATE WATER MANAGEMENT PLAN, at 91 (1999) [hereinafter 1999 STATE WATER PLAN]; Letter from David A. Sprynczynatyk, State Eng'r, to Kevin Willis, U.S. Fish & Wildlife Serv. (Apr. 5, 1995) (stating that a dam built "on non-tribal land within the reservation requires a state permit"); Letter from Vern Fahy, State Eng'r, to Allan [sic] Olson, Att'y Gen. (Dec. 24, 1974) ("Historically we have granted permits to fee owners within Indian Reservations.").

42. See, *e.g.*, Standing Rock Reservation, State Water Permits No. 1205 (City of Selfridge, 1964, 105 acre-feet) and No. 1880 (City of Solen, 1972, 31.4 acre-feet); Fort Berthold Reservation, State Water Permits No. 1823 (City of New Town, 1972, 480 acre-feet) and Nos. 3735 and 5509 (City of Parshall, 1984 and 2001, 225 and 125 acre-feet); Spirit Lake Reservation, State Water Permit No. 3005 (City of Warwick, 1978, 41.2 acre-feet).

tion are not recent. They began long ago, when non-Indians began taking homesteads on Indian reservations. Non-Indians settled reservations under federal Indian policy of the late 1800s and early 1900s that sought to assimilate Native Americans into white society.⁴³ As the Commissioner of Indian Affairs stated in 1889, “The logic of events demands the absorption of the Indians into our national life, not as Indians, but as American citizens.”⁴⁴ A scholar on federal Indian policy described what the government sought:

The change was to be made from the nomadic life of the buffalo hunter to the sedentary life of a small farmer, from communal patterns to fiercely individualistic ones, from native religious ceremonies to Christian practices, from Indian languages and oral traditions to spoken and written English.⁴⁵

A method to assimilate Indians was through land allotments, which were “persistently proposed” as the answer to “the Indian problem.”⁴⁶ President Roosevelt considered allotments “a mighty pulverizing engine” that would break-up the tribes.⁴⁷

Under the allotment system the federal government discarded communal ownership of reservation land, dividing it into tracts allotted to individual tribal members who could then begin new lives as farmers. As a Sioux leader recounted, “The whites were always trying to make the Indians give up their life and . . . go to farming.”⁴⁸ Allotment provisions were often inserted in treaties, including those establishing the Spirit Lake, Standing Rock, and Fort Berthold Reservations.⁴⁹ In 1887 the policy was made na-

43. See generally FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 609-715 (1984).

44. *Id.* at 610.

45. *Id.* at 656.

46. *Id.* at 659.

47. President’s Message to Congress (Dec. 3, 1901), *reprinted in* 35 CONG. REC. 81, 90 (1902).

48. PRUCHA, *supra* note 43, at 441 (quoting Sioux Chief Big Eagle who was explaining the causes of the 1862 Minnesota Uprising in which he participated).

49. Treaty of Feb. 19, 1867, 15 Stat. 505, *reprinted in* II INDIAN AFFAIRS: LAWS AND TREATIES 956, 958 (Charles J. Kappler ed., 1904) [hereinafter Spirit Lake Treaty] (establishing Spirit Lake Reservation and, at Art. 5, providing 160-acre allotments); Act of Mar. 2, 1889, 25 Stat. 888, *reprinted in* I INDIAN AFFAIRS: LAWS AND TREATIES 328, 329 (Charles J. Kappler ed., 1904) [hereinafter Standing Rock Treaty] (establishing the Standing Rock Reservation and, at § 8, providing for 40, 80, 160, and 320-acre allotments); Act of Mar. 3, 1891, 26 Stat. 989, 1032, *reprinted in* I INDIAN AFFAIRS: LAWS AND TREATIES 407, 425-26 (Charles J. Kappler ed., 1904) [hereinafter Fort Berthold Treaty] (establishing the Fort Berthold Reservation and, at Art. III, providing for 40, 80, and 160-acre allotments). The Kappler compilation is available at <http://digital.library.okstate.edu/Kappler>.

tionwide,⁵⁰ and not formally abandoned until 1934.⁵¹ Allotments—often 320 acres but not uncommonly 160 acres—were considered sufficient to sustain the Indian allottees.

After tribal members had selected their allotments, or had one assigned to them, there often remained on the reservation unallotted or “surplus” land.⁵² This land was opened to non-Indian homesteaders.⁵³ Encouraging non-Indians to settle on reservations furthered the assimilation policy; the government believed that with white neighbors to emulate Indians would more quickly develop farming skills and other characteristics of non-Indian society.⁵⁴ The amount of “surplus” land on many reservations was large. Consequently, opening it to non-Indians cut deep into the tribal land base.⁵⁵ Later events—by which title to many allotments passed from Indians to non-Indians—led to additional and significant land losses.⁵⁶

Land was originally protected by the federal government’s retention of title in trust for the Indian allottee. Retaining title in trust was necessary because Indians were unfamiliar with private land ownership and needed protection from unwise decisions and unscrupulous non-Indians. But the trust period lasted only a relatively short time, after which allotments were conveyed in fee to the Indian allottees, “open[ing] the door to early alienation of allotments.”⁵⁷ Title to allotments owned in fee could be lost three ways. First, fee land was subject to state tax law, and if taxes were not paid counties acquired the title.⁵⁸ Second, Indian owners could sell fee land; and

50. General Allotment (Dawes) Act of 1887, 24 Stat. 388, *amended by* 26 Stat. 794 (1890) (providing for 160-acre allotments to heads of families—or 320 acres if the allotment was for grazing—and smaller allotments to others); *see generally* D.S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (Francis Paul Prucha ed., 1973).

51. Indian Reorganization Act of 1934, Pub. L. No. 383, 48 Stat. 984, § 1, *reprinted in* V INDIAN AFFAIRS: LAWS AND TREATIES 378, 378 (Charles J. Kappler ed., 1941) (“hereafter no land of any Indian reservation . . . shall be allotted in severalty to any Indian”).

52. *E.g.*, *DeCoteau v. Dist. County Court*, 420 U.S. 425, 432 (1975).

53. *E.g. id.*; PRUCHA, *supra* note 43, at 867.

54. *E.g.*, H.R. REP. NO. 57-953, at 2 (1902) (breaking up the Spirit Lake Reservation, the Indians having taken their allotments, “will result in great good to the Indians through the intermingling of the races”); 1901 COMM’R OF INDIAN AFFAIRS ANNUAL REP., at 296 (stating in reference to the Turtle Mountain Band: “surrounded as they are by thrifty whites, the observation of several years has been to them something of an educator”); PRUCHA, *supra* note 43, at 581 (quoting Sen. Henry M. Teller who said white farmers as neighbors “would become valuable auxiliaries in the work of civilizing the Indians”).

55. CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 30 (Clay Smith chief ed., 3d ed. 2004) [hereinafter INDIAN LAW DESKBOOK].

56. *Id.*

57. PRUCHA, *supra* note 43, at 876.

58. *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 113 (1998); *County of Yakima v. Confederated Tribes & Bands and Yakima Indian Nation*, 502 U.S. 251, 263-64 (1992).

they found ready buyers among non-Indian farmers and ranchers.⁵⁹ And third, Indian owners could mortgage fee land, but unpaid loans led to foreclosure.⁶⁰ Thus, it was not only through the government's sale of "surplus" lands that non-Indians took title to reservation land, for throughout much of the first part of the 1900s a substantial amount of additional land was acquired through tax sales, direct land sales, and loan foreclosures.

This dramatic Indian-to-non-Indian shift in land ownership occurred in North Dakota. The first reservation opened to non-Indian homesteaders was Spirit Lake. Established in 1867,⁶¹ the Spirit Lake Reservation covered about 230,000 acres.⁶² By 1900, 137,000 acres had been allotted to tribal members or reserved for future allotments.⁶³ After allotments were taken, Congress authorized the President to open the reservation's "surplus" land to non-Indian homesteaders and President Roosevelt promptly opened 88,000 acres.⁶⁴ And by the latter part of the Twentieth Century—through a combination of private sales by Indian allottees, tax sales by Benson County, and bank foreclosures—non-Indian land ownership on the Spirit Lake Reservation had more than doubled. Calculations vary about the amount of non-Indian ownership, ranging from 168,000 acres⁶⁵ to 194,000 acres.⁶⁶ Whatever the exact amount, 140 years after the reservation was created,

59. Matthew F. Jaksa, *Putting the 'Sustainable' Back in Sustainable Development: Recognizing and Enforcing Indigenous Property Rights as a Pathway to Global Environmental Sustainability*, 21 J. ENVTL. L. & LITIG. 157, 188 n.140 (2006).

60. *Id.*

61. Spirit Lake Treaty, *supra* note 49.

62. S. REP. NO. 57-713, at 4 (1902). If the 11,000-acre Ft. Totten Military Reserve is included, the reservation covered about 241,000 acres. *Id.* If Devils Lake—which borders the reservation's northern boundary—is included, the reservation would be much larger. And the Spirit Lake Nation asserts that the 1867 Treaty's description of the reservation's northern boundary includes Devils Lake, but North Dakota as well as the United States disagree and assert that the lake is outside of the reservation. *See Spirit Lake Tribe v. North Dakota*, 262 F.3d 732 (8th Cir. 2001).

63. S. REP. NO. 57-713, at 4 (1902).

64. Pub. L. No. 179, 33 Stat. 319 (Apr. 27, 1904); Proclamation No. 32 of June 2, 1904, 33 Stat. 2368; Proclamation No. 68, 43 Stat. 1966 (Aug. 29, 1904); *see also* Proclamation No. 60 (June 8, 1907); Proclamation No. 64 (Apr. 26, 1916). It has been argued that when Congress opened the reservation to non-Indians it intended to disestablish the reservation, but the argument has been rejected. *United States v. Grey Bear*, 828 F.2d 1286, 1291 (8th Cir. 1987).

65. Devils Lake Sioux Tribe Land Transactions: Hearing on S. 503 Before the Sen. Select Comm. on Indian Affairs, 97th Cong. 23 (1981) (statement of Robert L. Pirtle, Special Counsel, Spirit Lake Nation).

66. SPIRIT LAKE NATION, 1969 OVERALL ECONOMIC DEVELOPMENT PLAN: FORT TOTTON REDEVELOPMENT AREA 3; *see also* Devils Lake Sioux Indian Tribe v. North Dakota Pub. Serv. Comm'n, 896 F. Supp. 955, 958 (D.N.D. 1995) (stating that non-Indians own 181,764 acres); *In re Otter Tail Power Co.*, 451 N.W.2d 95, 101 (N.D. 1990) (stating that non-Indians own 192,794 acres). A federal court, in dicta, has stated that the reservation's allotment and opening to non-Indians "evidences a clear Congressional intent to dissolve the reservation as a political entity." *Devils Lake Sioux Indian Tribe*, 896 F. Supp. at 960.

non-Indians own a majority of land that had been “reserved” for the Spirit Lake Nation.

Like Spirit Lake, the Fort Berthold and Standing Rock Reservations suffered significant losses of land. Surplus Land Acts took the initial toll, followed by non-Indian acquisitions by other means. Both reservations were established in similar ways. The initial reservations were large but steadily reduced. In 1889 and 1891, Congress established the modern-day boundaries.⁶⁷ The North Dakota side of the Standing Rock Reservation covers about 706,000 acres.⁶⁸ In 1908 Congress authorized the President to open the west half of the reservation to non-Indian homesteaders.⁶⁹ In 1913 it authorized opening the east half.⁷⁰ Non-Indians now own around fifty percent of the North Dakota side of the reservation.⁷¹

The Fort Berthold Reservation’s 1891 boundaries enclosed about 980,000 acres.⁷² In 1910 it was opened to non-Indian settlement.⁷³ Most of

67. Standing Rock Treaty, *supra* note 49, at 888; Fort Berthold Treaty, *supra* note 49, at 989.

68. Telephone Interview with Barb Hettich, Sioux County Auditor (May 29, 2008) [hereinafter Hettich Interview]; see also U.S. Bur. of Indian Affairs, *Land Ownership Map Standing Rock Sioux Reservation* (Mar. 1, 2004) [hereinafter BIA Map]. The map can be used to calculate—not specifically but approximately—non-Indian acreage on the reservation because the map divides the reservation into 640-acre sections and each section is color-coded to depict such land ownership categories as fee land, tribal land, trust land, and state-owned land. See WILLIAM C. SHERMAN, PRAIRIE MOSAIC: AN ETHNIC ATLAS OF RURAL NORTH DAKOTA 10-11 (1983) (providing a map of Sioux County that uses 1965 data to show where different ethnic groups live, including wide swaths populated by non-Indians).

69. Pub. L. No. 158, 35 Stat. 460, 460 (May 29, 1908), *reprinted in* III INDIAN AFFAIRS: LAW AND TREATIES 373 (Charles J. Kappler ed., 1913); Proclamation No. 61, 36 Stat. 2500, 2500 (Aug. 19, 1909) *reprinted in* III Indian Affairs: Law and Treaties 657 (Charles J. Kappler ed., 1913).

70. Pub. L. No. 380, 37 Stat. 675, 675 (Feb. 14, 1913), *reprinted in* III INDIAN AFFAIRS: LAW AND TREATIES 555 (Charles J. Kappler, ed., 1913); Proclamation No. 64, 39 Stat. 1721, 1721-24 (Mar. 18 1919), *reprinted in* IV INDIAN AFFAIRS: LAW AND TREATIES 956 (Charles J. Kappler ed., 1929). It has been asserted that by opening the Standing Rock Reservation to non-Indians Congress intended to disestablish it, but the argument has been rejected. *United States v. Long Elk*, 565 F.2d 1032, 1035-36 (8th Cir. 1977).

71. Hettich Interview, *supra* note 68. The North Dakota side of the reservation and North Dakota’s Sioux County are one and the same. There are about 335,000 acres of fee land in Sioux County. BIA Map, *supra* note 68. Almost all of this is owned by non-Indians. Hettich Interview, *supra* note 68. Further, about 23,500 acres in Sioux County are state-owned school lands. *Id.*; BIA Map, *supra* note 68.

72. See MARY JANE SCHNEIDER, NORTH DAKOTA INDIANS: AN INTRODUCTION 142 (Kendall/Hunt Publishing Co. 1994).

73. Pub. L. No. 197, 36 Stat. 455 (June 1, 1910), *reprinted in* III INDIAN AFFAIRS: LAW AND TREATIES 462 (Charles J. Kappler ed., 1913); Proclamation No. 62, 37 Stat. 1693, 1993 (June 29, 1911). The reservation was also opened by two other acts. Pub. L. No. 162, 1914, 38 Stat. 681, 681 (Aug. 3, 1914); Proclamation No. 64, 39 Stat. 1748, 1748 (Sept. 17, 1915); Pub. L. No. 201, 41 Stat. 595, 599. It has been asserted that when Congress opened the Fort Berthold Reservation to non-Indians it intended to diminish it, removing the Homestead Area from reservation status, but the argument has been rejected. *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1296 (8th Cir. 1994); *United States v. Standish*, 3 F.3d 1207, 1209 (8th Cir. 1993); *New Town v. United States*, 454 F.2d 121, 125 (8th Cir. 1972).

the non-Indian homesteaders settled in that portion of the reservation known as the Homestead Area and also as the Northeast Quadrant—located north and east of the Missouri River. The area covers about 350,000 acres and non-Indians own almost all of it.⁷⁴ By 1948 non-Indians had also acquired about 60,000 acres in other parts of the reservation.⁷⁵ Thus, non-Indians own about forty percent of the Fort Berthold Reservation.

After non-Indians took homesteads on the opened reservations the state asserted jurisdiction, treating reservations as integral parts of the state, and non-Indian residents looked not to the tribe but to the state as the dominant government. For example, in 1938 the state water commission approved Sioux County's petition to establish a water conservation district covering the entire county.⁷⁶ Because the county's boundaries are co-extensive with the North Dakota side of the reservation, the water district included all of the reservation's North Dakota lands. In the 1930s, the state water commission sponsored construction of dams in Sioux County "for the conservation of water . . . and to make impounded waters available for irrigation."⁷⁷ Landowners also constructed their own dams. By the 1930s, thirty-eight small dams had been constructed in the Cannonball River Basin on Standing Rock,⁷⁸ presumably many by non-Indians. Also, during that time period the state issued water permits to irrigate land on reservations.⁷⁹ A 1975 study found that within the Fort Berthold Reservation's Homestead Area, 295 water wells were being used for domestic and stock purposes.⁸⁰ Also

74. SCHNEIDER, *supra* note 72, at 143; *see also* Duncan Energy Co. v. Three Affiliated Tribes, 812 F. Supp. 1008, 1009-10 (D.N.D. 1992), *rev'd on other grounds*, 27 F.3d 1294 (8th Cir. 1994) (stating non-Indians own 97.5% of the Homestead Area).

75. H.D. MCCULLOUGH GORDON MACGREGOR, DEP'T OF THE INTERIOR, MISSOURI RIVER BASIN INVESTIGATION-SOCIAL & ECONOMIC REPORT ON THE FUTURE OF THE FORT BERTHOLD RESERVATION 10 (1948), *available at* <http://www.lib.ndsu.nodak.edu/govdocs/text/fortberthold2.html>.

76. State Water Conservation Comm'n, Order Establishing Water Conservation District (Jan. 5, 1938).

77. State Water Conservation Comm'n Res. No. 718 (Apr. 14, 1939).

78. N.D. STATE PLANNING BD., V SUMMARY REP. OF A PLAN OF WATER CONSERVATION FOR NORTH DAKOTA (1937) (unpaginated); in ch. "Cannonball River Sub-Basin" under "Economic Justification for Large Reservoirs").

79. *E.g.*, N.D. WATER CONSERVATION COMM'N, STATE ENG'R SEVENTH BIENNIAL REPORT TO THE GOVERNOR OF N.D., Supp. A, 12 (Permit No. 230; Fort Berthold Reservation); *Id.* at 20-22 (Permit Nos. 69, 161, 179, 187, 194, 210-11; Standing Rock Reservation); Steven R. Sagstad; I INVENTORY OF THE DEVILS LAKE SIOUX RESERVATION, FORT TOTTEN, NORTH DAKOTA xii, 3 (Mar. 1981) (stating that the State Engineer has issued over twenty water permits allowing the on-reservation appropriation of over 15,726 acre-feet for irrigation and municipal purposes).

80. HKM Consulting Eng'rs, *Inventory of Water Resources-Fort Berthold Indian Reservation-Water Resource Base Phase I*, Proj. No. M36.75.2, 42-42, 27 (undated, circa 1975).

in that non-Indian area were 190 small reservoirs and dugouts for stockwatering, and 39 more on non-Indian land elsewhere on the reservation.⁸¹

While Spirit Lake, Standing Rock, and the Fort Berthold Reservations lost swaths of land to homesteaders, land losses did not occur on the Turtle Mountain Reservation. Unlike the other reservations, Turtle Mountain is so small that it had no “surplus” land available for settlers. The initial reservation established in 1882 by President Arthur was fairly large, about 480,000 acres.⁸² But he soon reduced it to just two townships, or 46,080 acres,⁸³ which was too small to accommodate all tribal members.⁸⁴ Congress recognized this problem and allowed tribal members to take homesteads on the public domain.⁸⁵ Many took allotments near the reservation and today tribal members own a significant amount of land in Rollette County near but outside of the reservation.⁸⁶ A number of members took allotments southwest of Williston, in the Trenton area, which today is still home to an In-

81. *Id.*

82. See Exec. Order of Dec. 21, 1882, *reprinted in* I INDIAN AFFAIRS: LAWS AND TREATIES 885 (Charles J. Kappler ed., 1904) (setting apart described land “for the use and occupancy of the Turtle Mountain band of Chippewa”).

83. Exec. Order of Mar. 29, 1884, *reprinted in* I INDIAN AFFAIRS: LAWS AND TREATIES 885 (Charles J. Kappler ed., 1904) (restoring to the public domain all of the land described in the December 21, 1882, Executive Order, except two townships); Exec. Order of June 3, 1884, *reprinted in* I INDIAN AFFAIRS: LAWS AND TREATIES 885 (Charles J. Kappler ed., 1904) (returning one of the townships to the public domain but adding to the reservation a neighboring township).

84. DEP’T OF THE INTERIOR, 1906 COMM’R OF INDIAN AFFAIRS ANNUAL REP. 294 (stating that less than half of the tribe’s members have allotments on or near the reservation and where the rest might find allotments in North Dakota “is a serious problem”); DEP’T OF THE INTERIOR, 1900 COMM’R OF INDIAN AFFAIRS ANNUAL REP. FOR THE FISCAL YEAR ENDED JUNE 30, 1900, 308 (stating that the reservation is “overcrowded”); DEP’T OF THE INTERIOR, 1899 COMM’R OF INDIAN AFFAIRS ANNUAL REP. FOR THE FISCAL YEAR ENDED JUNE 30, 1899, 268 (stating that the tribal population is “much too great” for the small reservation and the government should consider setting apart a new reservation “of more generous proportions”).

85. Pub. L. No. 125, 33 Stat. 189, 195 (Apr. 21, 1904), *reprinted in* III INDIAN AFFAIRS: LAW AND TREATIES 39 (Charles J. Kappler ed., 1913); see also Pub. L. No. 258, 34 Stat. 325, 360-61 (June 21, 1906) (allowing tribal members to select allotments near Devils Lake), *reprinted in* III INDIAN AFFAIRS: LAW AND TREATIES 228 (Charles J. Kappler, ed., 1913); *Voight v. Bruce*, 44 Pub. Lands Dec. 524, 528 (Jan. 15, 1916) (finding that the Turtle Mountain Reservation is “limited,” so “Indians who were unable to secure lands on the reservation could select them on the public domain . . .”).

86. MICHAEL L. STROBEL, HYDROGEOLOGY AND WATER QUALITY OF THE SHELL VALLEY AQUIFER, ROLETTE COUNTY, NORTH DAKOTA (U.S. Geological Survey Water-Resources Investigations Report 97-4291, at 1, 1997) (prepared in cooperation with the Turtle Mountain Band). Tribally-owned and trust land outside the reservation covers almost as much acreage as does the reservation. *Id.* See also *United States v. Azure*, 801 F.2d 336, 339 (8th Cir. 1986) (stating that land outside the reservation—given the predominant Indian presence on it—is a “de facto reservation”).

dian community.⁸⁷ Many other members settled public domain land in Montana.⁸⁸

The Turtle Mountain Reservation's small size creates two water issues for the tribe and state. Do Indian water rights attach to the off-reservation allotments? The tribe asserts that they do.⁸⁹ The state has never officially addressed this proposition but a state engineer has questioned it.⁹⁰ The second issue relates to the reservation's lack of water resources. As a consequence, the tribe draws water from off-reservation wells and pipes it to the reservation. The state engineer insists that these off-reservation appropriations are subject to state approval and regulation.⁹¹ These two issues could lead to tribal-state tensions, particularly since the tribe's water needs are exacerbated by a growing population.⁹²

In sum, decisions made long ago by the federal government complicate tribal-state relations in North Dakota. Federal Indian policy encouraged non-Indians to settle on reservations. The resulting non-Indian presence coupled with federal policy to assimilate Indians led to the likelihood that state officials would view reservations as an integral part of the state to which state jurisdiction applied. The federal government then reversed course, replacing assimilation with a policy supporting Indian independence

87. See *State v. Gohl*, 477 N.W.2d 205, 206 (N.D. 1991).

88. Stanley M. Murray, *The Turtle Mountain Chippewa, 1882-1905*, 51 N.D. HISTORY 14, 32 (1984) (explaining problems caused by the reservation's inadequate size were still being addressed decades after it was created). In 1940 Congress authorized funding to buy tribal members land adjoining the reservation.). Pub. L. No. 520, 54 Stat. 219, 219 (May 24, 1940), *amended by* Pub. L. No. 80, 55 Stat. 207, 207 (May 28, 1941).

89. Letter from Alysia E. LeCounte & Richard A. Monette, Att'ys, Turtle Mountain Band, to David Sprynczynatyk, State Eng'r (Jan. 12, 1998); *United States v. Powers*, 305 U.S. 527, 532 (1939) (stating that on-reservation allottees hold water rights); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981) (stating that on-reservation allottees hold water rights); Ramsey Kropf, *Allotment Water Rights*, in *TRIBAL WATER RIGHTS: ESSAYS IN CONTEMPORARY LAW, POLICY, AND ECONOMICS* 95 (John E. Thorson, et al. eds., 2006); Richard B. Collins, *Indian Allotment Water Rights*, 20 LAND & WATER L. REV. 421, 446 (1985); David H. Getches, *Water Rights on Indian Allotments*, 26 S.D. L. REV. 405, 412-20 (1981).

90. Letter from David A. Sprynczynatyk, State Eng'r, to Alysia E. LaCounte & Richard A. Monette, Att'ys, Turtle Mountain Band (June 15, 1998); *see also* N.D. LEGIS. COUNCIL, AGRIC. & NATURAL RESOURCES COMM. MINUTES 3-4 (Sept. 15, 2005) (quoting Dale Frink, State Engineer, that the issue is one "of first impression" for North Dakota); Solicitor Op. M-36289 (Aug. 19, 1955), *reprinted in* II Opinions of the Solicitor of the Dep't of the Interior Relating to Indian Affairs 1917-1974, at 1688, 1689 (stating that there is "no basis" to extend to Indian allotments on the public domain a reservation water right).

91. Shaver Interview, *supra* note 33; *see also* INDIAN LAW DESKBOOK, *supra* note 55, at 279-80 (discussing whether *Winters* is limited to waters on the reservation); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1177 (Nell Jessup Newton editor-in-chief, 2005 ed.) [hereinafter COHEN'S HANDBOOK] (discussing whether *Winters* is limited to waters on the reservation).

92. Karen Tuomala, *H₂O: Shell Valley Aquifer Situation Complex and Far From Over*, TURTLE MOUNTAIN STAR, Sept. 21, 1998, at 1, 14. A tribal water system built in the mid-1970s had 700 users, but fifteen years later it had 2100 users, and the population served had grown from 7000 to 16,000 persons. *Id.*

and sovereignty.⁹³ But non-Indians had already arrived en masse on Indian reservations, and their presence can dilute tribal authority and expand a state's otherwise limited on-reservation jurisdiction.⁹⁴

A different problem was created by providing the Turtle Mountain Band with a tiny reservation and one lacking water resources, forcing the tribe to satisfy its needs from off-reservation sources and creating the likelihood of conflict with non-Indians competing for the same water. Also, the reservation's size forced tribal members to find off-reservation homes, leading to questions whether they are subject to laws made in Bismarck or in Belcourt.

III. REJECTION OF STATE WATER LAW AND ASSERTIONS OF SOVEREIGNTY BY NORTH DAKOTA INDIAN TRIBES

Not until decades after non-Indians began developing—under state law—the water resources of their on-reservation homesteads did tribes and their federal trustee begin challenging state jurisdiction. Perhaps the first formal objection came in 1961 when the BIA informed the state engineer that state water laws are “not applicable to Indian lands.”⁹⁵ By the 1970s all the tribes were objecting to state jurisdiction.

In 1974 they jointly requested a moratorium on state water permits for commercial uses.⁹⁶ Also that year, the Spirit Lake Nation asserted that all water appropriations within its reservation require tribal approval and that it has sole jurisdiction over on-reservation water.⁹⁷ The United States supported the tribe,⁹⁸ but the State Engineer continued authorizing non-Indians to appropriate water from aquifers under the reservation.⁹⁹ In 1976 the

93. See generally, PRUCHA, *supra* note 43, at 921-1012.

94. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 (2001) (tribal “power over nonmembers on non-Indian fee land is sharply circumscribed”); *South Dakota v. Bourland*, 508 U.S. 679, 692 (1993) (“[W]hen Congress has broadly opened up such [Indian] land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control.”); *Montana v. United States*, 450 U.S. 544, 559 n.9 (1981) (“It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.”).

95. Letter from Area Dir., BIA, to Milo W. Hoisveen, State Eng’r (Nov. 17, 1961). The Area Director did not, however, necessarily assert that state law was inapplicable to non-Indian activities on non-Indian reservation land. *Id.*

96. United Tribes of North Dakota Res. No. 74-30-UT (Oct. 18, 1974).

97. Letter from Carl McKay, Chairman, Spirit Lake Nation, to State Water Eng’r (May 28, 1974); see also Letter from Carl McKay, Chairman, Spirit Lake Nation, to Vernon Fahy [sic], State Eng’r (Feb. 20, 1975).

98. *E.g.*, Letters from Wallace G. Dunker, Field Solicitor, U.S. Dep’t of the Interior, to Vernon Fahy, State Eng’r (Nov. 30, 1976; May 26, 1977).

99. *E.g.*, Letter from Vern Fahy, Chief Eng’r, to Allan [sic] Olson, Att’y Gen. (Dec. 24, 1974) (“Historically we have granted permits to fee owners within Indian Reservations.”); see *al-*

Standing Rock Sioux Tribe stated that it controls and has always asserted sovereignty over water and other natural resources on its reservation and demanded that all water users get tribal approval.¹⁰⁰ Recently, it has stated that it does not recognize state water rights and demands that all water appropriations be authorized under tribal law.¹⁰¹ Also in the 1970s, the Three Affiliated Tribes began asserting its sovereign interests, stating that non-Indian individuals and governments could not “use any of the waters of the Missouri River or other streams arising on, bordering upon, or traversing through the Fort Berthold Reservation”¹⁰² This assertion of sovereignty was spurred by proposals from energy companies planning large withdrawals from Lake Sakakawea.¹⁰³

Spirit Lake, Standing Rock, and the Three Affiliated Tribes have not only stated that they control on-reservation waters, they have acted on their words. They have developed on-reservation water resources, and reject any notion that in doing so they are subject to state regulatory authority. They

so Letter from Vern Fahy, Chief Eng’r, to BIA Superintendent, Fort Totten Agency (Feb. 25, 1975) (“[W]e have no choice but to consider these permits in the same manner as we consider others.”). The State Engineer’s position was on the advice of the Attorney General’s Office. *Id.*; Letter from Paul M. Sand, First Asst. Att’y Gen., to Vern Fahy, Chief Eng’r (Jan. 2, 1975).

100. Standing Rock Sioux Res. No. 525-76 (Sept. 28, 1976); *see also* Letter from Wallace G. Dunker, Field Solicitor, U.S. Dep’t of the Interior, to Vernon Fahy, State Eng’r (Nov. 15, 1977) (stating that there is an “absence of State jurisdiction” to issue a water permit to irrigate land on the Standing Rock Reservation); Standing Rock Sioux Res. No. 291-74 (Jan. 25, 1974) (“the Tribe is the owner of all first, paramount, and immemorial rights to all water, including those on the surface and underground, occurring on, arising upon, passing through, or bordering upon the Standing Rock Indian Reservation”).

101. Standing Rock Sioux Tribe, Dep’t of Water Res., Public Notice (2007); *see also* STANDING ROCK SIOUX CONST., art. I (stating that tribe’s jurisdiction extends to all “waterways, watercourses and streams running through any part of the Reservation”); STANDING ROCK WATER CODE § 34-102 (stating that the tribe holds exclusive title to and jurisdiction over all waters of the reservation and its interests in water are “overriding, prior and supreme”). A question arises about the water code’s validity in light of a 1975 Department of the Interior’s moratorium on approving tribal water codes. *See* Cabell Breckenridge, *Tribal Water Codes*, in Kropf, *supra* note 89, at 199, 206-07; Peter Capossela, *Indian Reserved Water Rights in the Missouri River Basin*, 6 GREAT PLAINS NAT. RESOURCES J. 131, 150 (2002).

102. *E.g.*, Letter from Vincent Malnourie, Chairman, Three Affiliated Tribes, to State Water Comm’n (Nov. 21, 1973); *see also* Three Affiliated Tribes Res. No. 76-127 (May 7, 1976) (“All water arising on or flowing through the Fort Berthold Reservation belongs to the Three Affiliated Tribes.”); Letter from Jerry Straus, Att’y, Three Affiliated Tribes, to Vernon Fahy, State Eng’r (Aug. 2, 1974) [hereinafter Straus Letter].

103. *See* Letter from Vern Fahy, State Eng’r, to Jerry C. Straus, Att’y, Three Affiliated Tribes (Nov. 2, 1976) (referring to a proposed water marketing agreement between the Bureau of Reclamation and ANG Coal Gasification Co.); Letter from Vern Fahy, Eng’r and Secretary, State Water Comm’n, to Arthur A. Link, Governor (Dec. 3, 1974) (referring to a water permit application by Natural Gas Pipeline Co. of America); Straus Letter, *supra* note 102 (referring to a water permit application by El Paso Natural Gas Co.).

have developed irrigation projects and water for domestic, municipal, and government purposes.¹⁰⁴

While in the 1970s these three tribes began demanding respect for and exercising their sovereign interests in water, the Turtle Mountain Band was faced with a different problem. Unlike what was occurring on other reservations, the state was not exercising jurisdiction on Turtle Mountain, probably because non-Indians did not live on this reservation. Nonetheless, in the late 1970s and early 1980s, the Turtle Mountain Band began asserting its water rights when it became concerned about losing control of the reservation's water source.

The reservation's water needs, as well as those of many allotments near the reservation, are satisfied primarily from the Shell Valley Aquifer.¹⁰⁵ It covers about fifty-six square miles but only a small portion of it underlies the reservation.¹⁰⁶ Most of the aquifer is south of the reservation, under land owned by non-Indians, some of whom appropriate water from it under state permits.¹⁰⁷

The first state permit was issued in 1964 to the City of Rolette,¹⁰⁸ a non-reservation community, and in 1977 two irrigation permits were issued

104. *E.g.*, Letter from Murray G. Sagsveen, Dir. Legal Services, State Water Comm'n, to Ronald A. Reichert, Att'y (Jan. 5, 1975) (referring to a Three Affiliated irrigation project); U.S. ARMY CORPS OF ENG'RS, NOTICE OF PERMIT PENDING (Mar. 15, 1976) (referring to a Three Affiliated project to supply water to a medical center, motel, and homes); Memorandum from Murray G. Sagsveen, Dir. Legal Services, State Water Comm'n (May 13, 1976) (noting Three Affiliated water permit to tribal member to irrigate 100 acres); Letter from Clarence Green, Farm Manager, to Cornelius Grant, Econ. Dev. Admin. (Apr. 24, 1979) (discussing Spirit Lake's plan to expand tribal farm's irrigated acreage); Memorandum from Jon Reiten, State Water Comm'n, to Milton O. Lindvig, Dir. Hydrology Div., State Water Comm'n (Oct. 27, 1981) (discussing Spirit Lake's plan to expand tribal farm's irrigated acreage); U.S. ARMY CORPS OF ENG'RS, NOTICE OF PERMIT PENDING (Sept. 2, 1982) (referring to Standing Rock project to irrigate 800 acres); Letter from Gene Allery, Superintendent, Fort Totten Agency, to Vernon Fahy, State Eng'r (Dec. 17, 1986) (discussing BIA plans to develop groundwater on Spirit Lake); Letter from James L. Winters, State Supervisor, U.S. Army Corps of Eng'rs, to Cary Backstrand, Office of the State Eng'r (Nov. 5, 1992) (discussing Standing Rock project to construct an intake structure for irrigation); Letter from Rich Schilf, Water Res. Specialist, Spirit Lake Nation, to Dave Sprynczynatyk, State Eng'r (Sept. 17, 1996) (discussing a tribal water project and noting that Phase I constructed a pipeline from wells tapping the Warwick Aquifer to several reservation communities and that Phase II would expand the system to other reservation areas); Letter from Dr. Lawrence Helt, Dir., Fort Berthold Cmty. Coll., to David A. Sprynczynatyk, State Eng'r (June 25, 1998) (discussing the College's plan to appropriate water for irrigation); STANDING ROCK SIOUX TRIBE & U.S. DEP'T OF THE INTERIOR, ENVTL. ASSESSMENT: STANDING ROCK IRRIGATION PROJECT (May 23, 2002) [hereinafter STANDING ROCK IRRIGATION EA] (stating that in the 1980s the Standing Rock tribal farm converted 2,100 acres to irrigation).

105. Strobel, *supra* note 86, at 1, 3.

106. *Id.* at 1-2.

107. Letter from Joe Baldwin, State Water Comm'n, to Cletus H. Poitra, Turtle Mountain Band (Feb. 14, 1980) (providing a history of state permitted appropriations from the Shell Valley Aquifer).

108. State Water Permit No. 1149 (City of Rolette, 1964, 225 acre-feet).

to landowners south of the reservation.¹⁰⁹ The federal government objected and the tribe responded with a request that the state recognize a priority for tribal needs over the irrigation needs of non-Indians.¹¹⁰ The tribe itself had a 1975 state water permit to appropriate from the Shell Valley Aquifer and wanted to protect it and broader tribal interests.¹¹¹ Non-Indians, however, continued to seek access to the aquifer.¹¹² In 1980, the tribe again requested a moratorium on state permits.¹¹³ The state took the tribe's concern seriously.¹¹⁴ The state water commission instructed its staff to meet with tribal representatives and then recommend how the commission might "recognize the concern and needs of the Turtle Mountain Indians."¹¹⁵ The tribe, however, did not respond to requests for meetings,¹¹⁶ though it did continue protesting state-authorized appropriations from the Shell Valley Aquifer.¹¹⁷

Despite such protests, the tribe continued to cooperate with the state in drawing water from the aquifer. The tribe's 1975 state permit allowed an annual appropriation of 350 acre-feet.¹¹⁸ The tribe needed a state permit because the tribe's water wells were located off the reservation, and when tribes carry out off-reservation activities they are generally subject to state law.¹¹⁹ Being more interested in satisfying the needs of its members than

109. State Water Permit No. 2776 (Andrien Mongeon, 1977, 265 acre-feet) and No. 2994 (James Mongeon, 1977, 320 acre-feet).

110. Letter from Wallace G. Dunker, Field Solicitor, U.S. Dep't of the Interior, to Vernon Fahy, State Eng'r (Oct. 4, 1977); Turtle Mountain Council Res. No. 2109-12-77 (Dec. 21, 1977).

111. State Water Permit No. 2252 (Turtle Mountain Band, 1975, 350 acre-feet).

112. State Water Permit No. 3200 (Gary Nelson, 1979, 586 acre-feet) and No. 3262 (All Seasons Water Users Dist., 1980, 28 acre-feet). The All Seasons Water Users District later acquired two more permits. State Water Permit No. 5179 (1997, 72 acre-feet) and No. 5369 (1999, 100 acre-feet).

113. *E.g.*, Letters from Wallace G. Dunker, Field Solicitor, U.S. Dep't of the Interior, to Vernon Fahy, State Eng'r (Feb. 15, 1980; Apr. 1, 1980); Turtle Mountain Band Res. No. 2402-02-80 (Feb. 15, 1980); Letter from Edwin J. Henry, Chairman, to Arthur A. Link, Governor (July 21, 1980). The tribe is not only concerned about water quantity but also about water quality. The land overlying the Shell Valley Aquifer is farmland and the tribe is concerned about contamination from agricultural chemicals. Strobel, *supra* note 86, at 3.

114. *See* Letter from Arthur A. Link, Governor, to Bob Lattergrass, Tribal Planning, Turtle Mountain Band (Feb. 26, 1980) (promising response to tribe's request for moratorium on state-issued water permits).

115. STATE WATER COMM'N MEETING MINUTES 60 (Apr. 2-3, 1980).

116. *See* STATE WATER COMM'N MEETING MINUTES 116 (June 2-3, 1980) (noting that Asst. Att'y Gen. Mike Dwyer was unable to arrange meeting with tribe); Memorandum from Mike Dwyer to file (July 29, 1980) (noting that the changing tribal leadership seems to be the source of the tribe's failure to respond to the state).

117. *See, e.g.*, Letter from Edwin J. Henry, Chairman, Turtle Mountain Band, to Fred Gillis, Superintendent, Turtle Mountain Agency (July 10, 1980) (expressing concern about non-Indian appropriations and asking BIA to object to further state permits).

118. State Water Permit No. 2252 (Turtle Mountain Band, 1975, 350 acre-feet).

119. *E.g.*, Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 463 (1995); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973); Fournier v. Roed, 161 N.W.2d 458, 466 (N.D. 1968).

engaging in a jurisdictional fight, the tribe complied with state law. It has since acquired two additional state water permits to appropriate from the Shell Valley Aquifer.¹²⁰ In doing so, however, the tribe has not necessarily conceded that it is subject to state jurisdiction and seems willing to comply with state water law only as a good will gesture.¹²¹ In response, the state has administered the permits with a forgiving regulatory hand.¹²²

Despite tribal assertions of sovereignty that began in the 1970s, the state continued exercising jurisdiction over some on-reservation water appropriations. But the scope of this jurisdiction and the security of interests acquired under it may be questioned, as the United States Supreme Court made clear 100 years ago.

IV. WINTERS V. UNITED STATES

A. *WINTERS*: ITS ORIGINS

In 1888 the Fort Belknap Reservation was established for the Gros Ventre and Assiniboine in Montana Territory.¹²³ Two years later the Great Northern Railroad finished building its line across Montana and the migration of non-Indian homesteaders—encouraged by the government’s settlement policies—began in earnest. Homesteaders staked claims upstream from the reservation on the Milk River, which forms the reservation’s northern border. The settlers diverted water from the Milk for irrigation.¹²⁴ Irrigation facilities had also been developed by Indians on their reservation. There was enough water for all until a 1905 drought limited the Milk Riv-

120. State Water Permit No. 3506 (Turtle Mountain Band, 1981, 538 acre-feet) and No. 5260 (Turtle Mountain Band, 1998, 1700 acre-feet). The latter permit was issued over the objections of non-Indians living south of the reservation and on land overlying the Shell Valley Aquifer. See Memorandum from Jon C. Patch, Hydrologist, to David A. Sprynczynatyk, State Eng’r, and Milton O. Lindvig, Dir., Water Appropriations (Oct. 15, 1998). Non-Indians have opposed other water permit applications filed by the Turtle Mountain Band. Letter from Mark F. Purdy, Att’y, to Vernon Fahy, State Eng’r (Aug. 11, 1975).

121. Hearing on H.B. 1025 Before the H. Nat. Res. Comm., 60th Legis. Assem. 13 (2007) (stating that the tribe “as a good neighbor” has obtained state water permits; testimony of Tom Davis, Dir., Water Resources, Turtle Mountain Band).

122. See Letter from Jon C. Patch, State Eng’rs Office, to George S. Azure, Pub. Util. Comm’n, Turtle Mountain Band (Mar. 12, 1996) (noting that for seven years tribe appropriated more water than permit allows).

123. *Winters v. United States*, 207 U.S. 564, 565 (1908); see JOHN SHURTS, *INDIAN RESERVED WATER RIGHTS: THE WINTERS DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT, 1880s-1930s* (Legal History of North America Series, vol. 8, 2000) (reviewing *Winters* and the facts surrounding it); Norris Hundley, Jr., *The ‘Winters’ Decision and Indian Water Rights: A Mystery Reexamined*, 13 W. HISTORICAL QTLY. 17 (1982); Norris Hundley, Jr., *The Dark and Bloody Ground of Indian Water Rights: Confusion Elevated to Principle*, 9 W. HISTORICAL QTLY. 455 (1978) [hereinafter Hundley, *Confusion*].

124. *Winters*, 207 U.S. at 569.

er's flow and the upstream non-Indian appropriations deprived the reservation of water. The United States filed suit to protect Gros Ventre and Assiniboine interests. The non-Indian settlers responded, arguing that if they could not irrigate their land it would be useless and the government's effort to settle the region would be "wholly defeated."¹²⁵

This reasoning was rejected by the Supreme Court.¹²⁶ It stated that when the government and the Indians established the Fort Belknap Reservation they intended to transform the Indians' lifestyle from nomadic to "pastoral and civilized."¹²⁷ To achieve this, the arid reservation required irrigation, without which the land was "practically valueless," "a barren waste."¹²⁸ Neither the tribe nor the government could have intended to deprive the reservation of the resource needed for agricultural productivity and to transform the Indians from wandering hunters into small-tract farmers. Thus, the 1888 treaty necessarily reserved waters of the Milk River to the Fort Belknap Indians to allow them to accomplish the purpose for which their reservation was established.¹²⁹ Although the treaty does not contain the word "water," the Court implied that a water right had been reserved.¹³⁰

The *Winters* decision is remarkable. It occurred at a time when Indian wars were not distant memories and when federal Indian policy was not to promote or even protect Indian interests but to break apart tribal communities and assimilate Indians into white society. This policy was aggressively implemented through allotments and opening reservations to non-Indian settlers. Indian children were placed in schools where the "white way" was taught and Indian culture suppressed, sometimes militantly. And the Indian Office (now the Bureau of Indian Affairs) dominated reservation decision-making and politics. The decision occurred at a time when the disappearance of "the Indian" and Indian tribes was thought to be at hand.¹³¹ It was issued a few years after *Lone Wolf v. Hitchcock*¹³² in which the Supreme Court ruled that Congress could unilaterally change and even abrogate treaties,¹³³ and less than a year after *Kansas v. Colorado*¹³⁴ in which the Court

125. *Id.* at 570.

126. *Id.* at 576.

127. *Id.*

128. *Id.* at 576-77.

129. *Id.* at 577-78.

130. *Id.*

131. See Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 67 (2005) ("Conventional wisdom presumed that allotment would be the end of the Indian problem, and there would eventually be no more Indians or Indian tribes.").

132. 187 U.S. 553 (1903).

133. *Lone Wolf*, 187 U.S. at 566.

134. 206 U.S. 46 (1907).

rejected the notion that the federal government had general supervisory authority over waters in the West.¹³⁵ Further, *Winters* was issued during a period in which the government was aggressively promoting the West's settlement and development, for which prior appropriation under state law was widely considered necessary.¹³⁶ Nonetheless, the federal district court, the federal appellate court, and the Supreme Court issued decisions at odds with the prior appropriation doctrine and the water law of western states.¹³⁷ The decision threatened "to disrupt the pageantry of national expansion led by yeoman farmers settling hostile lands."¹³⁸ These farmers considered prior appropriation a sacred covenant between them and the government; the reward for enduring the risks and hardships of settling the West.¹³⁹ Despite the milieu in which it was litigated, the *Winters* decision protected tribal interests and is "a kind of Magna Carta for the Indian."¹⁴⁰ It has also been described as "the Great Charter of Indian water rights."¹⁴¹

Even so, the Court's substantive analysis is skimpy and conclusory, stretching merely a couple of pages. It does not identify a supporting theory—constitutional or one based on property or water law. The Court did not define the amount of water to which the tribe was entitled nor provide a formula by which to establish the amount. Nonetheless, the decision was immediately relied on by the Ninth Circuit. The agreement creating the Blackfeet Reservation reserved to the tribe a "paramount right . . . to the ex-

135. *Kansas*, 206 U.S. at 85-95. Beginning with an 1866 law, Congress expressly recognized the importance of deferring to state water law in thirty-seven statutes. *United States v. New Mexico*, 438 U.S. 696, 702 n.5 (1978); A. Dan Tarlock, *One River, Three Sovereigns: Indian and Interstate Water Rights*, 22 LAND & WATER L. REV. 631, 637 (1987) [hereinafter Tarlock, *One River*] ("[T]he history of Western water allocation is one of federal deference to state water law."); Larson, *supra* note 11, at 251.

136. Thorson, *supra* note 27, at 383. For example, the Reclamation Act of 1902 "was a strategic federal instrument to further settlement and economic development of the West." *Id.* See Reclamation Act of 1902, Pub. L. No. 161, 32 Stat. 388. Section 8 of the Act (codified at 43 U.S.C. § 383 (2009)) directed the Secretary of the Interior to implement the Reclamation Act of 1902 in accordance with state law. *Id.*

137. David H. Getches, *The Unsettling of the West: How Indians Got the Best Water Right*, 99 MICH. L. REV. 1473, 1474 (2001) (reviewing JOHN SHURTS, INDIAN RESERVED WATER RIGHTS: THE WINTERS DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT, 1880s-1930s (2000)).

138. *Id.*

139. Tarlock, *Prior Appropriation*, *supra* note 17, at 886.

140. Hundley, *Confusion*, *supra* note 123, at 463.

141. NAT'L WATER COMM'N, WATER POLICIES FOR THE FUTURE: FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES 474 (1973). Some have the view that the *Winters* decision is unremarkable. See SHURTS, *supra* note 123, at 15, 29-50, 65-66, 78-83, 163-66 (explaining that the decision is unsurprising because the prior appropriation doctrine had not solidified itself in the West); Tarlock, *One River*, *supra* note 135, at 633, 642 (1987) (stating that the decision complemented assimilation-through-allotment by recognizing a water right that would benefit allotted land).

tent reasonably necessary for the purposes of irrigation and stock raising, and domestic and other useful purposes.”¹⁴²

B. *WINTERS*: ITS CONFIRMATION

In the decades following *Winters* the Indian reserved water right was applied in a few reported cases¹⁴³ and relied on at the administrative level by federal officials as a tool to fulfill the government’s trust responsibilities, at least for some tribes to some degree.¹⁴⁴ But for the most part *Winters’* rights fell dormant as a victim of federal policy promoting western expansion at the expense of Indians.¹⁴⁵ Not until decades later, when the Supreme Court again addressed Indian water rights, did the *Winters* Doctrine establish a real presence in the development, politics, and law of the West.

This occurred when the Court was forced to address the subject in 1952 when Arizona filed an original action with the Court, suing California to apportion the Colorado River.¹⁴⁶ The river’s basin, however, serves other states as well as Indian reservations and so Nevada, New Mexico, and Utah intervened, and, to protect the water claims of five Indian reservations and other federal reserves, such as national forests, the United States intervened.¹⁴⁷ The Court adopted its Special Master’s finding that about 1,000,000 acre feet—to be used on about 135,000 irrigable acres—was the quantity of water reserved for the Indian reservations.¹⁴⁸ The fact that some of the reservations were created not by treaty but by executive order was given “short shrift,”¹⁴⁹ and the Court readily adopted *Winters* and its rationale:

[W]hen the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe that when Congress created the great

142. *Conrad Inv. Co. v. United States*, 161 F. 829, 831 (9th Cir. 1908).

143. *See, e.g.*, *United States v. Powers*, 305 U.S. 527, 533 (1939); *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321, 325 (9th Cir. 1956); *United States v. Walker River Irrig. Dist.*, 104 F.2d 334, 339-40 (9th Cir. 1939); *United States v. McIntire*, 101 F.2d 650, 653 (9th Cir. 1939); *United States v. Hibner*, 27 F.2d 909, 910 (E.D. Idaho 1928); *Skeem v. United States*, 273 F. 93, 94 (9th Cir. 1921).

144. SHURTS, *supra* note 123, at 181-206.

145. *E.g.*, Thorson, *supra* note 27, at 376.

146. *Arizona v. California*, 373 U.S. 546, 551 (1963), *decree issued*, 376 U.S. 340 (1964).

147. *Id.*

148. *Arizona*, 373 U.S. at 596. These amounts were divided among the five reservations. *Arizona*, 376 U.S. at 344-45. A later effort to increase the amount was rejected in the interests of finality. *Arizona v. California*, 460 U.S. 605, 619-20 (1983).

149. *Arizona*, 373 U.S. at 598; *see also Walker River Irrig. Dist.*, 104 F.2d at 336 (stating that *Winters* applies not only to treaty-created reservations, but also to those created by non-treaty agreements and executive orders).

Colorado River Indian Reservation and when the Executive Department . . . created the other reservations they were unaware that most of the lands were of the desert kind . . . and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.¹⁵⁰

The Indian reserved water right was confirmed. The 1963 decision and the consequent realization that there were potentially large Indian water claims “sent shock waves” through the West.¹⁵¹ “*Winters* was no longer a dusty turn-of-the-century novelty but a powerful legal doctrine.”¹⁵²

C. *WINTERS*: ITS ADJUDICATION

The process by which Indian reserved water rights are adjudicated is tied to an analogous water right, that is, the federal reserved water right. A federal reserved water right arises when the federal government withdraws land from the public domain and reserves it for a particular purpose. The government is deemed to reserve unappropriated water necessary to accomplish the purpose of the federal reserve and thus holds reserved water rights in national monuments, recreation areas, wildlife refuges, national forests, and national parks.¹⁵³

Such water rights were often left unquantified by the United States.¹⁵⁴ This led to uncertainty about state-based rights and the amount of water available for future appropriators. Resolving the uncertainty was inhibited by the government’s immunity from suit. Without the government—the West’s largest landowner and holder of extensive water rights—water adjudications were incomplete.¹⁵⁵ States took their concern to Congress and in 1952 it enacted the McCarran Amendment, which waives the government’s immunity, subjecting it to state-court water adjudications.¹⁵⁶ Even though

150. *Arizona*, 373 U.S. at 598-99.

151. Thorson, *supra* note 27, at 460.

152. *Id.* at 461. Besides a *Winters* water right, a tribe could also have an aboriginal water right. Tribal water uses existing prior to the reservation’s creation, such as instream flow for fish, could be an aboriginal right with an immemorial time of priority. *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983); *State ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754, 764 (Mont. 1985).

153. *E.g.*, *Cappaert v. New Mexico*, 426 U.S. 128, 138 (1976); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 805 (1976); *Arizona*, 373 U.S. at 601. There is also a federal reserved right for stock watering on the public domain. *United States v. Idaho*, 959 P.2d 449, 453 (Idaho 1998).

154. Michael D. White, *McCarran Amendment Adjudications-Problems, Solutions, Alternatives*, 22 LAND & WATER L. REV. 619, 625 (1987).

155. *United States v. Oregon*, 44 F.3d 758, 769 (9th Cir. 1994).

156. 43 U.S.C. § 666 (2009); see John E. Thorson, et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 9 U. DENV. WATER L. REV. 299, 331-37, 358-84 (2006) [hereinafter Thorson, *Dividing*] (discussing the McCarran Amendment’s interpretation and appli-

the Amendment does not waive tribal sovereignty—or even mention tribes—state courts can obtain jurisdiction over and adjudicate Indian water rights because they have jurisdiction over the United States and the United States is the Indians’ trustee.¹⁵⁷ And because tribes are unwilling to rely on the federal government to protect their interests, they typically waive immunity from suit and intervene in state water rights proceedings.

The McCarran Amendment’s consequence of putting Indian water rights before state courts has been described as “startling.”¹⁵⁸ State judges are viewed as unfriendly if not “hostile” to tribal interests.¹⁵⁹ Because they are elected officials, their willingness to make decisions unpopular with the wider community is questioned.¹⁶⁰ A North Dakota tribe asserts that state courts are “a forum . . . tribes fear.”¹⁶¹ But fears that state courts would be manifestly unfair to Indians “have not been realized.”¹⁶² There is “no convincing evidence” that tribes are treated unfavorably in state courts or that they are favored in federal courts.¹⁶³ Indeed, state court rulings often favor tribes and federal agencies.¹⁶⁴ Whatever the consequence, the McCarran Amendment puts litigating federal and Indian reserved water rights in state courts.¹⁶⁵

cation); Thorson, *supra* note 27, at 442-43 (discussing events leading to the Amendment’s enactment); Bennett W. Raley, *Chaos in the Making: The Consequences of Failure to Integrate Federal Environmental Statutes with McCarran Amendment Water Adjudications*, 41 RKY. MT. MIN. L. INST. 24-1, 24.04(1) (1995) (reviewing the Amendment’s legislative history).

157. *Colo. River*, 424 U.S. at 809-10; *see also* *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 569 (1983); *Arizona v. California*, 460 U.S. 605, 626-27 (1983); *United States v. Dist. Court for Eagle County*, 401 U.S. 520, 525 (1971).

158. Barbara A. Cosens, *The Measure of Indian Water Rights: The Arizona Homeland Standard, Gila River Adjudication*, 42 NAT. RESOURCES J. 835, 842 (2002); *see also* Robert H. Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The Colorado River Decision*, 30 STAN. L. REV. 1111, 1130-31 (1978) (stating that the United States and tribes have “strong countervailing interests . . . in presenting their reserved [water] rights claims to a federal forum.”).

159. COHEN’S HANDBOOK, *supra* note 91, at 1211.

160. Alexander Hays, *The Nez Perce Water Rights Settlement and the Revolution in Indian Country*, 36 ENVTL. LAW. 869, 886 (2006); Gregory J. Hobbs, Jr., *State Water Politics Versus an Independent Judiciary: The Colorado and Idaho Experiences*, 5 U. DENV. WATER L. REV. 122, 140-43 (2001).

161. Standing Rock Sioux Tribe, *Missouri River Master Manual and Environmental Impact Statement Review and Comments July 7, 1993*, in III FINAL ENVIRONMENTAL IMPACT STATEMENT, MISSOURI RIVER MASTER WATER CONTROL MANUAL, Appx. A, Part 1, at A1-90, A1-146 (Mar. 2004) [hereinafter *Standing Rock Comments on Master Manual FEIS*].

162. David H. Getches, *Foreward* to BONNIE G. COLBY, ET AL., *NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST*, at xv (2005).

163. Thorson, *Dividing*, *supra* note 156, at 361.

164. *Id.* at 475 (citing *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 91 (Wyo. 1988) and *United States v. Superior Court of Maricopa County*, 697 P.2d 658, 669-70 (Ariz. 1985)).

165. *Panel Discussions from “Indian Nations on the Eve of the Twenty-First Century,”* 43 S.D. L. REV. 438, 446 [hereinafter *Williams Statement*] (statement by Susan Williams). Though

D. *WINTERS*: ITS QUANTIFICATION1. *The Practicably Irrigable Acres (PIA) Standard*

While the *Winters* Court declared the reserved water right, it did not explain how to quantify it. This crucial point was addressed in *Arizona v. California*.¹⁶⁶ Arizona argued that the standard should be the Indians' reasonably foreseeable needs, a measure the Court rejected because such needs are speculative.¹⁶⁷ Something objective was required. It adopted with little explanation its Special Master's view that the quantity should be the amount needed to irrigate the reservation's PIA.¹⁶⁸ As the Court explained in a later decision, it wanted a "fixed calculation of future water needs" and the irrigable acreage standard "allowed a present water allocation that would be appropriate for future water needs."¹⁶⁹ If the right were opened it could continually expand as a reservation's water needs changed. Under such a system, water rights developed by non-Indians would never be secure. Further, PIA "reflects the purposes for which the reservations were created."¹⁷⁰ Applying this analysis, the Wyoming Supreme Court in the *Big Horn*¹⁷¹ adjudication stated that the amount of water reserved is that sufficient to fulfill the purposes of the Wind River Reservation.¹⁷² And because these purposes were agricultural, the measure is the amount of water

state courts may have jurisdiction to adjudicate Indian water rights, in doing so they apply federal, not state law. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983). State law, however, may apply when administering an Indian water right that has been adjudicated. See COHEN'S HANDBOOK, *supra* note 91, at 1189-91, 1209 (citing *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 835 P.2d 273, 278-80 (Wyo. 1992)).

166. 373 U.S. 546 (1963).

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

168. *Id.* at 600.

169. *Arizona v. California*, 460 U.S. 605, 617 (1983). Even though PIA may quantify the water right, water adjudicated under PIA can be used for purposes other than agriculture. Certain uses—domestic, municipal, and industrial—are sometimes considered "subsumed" in PIA water, and, therefore, PIA water can be used for these non-agricultural purposes. *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 99 (Wyo. 1988), *aff'd sub nom.*, *Wyoming v. United States*, 492 U.S. 406 (1989) (per curiam); *see also* *United States v. Washington*, 375 F. Supp. 2d 1050, 1070 (W.D. Wash. 2005) (citing *Arizona v. California*, 439 U.S. 419, 422 (1979)); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48-49 (9th Cir. 1981).

170. *Arizona*, 460 U.S. at 648 n.4 (Brennan, J., concurring in part and dissenting in part). *See infra* Part IV.D.2 (discussing the purpose of North Dakota reservations).

171. 753 P.2d 76 (Wyo. 1988).

172. *Big Horn*, 753 P.2d at 94-96; *see also* *United States v. Adair*, 723 F.2d 1394, 1419 (9th Cir. 1983) ("[T]he purpose of a federal reservation of land defines the scope and nature of impliedly reserved water rights.") (citing *United States v. New Mexico*, 438 U.S. 696, 700 (1978)).

“necessary to irrigate the practicably irrigable acreage on the reservation.”¹⁷³

The PIA standard—quantifying the water right based on the reservation’s potential for agriculture—has become the presumptive method by which Indian water rights are adjudicated.¹⁷⁴ It provides an objective standard tied to the primary purpose for which most reservations were established, including North Dakota reservations.

2. *The Purpose of North Dakota Reservations*

The federal objective in establishing nearly all reservations was to assimilate Indians by turning them from the hunt to the plow.¹⁷⁵ North Dakota reservations were no exception. North Dakota tribes, however, reject the notion that their reservations were created for such a limited purpose. They assert—and it is undeniable—that reservations were established not so much to turn Indians into farmers, but to give them a homeland to replace aboriginal lands. Because aboriginal lands were used in a myriad of ways by the tribal community, reservations—if they are truly a replacement homeland—must satisfy a tribe’s domestic, economic, environmental, recreational, and spiritual needs.

The Standing Rock Sioux Tribe asserts that its reservation was established “as a permanent homeland.”¹⁷⁶ Thus, it believes it is entitled to use all water necessary to make itself economically self-sufficient, and because what is necessary to ensure self-sufficiency is never static the tribe’s water right is “inherently unquantifiable.”¹⁷⁷ The reserved water right extends to surface and groundwater, to consumptive and non-consumptive uses, to “an almost infinite choice” of commercial activities, and includes the power to convey and market water.¹⁷⁸ It extends to “the full spectrum of uses necessary to the ‘arts of civilization,’” and by any measure it is “immense.”¹⁷⁹

173. *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d at 100-01 (citing *Arizona v. California*, 373 U.S. 546 (1963)).

174. Cosens, *supra* note 158, at 842; Williams Statement, *supra* note 165, at 449.

175. COHEN’S HANDBOOK, *supra* note 91, at 1179; Susan M. Williams, *The Winters Doctrine on Water Administration*, 26 RKY. MT. MIN. L. INST. 24-1, 24-3 (1990).

176. BAKER & HOSTETLER LAW FIRM, CANNONBALL RIVER BASIN WATER MANAGEMENT STUDY: HISTORIC TRIBAL WATER RIGHTS 5-6 (1995) [hereinafter STANDING ROCK STUDY].

177. *Id.* at 6; *see also* Standing Rock Sioux Res. No. 106-01, at 24 (Apr. 5, 2001) (“[T]he purpose and amount of [the] water [right is] adjustable in the future to better reflect improved knowledge and changing conditions.”).

178. STANDING ROCK STUDY, *supra* note 176, at 7, 11-12; *see also* *Standing Rock Comments on Master Manual FEIS*, *supra* note 161, at A1-91.

179. STANDING ROCK STUDY, *supra* note 176, at 11-12; *but see* State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 712 P.2d 754, 765 (Mont. 1985) (noting that there are no “decisive federal cases on the extent of Indian water rights for uses classed as ‘acts of civilization’”).

But, if the specific purpose for which the Standing Rock Reservation was created is sought, it is agricultural. The reservation was established in 1889 when Congress broke apart the Great Sioux Reservation and established six reservations, including Standing Rock.¹⁸⁰ For all six the government was to acquire for the Indians, from time to time, 25,000 breeding cows and 1000 bulls.¹⁸¹ Indians who took allotments would receive:

[T]wo milch [sic] cows, one pair of oxen, with yoke and chain, or two mares and one set of harness . . . and they shall also receive one plow, one wagon, one harrow, one hoe, one axe, and one pitchfork . . . [and] for two years the necessary seeds shall be provided to plant five acres of ground into different crops.¹⁸²

Agriculture was also a primary purpose for which the other North Dakota reservations were created. The 1891 agreement defining the Fort Berthold Reservation's boundaries states that the Indians "are desirous of disposing" of the land they do not need "in order to obtain the means necessary to enable them to become wholly self-supporting by the cultivation of the soil and other pursuits of husbandry."¹⁸³ To promote farming, allottees would receive assistance building "a comfortable house" and one cook-stove, a yoke of work oxen, a breaking plow, stirring plow, cow, wagon, axe, hoe, spade, hand-rake, scythe, and one pitch fork.¹⁸⁴

But, the Three Affiliated Tribes does not believe that such specific references to agriculture define its reservation's purposes or provide the standard by which its reserved water right is to be quantified. It asserts that the reservation's "broad purpose" was to create "a secure homeland," and thus its water right covers all purposes needed "to fulfill the general objective of making a permanent home;"¹⁸⁵ it entitles the tribe to whatever amount of water it needs for agricultural, industrial, aesthetic, mineral, and recreational uses, as well as for preserving fish and wildlife, and it is flexible

More specifically, Standing Rock asserts the right to irrigate at least 303,650 acres with 1.2 million acre-feet of water annually, to supply 50,000 head of livestock with 1500 acre-feet annually, to use 10,000 acre-feet annually to satisfy industrial needs, and unspecified amounts for the domestic needs of 30,000 people and to develop natural resources and further recreation. Letter from Ron His Horse Is Thunder, Chairman, Standing Rock Sioux, to Wayne Stenehjem, Att'y Gen. (Dec. 5, 2005); Standing Rock Sioux Res. No. 106-01, at 24 (Apr. 5, 2001).

180. Standing Rock Treaty, *supra* note 49, at ¶ 1.

181. *Id.* § 17.

182. *Id.*

183. Fort Berthold Treaty, *supra* note 49, at Preamble.

184. *Id.* at art. VII.

185. Letter from Raymond Cross, Consultant, Three Affiliated Tribes, to Mike Dwyer, State Water Comm'n (Nov. 16, 1981); *see also* Memorandum from Dale T. White & Thomas W. Fredericks, Att'ys, Three Affiliated Tribes, to Joe Cichy, Counsel, State Water Comm'n at 11 (May 17, 1984) [hereinafter White & Fredericks Memo].

enough to adapt to changing circumstances.¹⁸⁶ In fact, the right includes, the tribe claims, “such other further uses as the Tribal Council may specify.”¹⁸⁷

Another treaty that expressly contemplated an agrarian life is the 1867 treaty establishing the Spirit Lake Reservation. The reservation was created after the tribe fled its original reservation in Minnesota. It did so after the Minnesota Uprising of 1862, fearing reprisals for raids and killings in which its members did not participate. The tribe had been on the Minnesota reservation for eight years, during which time it had to some degree abandoned its nomadic heritage.¹⁸⁸ In negotiating for a new homeland in Dakota Territory these Sioux Indians asked “that provision be made to enable them to return to an agricultural life and be relieved from a dependence upon the chase for a precarious subsistence.”¹⁸⁹ The treaty states that the reservation it establishes will promote the tribe’s “agricultural improvement and civilization,” that the tribe’s withdrawal “from all dependence upon the chase” for subsistence is “necessary to the adoption of civilized habits,” and, thus the tribe will rely for its survival “solely upon agricultural and mechanical labor.”¹⁹⁰ To better ensure that tribal members give up “the chase,” the treaty prohibits fur trading throughout the tribe’s aboriginal lands.¹⁹¹ In an agreement a few years later the tribe expressed its intent to become self-supporting by cultivating the soil and “other pursuits of husbandry.”¹⁹²

As for Turtle Mountain, the 1882 and 1884 Executive Orders creating its reservation say nothing about the reservation’s purpose.¹⁹³ The tribe’s 1892 land cession agreement—by which it ceded aboriginal land in much of northeast North Dakota—is also silent about reservation purposes. Nonetheless, the tribe acknowledged its new means of subsistence. In a letter to Congress urging prompt ratification of the 1892 agreement the Turtle Mountain Band stated that it is “dependent on the soil” for its survival.¹⁹⁴ And there is evidence that this was indeed the government’s plan for the tribe. The Turtle Mountain Commission—established to settle the tribe’s

186. Letter from Ray Cross, Three Affiliated Tribes Legal Dep’t, to Joe Siche [sic], Counsel, State Water Comm’n, 2-3, 12 (May 9, 1984); White & Fredericks Memo, *supra* note 185, at 11.

187. White & Fredericks Memo, *supra* note 185, at 11.

188. PRUCHA, *supra* note 43, at 439-40.

189. Spirit Lake Treaty, *supra* note 49, at 6.

190. *Id.* at 8-9.

191. *Id.* at 9.

192. Amended Agreement with Certain Sioux Indians of 1873 (May 2, 1873), *reprinted in* II INDIAN AFFAIRS: LAWS AND TREATIES 1059-60 (Charles J. Kappler ed. 1904).

193. Exec. Orders of Dec. 21, 1882, Mar. 29, 1884, and June 3, 1884, *reprinted in* I INDIAN AFFAIRS: LAWS AND TREATIES 885 (Charles J. Kappler ed., 1904).

194. S. Doc. No. 54-239 (1896) (“Praying that the Agreement Entered into on the 22nd Day of October, 1892 . . . be Speedily Ratified . . .”).

aboriginal land claim—recommended that land allotted to members for which there was no room on the reservation should be “good farming lands” with “sufficient rainfall to ensure a reasonable prospect of an annual crop.”¹⁹⁵ The Commission added that “[i]t requires labor to care for and secure crops, and labor is a civilizer.”¹⁹⁶ Farming would prevent the Indians from slipping back into their “old accustomed way, a way which certainly carries with it the evils attendant upon a shiftless mode of living.”¹⁹⁷

In sum, if quantifying the reserved water right is tied to the specific, as opposed to the more general purpose for which North Dakota reservations were created, a quantification method linked to agriculture is appropriate. There are, however, significant problems with using PIA as the quantification standard.

3. *The PIA Standard's Questionable Usefulness*

It may be unwise to quantify reserved water rights on the basis of a reservation's irrigable land. Doing so will be complex and costly, and while the calculation seems objective, results can be highly variable. Further, PIA may be unfair for some tribes, including North Dakota tribes.

Only arable land—land susceptible to sustained irrigation—can be practicably irrigable. And the engineering feasibility of building irrigation infrastructure, at a reasonable cost, must be established.¹⁹⁸ The inquiry includes a physical analysis and an economic one. Expert soil scientists, hydrologists, geologists, agronomists, economists, and engineers are required.¹⁹⁹ Evidence is needed on soil type and quality, climate and growing season, water quantity and quality, market factors and prices, equipment, labor, and financing.²⁰⁰ The economic analysis can be not only complex

195. REP. OF THE TURTLE MOUNTAIN COMMISSION ON THE AGREEMENT CONCLUDED BETWEEN . . . THE UNITED STATES, AND THE TURTLE MOUNTAIN BAND (Oct. 22, 1892), reprinted in S. Doc. 56-444 at 22 (1900).

196. *Id.*

197. *Id.*

198. *E.g.*, State ex rel. Martinez v. Lewis, 861 P.2d 235, 247 (N.M. Ct. App. 1993); *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 101 (Wyo. 1988); Martha C. Franks, *The Uses of the Practically Irrigable Acreage Standard in the Quantification of Reserved Water Rights*, 31 NAT. RESOURCES J. 549, 578 (1991); H.S. Burness, et al., *Practically Irrigable Acreage and Economic Feasibility: The Role of Time, Ethics and Discounting*, 23 NAT. RESOURCES J. 289 (1983). See generally H.S. Burness, et al., *The “New” Arizona v. California: Practically Irrigable Acreage and Economic Feasibility*, 22 NAT. RESOURCES J. 517 (1982).

199. *E.g.*, *Martinez*, 861 P.2d at 246-47 (noting that some expert witnesses were recalled “as many as half a dozen times”); Steven J. Shupe, *Identifying Practically Irrigable Acreage (PIA)*, in INDIAN WATER 1985: COLLECTED ESSAYS 103, 104 (Christine L. Miklas & Steven J. Shupe eds., 1986).

200. *Martinez*, 861 P.2d at 247.

but easily manipulated,²⁰¹ based as it is “on projections, assumptions, and uncertainties”²⁰² It includes a discount rate, and the rate selected can “make or break an economic feasibility analysis.”²⁰³ It is all “a dangerous gamble.”²⁰⁴ Many things can go wrong:

(1) [T]he Tribe’s reliance on specialty crops did not comport with appropriate economic procedures, which consider the proper ratio of specialty crops to basic crops; (2) the Tribe’s analysis of markets for these specialty crops was faulty; (3) the Tribe’s estimates of crop yields were overstated and unrealistic; (4) the terrain and location of the reservation dictated high-quality, top-level management for which the Tribe failed to adequately budget; (5) the Tribe failed to adequately address risks such as weather, insects, and disease; (6) the Tribe failed to include factors such as storage, transportation, supply and demand; (7) the Tribe understated its labor costs; and (8) the Tribe’s accounting system was inadequate.²⁰⁵

Using PIA may also be problematic because the standard requires tribes to prove an economic feasibility that the federal government was never required to prove—and may not have been able to prove—for irrigation projects it constructed primarily to benefit non-Indians.²⁰⁶

Because the PIA standard is fact dependent it can bring widely varying results.²⁰⁷ It can result in a “substantial” reserved water right.²⁰⁸ The award in Wyoming’s *Big Horn* adjudication was “sizeable.”²⁰⁹ Thus, PIA is sometimes attacked as recognizing water rights that exceed tribal needs.²¹⁰ But in some instances the standard leads to a small award because a reservation’s individual characteristics make irrigation economically infeasible.

201. Shupe, *supra* note 199, at 109.

202. *Martinez*, 861 P.2d at 248.

203. *Id.* at 250.

204. Franks, *supra* note 198, at 579.

205. *Martinez*, 861 P.2d at 247.

206. Franks, *supra* note 198, at 578; BONNIE G. COLBY, ET AL., NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST 13 (2005).

207. Cosens, *supra* note 158, at 843.

208. Walter Rusinek, Note, *A Preview of Coming Attractions? Wyoming v. United States and the Reserved Rights Doctrine*, 17 *ECOLOGY L.Q.* 355, 407 (1990); *see also* Williams, *supra* note 175, at 24-39 (stating that *Winters* awards are “characteristically large”).

209. Richard B. Collins, *Western Justice*, 112 *YALE L. J.* 975, 979 (2003); *see also* 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. L.* 1157, 1173 (2006); Rusinek, *supra* note 208, at 391.

210. Williams, *supra* note 175, at 24-3; *Arizona v. California*, 460 U.S. 605, 617 (1983) (explaining that some states assert that PIA is “a much too liberal measure”).

ble,²¹¹ or to an award substantially less than that sought by the tribe and the United States.²¹²

PIA presents practical problems for North Dakota tribes. Two issues confront the Turtle Mountain Band. First, the reservation is small, covering just two townships, and its topography severely limits the area that could be successfully irrigated. Much of it is woodland, interspersed with small lakes and sloughs.²¹³ Not long after the reservation was created it was estimated that only about a third of it was tillable,²¹⁴ and the amount of this tillable land that is practicably irrigable is undetermined. Second, the number of off-reservation allotments collectively comprise a fair amount of acreage, but whether this land would be included in assessing the tribe's practicably irrigable acres is uncertain.²¹⁵ Applying the PIA standard at Turtle Mountain might result in a small tribal water right.

Different problems face the Fort Berthold and Standing Rock Reservations. The Missouri River Valley provided a rich, life-sustaining resource for the two reservations. Its fertile bottomlands were natural agricultural zones, until flooded and permanently submerged by federal reservoirs. The best irrigable lands of the Three Affiliated Tribes and Standing Rock Sioux are gone. Although a Chairman of the Three Affiliated Tribes has stated that lands above the river valley are "barren" and unsuited to the tribe's "agricultural traditions,"²¹⁶ both Fort Berthold and Standing Rock Reservations do have irrigable land.²¹⁷ The amount, however, is decidedly less with the flooding of the river bottoms.

211. *United States v. Washington*, 375 F. Supp. 2d 1050, 1062, 1066-67 (W.D. Wash. 2005) (noting that only seven percent of the reservation area in question is suitable for agriculture).

212. *State ex rel. Martinez v. Lewis*, 861 P.2d 235, 238 (N.M. Ct. App. 1993) (noting that the tribe sought 17,750 acre-feet per year but was awarded 2,322 acre-feet).

213. *See* 1900 COMM'R OF INDIAN AFFAIRS ANNUAL REP. 308.

214. *Id.*

215. *See supra* notes 89-90 and accompanying text; Hays, *supra* note 160, at 887 ("Of the twenty or so Indian water rights settlements since the early 1980s, none have recognized off-reservation reserved water rights for tribes.").

216. *See* Transcript of Public Hearing (Oct. 24, 2001), in IV FINAL ENVIRONMENTAL IMPACT STATEMENT, MISSOURI RIVER MASTER WATER CONTROL MANUAL, App. A, Part 2, at A2-29, A2-52, 53 (Mar. 2004) [hereinafter IV FEIS CORPS MASTER MANUAL] (statement of Tex Hall, Chairman, Three Affiliated Tribes).

217. U.S. DEP'T OF THE INTERIOR, MISSOURI RIVER BASIN INVESTIGATION-SOCIAL AND ECONOMIC REP. ON THE FUTURE OF FORT BERTHOLD RESERVATION 11 (1948), available at <http://www.lib.ndsu.nodak.edu/govdocs/text/fortberthold2.html>. This study suggested that none of the land above the river valley would be irrigable. *Id.* But not long ago Congress authorized funding to irrigate 15,200 acres on Fort Berthold and 2380 acres on Standing Rock; conditioned, however, on an "irrigability" finding by the Secretary of the Interior. Garrison Diversion Reformulation Act of 1986, Pub. L. No. 99-294, 100 Stat. 418, 421, § 3, amended by Dakota Water Resources Act of 2000, Pub. L. No. 106-554, Appx. D, Title VI, 114 Stat. 2763A-281, § 605. And the Department of the Interior identified 22,000 irrigable acres in two areas on Fort Berthold and 5800 acres in three areas on Standing Rock. STANDING ROCK IRRIGATION EA, *supra* note 104, at

A standard so dependent on the vagaries of soil productivity, topography, and climate, and on the arbitrary manner in which the government established reservations requires scrutiny before application.²¹⁸ Further, PIA alone doesn't ensure that a tribe will be able to put its water to use.²¹⁹ Tribes often lack funds to build irrigation infrastructure and Congress is becoming less willing to provide funding.²²⁰ As mentioned, Wyoming tribes received a large award in the *Big Horn* adjudication but it has gone largely unimplemented.²²¹ And it is ironic that the amount of water appropriated on the Fort Belknap Reservation—the reservation that gave birth to the Indian reserved water right—is little more than what it was 100 years ago.²²²

4. *The PIA Standard's Uncertain Future*

Not long after *Arizona v. California*—in which the Supreme Court confirmed the Indian reserved water right—the Court decided three cases that could limit the right, no matter what method is used to quantify it. The first decision is *Cappaert v. United States*,²²³ which held that the federal water right in a national monument reserves “only” the amount needed to fulfill the monument's purposes and “no more.”²²⁴ The water right is to be tailored “to minimal need.”²²⁵ Perhaps Indian reserved water rights are similarly limited.

The second decision is *United States v. New Mexico*,²²⁶ in which the Court emphasized the implied nature of the federal reserved water right in a national forest. Because the right is implied and because Congress has generally deferred to state water law, quantifying the right requires careful ex-

2; U.S. DEP'T OF THE INTERIOR, FORT BERTHOLD INDIAN RESERVATION LAND CLASSIFICATION REP. 2 (Feb. 1988).

218. See *United States v. Washington*, 375 F. Supp. 2d 1050, 1062, 1067 (W.D. Wash. 2005) (finding that reservation lacked agricultural lands and so loosely applied the PIA standard).

219. Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. COLO. L. REV. 683, 717 (1997) (“Commentators agree that the PIA standard is not bringing great wealth to Indian reservations.”).

220. E.g., Thorson, *Dividing*, *supra* note 156, at 409 (stating that in a New Mexico settlement the government was expected to pay most of a \$280 million water project, but reduced its commitment to \$11 million).

221. Blumm, *supra* note 209, at 1174-75 (stating that tribal efforts to develop its water right have been in limbo due to lack of funding).

222. Hundley, *supra* note 123, at 41; SHURTS, *supra* note 123, at 149 (stating that Fort Belknap's water right was “‘undone’ by the realities of capital flows: of what value were the reservation's legal rights . . . if the people in the valley and in government made sure that the really significant investments for water development went to the non-Indian farmers and not to the Indians . . .”).

223. 426 U.S. 128 (1976).

224. *Cappaert*, 426 U.S. at 141.

225. *Id.*

226. 438 U.S. 696 (1978).

amination.²²⁷ Where water is needed to fulfill the purposes for which the national forest was created, there is a water right, but where the water is only valuable for the forest's secondary use there arises the contrary inference, that is, that the United States must acquire water rights under state law.²²⁸ Thus, water was reserved to preserve the national forest's timber, but not necessarily to preserve the forest's aesthetics and wildlife. Also, the dissent stated that because the reserved water rights doctrine is implied it should be applied "with sensitivity" to those who have water rights under state law.²²⁹ Perhaps Indian reserved water rights are to be applied narrowly to meet only the reservation's primary, nineteenth century purpose, and also with "sensitivity" to water rights held by non-Indians.

Because *Cappaert* and *New Mexico* did not involve Indian reservations, some courts find them inapplicable to the Indian reserved water right.²³⁰ Others perceive them as binding.²³¹ Yet others find that they provide "guidance."²³²

The third Supreme Court decision that could limit Indian reserved water rights is *Washington v. Washington Fishing Vessel Association*,²³³ which involved hunting and fishing rights.²³⁴ These rights secured "so much as, but not more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living."²³⁵ If treaty rights to a natural resource are limited to providing a modest living standard, Indian water rights may be subject to narrow construction.

In addition to these three decisions, Justice Sandra Day O'Connor's 1989 "ghost" opinion in the *Big Horn* adjudication raises questions about PIA. In *Big Horn*, Wyoming was unhappy about the amount of water

227. *New Mexico*, 438 U.S. at 701-02, 715; see generally Alan E. Boles, Jr. & Charles M. Elliott, *United States v. New Mexico and the Course of Federal Reserved Water Rights*, 51 U. COLO. L. REV. 209 (1980) (reviewing the decision and explaining that it strengthens state authority over water); Sally K. Fairfax & A. Dan Tarlock, *No Water for the Woods: A Critical Analysis of United States v. New Mexico*, 15 IDAHO L. REV. 509 (1979) (reviewing the decision and its impact on federal-state relations).

228. *New Mexico*, 438 U.S. at 702.

229. *Id.* at 718 (Powell, J., dissenting). "Although the majority opinion does not use the term sensitivity, the majority opinion is considered the source of the Sensitivity Doctrine." Cosens, *supra* note 158, at 849 n.74.

230. *E.g.*, *In re Gen. Adjudication of all Rights to use Water in the Gila River Sys. and Source*, 35 P.3d 68, 73-74 (Ariz. 2001).

231. *E.g.*, *Skokomish Indian Tribe v. United States*, 401 F.3d 979, 989 (9th Cir. 2005); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981); *United States v. Washington*, 375 F. Supp. 2d 1050, 1063-64 (W.D. Wash. 2005); *In re Gen. Adjudication of All Rights to use Water in the Big Horn River Sys.*, 835 P.2d 273, 278-79 (Wyo. 1992).

232. *United States v. Adair*, 723 F.2d 1394, 1408 (1983).

233. 443 U.S. 658 (1979).

234. *Washington Fishing Vessel*, 443 U.S. at 662.

235. *Id.* at 686.

awarded by the Wyoming Supreme Court under the PIA standard.²³⁶ It petitioned the U.S. Supreme Court for review. After oral argument and after Justice O'Connor had drafted and circulated to the other justices what probably would have been the majority opinion, she disqualified herself. She belatedly learned that her family's Arizona ranch was involved in a water adjudication involving Indian water rights and believed that this compromised or could be seen as compromising her fairness.²³⁷ The remaining justices, however, were split, and so the Court issued a one-sentence opinion affirming "by an equally divided Court" the Wyoming decision.²³⁸ But questions posed at argument led to speculation that the PIA standard may not survive another trip to the Court.²³⁹ Justice White even questioned the *Winters* Doctrine itself.²⁴⁰ Justice Marshall was a member of the Court and after he died his papers were opened and revealed that before Justice O'Connor's disqualification she wrote an opinion that four other justices were prepared to sign.

O'Connor found some merit in Wyoming's argument that PIA should be discarded because it gives an "unjustified windfall."²⁴¹ Her opinion, however, declined to discard PIA, finding it useful because it provides some predictability and "is based on objective factors."²⁴² But she would have significantly revised it. For her, quantifying Indian reserved water rights requires a "sensitivity to the impact on state and private appropriators of scarce water under state law."²⁴³ This requires "some degree of 'pragmatism' in determining PIA . . . [and] this pragmatism involves a 'practical' . . . assessment of the reasonable likelihood that future irrigation projects . . . will actually be built."²⁴⁴ In essence, O'Connor wanted consideration for existing water users when determining tribal water rights. This would interject the concept of priority, benefiting appropriators under state law. O'Connor even hinted that a tribe's reserved water right can be lost by nonuse.²⁴⁵ Further, she stated that in light of the monetary costs,

236. *In re* Gen. Adjudication of All Rights to use Water in the Big Horn River Sys., 753 P.2d 76, 101-12 (Wyo. 1988).

237. Mergen & Liu, *supra* note 219, at 684-85.

238. *Wyoming v. United States*, 492 U.S. 406, 407 (1989).

239. *E.g.*, Joseph R. Membrino, *Indian Reserved Water Rights, Federalism and the Trust Responsibility*, 27 LAND & WATER L. REV. 1, 9 (1992); Rusinek, *supra* note 208, at 401-02.

240. Rusinek, *supra* note 208, at 403.

241. Mergen & Liu, *supra* note 219, at 704.

242. *Id.* at 734-35 (draft opinion).

243. *Id.* at 737 (draft opinion).

244. *Id.* at 738 (draft opinion).

245. *Id.* at 734 (draft opinion) ("According to some courts and commentators, Indian reserved water rights . . . are not lost through nonuse This Court, however, has never deter-

large irrigation projects are no longer likely in the West.²⁴⁶ By being “sensitive” to appropriators under state law and “pragmatic” about actually building irrigation projects, the O’Connor draft opinion “proposed radically altering the quantification criterion.”²⁴⁷ One North Dakota tribe even thinks that the opinion would have “destroyed” the essence of *Winters*.²⁴⁸

While the United States Supreme Court almost substantially modified the PIA standard, the Arizona Supreme Court rejected PIA in 2001.²⁴⁹ It stated that reservations were created to serve as a “permanent home and abiding place,”²⁵⁰ and based on this and inherent problems with PIA, it adopted a “homeland” standard to assess the amount of water reserved for Indian lands.

While the homeland standard is “uncharted territory,” the Arizona Supreme Court concluded that it is the best way to tailor the reserved water right to each reservation’s “minimal needs.”²⁵¹ It requires a multi-faceted approach that considers the tribe’s history, particularly the cultural significance that water holds for the tribe, the tribe’s economic base, past water uses, present and projected population, and the reservation’s geography, topography, and natural resources.²⁵² A land use plan should be developed specifying the amount of water necessary for different purposes, though proposed projects must be practical and economically sound.²⁵³

The Arizona Supreme Court’s “homeland” standard is similar to what North Dakota tribes have asserted as the proper measure for reserved water rights.²⁵⁴ But just what amount of water the homeland standard will provide is uncertain. One court has stated it would provide a “water right for a broad and almost unlimited range of activities”²⁵⁵ Conversely, one commentator believes it introduces “an element of sanity and equity.”²⁵⁶ Others

mined the specific attributes of reserved water rights—whether such rights are subject to forfeiture for nonuse.”).

246. *Id.* at 739 (draft opinion); *see also* Franks, *supra* note 198, at 578 (stating that large irrigation projects are “no longer economically feasible”); Tarlock, *One River*, *supra* note 135, at 638 n.39, 659 (stating that the Reclamation Era is over and the government will no longer build multi-purpose dams and large irrigation projects).

247. Mergen & Liu, *supra* note 219, at 706, 722; Rusinek, *supra* note 208, at 391, 404.

248. Standing Rock Sioux Res. No. 106-01, at 16 (Apr. 5, 2001).

249. *In re* Gen. Adjudication of all Rights to use Water in the Gila River Sys. and Source, 35 P.3d 68, 76-79 (Ariz. 2001); *see* Cosens, *supra* note 158 (reviewing the decision).

250. *Gila River*, 35 P.3d at 76 (quoting *Winters v. United States*, 207 U.S. 564, 565 (1908)).

251. *Id.* at 79.

252. *Id.* at 79-80.

253. *Id.* at 81.

254. *See supra* notes 177-79, 185-87 and accompanying text.

255. *United States v. Washington*, 375 F. Supp. 2d 1050, 1062 (W.D. Wash. 2005) (rejecting the homeland standard because it is contrary to federal law and the “primary purpose” doctrine).

256. Cosens, *supra* note 158, at 836.

are not so sure. They doubt that the homeland standard furthers tribal interests. It may give tribes only “a shadow” of what PIA provided.²⁵⁷ While it avoids PIA’s inherent problems, its focus on minimum needs may leave some tribes with less water than the PIA standard.²⁵⁸ The Arizona Supreme Court even stated that its “minimalist approach” demonstrates sensitivity for existing water rights.²⁵⁹ The homestead standard’s novelty may “escalate uncertainty and protract litigation.”²⁶⁰ A representative of the Standing Rock Sioux Tribe stated that the Arizona court’s reliance on a standard of minimal use is an “immoral act.”²⁶¹ And lastly, the homeland standard’s apparent malleability could give state courts considerable discretion in defining the scope and amount of the Indian water right.

If the Arizona Supreme Court’s decision has done anything, it has complicated the task of lawyers and political leaders assessing whether or not to adjudicate Indian water rights. Weighing the wisdom of an adjudication was difficult when PIA was the lone quantification standard. Now the Arizona precedent can be used to assert the application of a new standard. But it will take time for courts to develop the homeland standard and even more time to analyze whether it entitles tribes to more or less water than PIA. The gamble that is adjudicating water rights is now riskier.

V. TRIBAL-STATE WATER RELATIONS

A. EVOLVING STATE RECOGNITION OF THE INDIAN RESERVED WATER RIGHT

For many decades after the *Winters* decision, North Dakota officials seemed unaware that tribes held protected water rights. *Winters* and Indian reserved water rights are unmentioned in the state engineer’s biennial reports immediately following the decision.²⁶² The reports did not recognize that the prior appropriation and water permitting system being inaugurated in North Dakota needed to consider or might be compromised by the newly-pronounced Indian water right. In fact, the state engineer seemed to

257. Galen Lemei, *Abandoning the PIA Standard: A Comment on Gila V*, 9 MICH. J. RACE & L. 235, 266-67 (2003).

258. COHEN’S HANDBOOK, *supra* note 91, at 1187.

259. 35 P.3d at 81.

260. Colby, *supra* note 162, at 13.

261. Transcript of Public Hearing . . . January 30, 2002, in IV FEIS CORPS MASTER MANUAL, *supra* note 216, at A2-177, A2-188 (statement by Milo Cadotte, Councilman, Standing Rock Tribal Council) (“one of the most immoral acts of any court . . . in our history”).

262. *E.g.*, 1906 N.D. STATE ENG’R SECOND BIENNIAL REP. 42-43; 1908 N.D. STATE ENG’R THIRD BIENNIAL REPORT; 1910 N.D. STATE ENG’R FOURTH BIENNIAL REPORT; 1912 N.D. STATE ENG’R FIFTH BIENNIAL REPORT.

view reservations as no different than any other part of the state. In 1910 he noted that Congress had opened the Fort Berthold Reservation to non-Indians and consequently, “[e]special interest attaches” to the reservation’s resources; more particularly, he suggested that small irrigation projects could be developed on reservation streams.²⁶³ Whatever state officials may have thought about *Winters*, water appropriations and state-permitting proceeded without concern for Indian water rights or for the ultimate security of state-issued permits. Later biennial reports by the state engineer also do not mention either *Winters* or Indian water rights.²⁶⁴ And the subjects are unmentioned in the state’s first water plan, issued in 1938.²⁶⁵

The state’s initial failure to appreciate Indian reserved water rights is understandable. The culture of the times had little inclination to delay development to consider Indian interests. Courts that did acknowledge *Winters* found it easy to distinguish,²⁶⁶ and after *Winters* the Supreme Court itself seemed to indicate that states held primacy in allocating water.²⁶⁷ As for Indian leaders, they were focused on survival, on holding their tribes together and reservations intact; asserting water rights would have to wait until tribal existence was more secure.

And the federal government itself was doing little to protect Indian water rights. Exemplifying the federal view is a 1919 comment by Cato Sells, who, as the Commissioner of Indian Affairs should have been the Indians’ leading advocate in Washington. He said that to enforce Indian water rights “would not be just to those settlers who have gone into this [Utah] valley and expended private means in development work, practically under an invitation from the Government”²⁶⁸ In fact, during most of the first fifty years after *Winters* federal policy encouraged farmers to settle the West, a policy “pursued with little or no regard for Indian water rights and the *Winters* doctrine.”²⁶⁹ Many federal water projects were built on streams flowing through or bordering Indian reservations without any attempt to define, let alone protect tribal interests.²⁷⁰ One of those federal projects was the

263. 1910 N.D. STATE ENG’R FOURTH BIENNIAL REPORT 50, 53.

264. *E.g.*, 1920 N.D. STATE ENG’R NINTH BIENNIAL REPORT; 1930 N.D. STATE ENG’R FOURTEENTH BIENNIAL REPORT.

265. N.D. STATE PLANNING BD., I SUMMARY REPORT OF A PLAN OF WATER CONSERVATION FOR NORTH DAKOTA (1937).

266. *E.g.*, *United States v. Wightman*, 230 F. 277, 282-83 (D. Ariz. 1916); *Byers v. Wa-Wa-Ne*, 169 P. 121, 126-28 (Or. 1917).

267. Thorson, *supra* note 27, at 387 (citing *Cal. Or. Power v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935)).

268. SHURTS, *supra* note 123, at 238.

269. NAT’L WATER COMM’N, *supra* note 141, at 474.

270. *Id.* at 474-75.

construction of Missouri River dams and reservoirs.²⁷¹ The removal of tribes from the Missouri River Valley “touched every aspect” of Indian life, causing “chaos and heartache.”²⁷² Tribes were left “materially and spiritually impoverished.”²⁷³ And since damming the great river, the Corps of Engineers is regularly criticized for managing the river in a way that disregards, if not undermines tribal water rights.²⁷⁴ In the history of the government’s treatment of Indian tribes, “its failure to protect Indian water rights . . . is one of the sorrier chapters.”²⁷⁵

Water permit applications filed by the Bureau of Indian Affairs further justified North Dakota’s initial non-appreciation for Indian water rights. In 1936 the BIA Superintendent at Fort Yates filed with the state engineer notices to appropriate water from the Cannonball River and from Four Mile Creek.²⁷⁶ The stated purpose was to irrigate reservation gardens. A few years later the BIA had six “Indian garden” irrigation projects operating under state water law.²⁷⁷ Similar notices were filed in 1936 and 1937 by the BIA Superintendent at Elbowoods, seeking to appropriate water from Beaver, Six Mile, and Lucky Mound Creeks on the Fort Berthold Reservation.²⁷⁸ Also, the state engineer has a 1949 conditional water permit on file for Fort Berthold authorizing an unspecified amount of water to be used for

271. See, e.g., PAUL VANDEVELDER, *COYOTE WARRIOR: ONE MAN, THREE TRIBES, AND THE TRIAL THAT FORGED A NATION* (2004); MICHAEL LAWSON, *DAMMED INDIANS: THE PICK-SLOAN PLAN AND THE MISSOURI RIVER SIOUX, 1944-1980* (1982); Roy V. Meyer, *Fort Berthold and the Garrison Dam*, 35 N.D. HISTORY 216 (1968).

272. Lawson, *supra* note 271, at 51, 57-58.

273. Vine Deloria, Jr., *Foreword* to LAWSON, *supra* note 271, at xii.

274. E.g., Standing Rock Sioux Res. No. 106-01, at 1, 3 (Apr. 5, 2001) (stating that the Corps fails to consider Indian water rights in managing the river and that its management is “based on the presumption of no Indian water rights and insignificant future Indian water use”); Standing Rock Sioux Tribe, *Rejection of the Army Corps of Eng’rs Revised Draft Environmental Impact Statement February 20, 2002*, in IV FEIS CORPS MASTER MANUAL, *supra* note 216, at A2-431 (“Historically . . . no agency of the . . . government has harmed the . . . Tribe as much as the . . . Corps . . .”); Tex G. Hall, *Revised Draft Environmental Impact Study United States Army Corps of Engineers Master Manual Public Comments February 28, 2002*, in IV FEIS CORPS MASTER MANUAL, *supra* note 216, at A2-499, A2-504 (stating that the Corps “cavalierly dismisses” Indian water rights); Capossela, *supra* note 101, at 152 (stating that the Corps promotes navigation, hydropower, and fisheries at the expense of tribal interests); William H. Veeder, *Indian Water Rights in the Upper Missouri River Basin*, 48 N.D. L. REV. 617, 635 (1972) (“Indian rights to the use of water from Montana to Nebraska have been encroached upon, seized, or gravely impaired by the [federal government] in a manner that shocks the conscience.”); see also John H. Davidson, *Indian Water Rights, the Missouri River, and the Administrative Process: What are the Questions?*, 24 AMERICAN INDIAN L. REV. 1, 7 (2000).

275. NAT’L WATER COMM’N, *supra* note 141, at 475.

276. Notices of Appropriation filed with N.D. State Eng’r by L.C. Lippert, Superintendent, Standing Rock Indian Reservation (May 21, 1936; May 26, 1936).

277. 1940 N.D. STATE WATER CONSERVATION COMM’N SECOND BIENNIAL REPORT 42.

278. Notices of Appropriation filed with N.D. State Eng’r by W.R. Beyer, Superintendent, Fort Berthold Indian Reservation (June 23, 1936; Dec. 3, 1937); 1939 N.D. STATE ENG’R EIGHTEENTH BIENNIAL REPORT 26.

irrigation.²⁷⁹ And other federal agencies—the Works Progress Administration and U.S.D.A.’s Bureau of Biological Survey—also complied with the state engineer’s permitting requirements when carrying out on-reservation activities.²⁸⁰

Without either tribes or their trustee asserting water rights, officials in Bismarck proceeded as if such rights did not exist. While understandable for a time, there should have been no doubt about the existence and significance of tribal water rights following the Supreme Court’s 1963 *Arizona v. California* decision affirming *Winters*.²⁸¹ While *Arizona v. California* may have “sent shock waves” through the West,²⁸² it did not seem to register concern in North Dakota state government. The state engineer and the state water commission’s biennial reports immediately following *Arizona v. California* do not mention Indian water rights. The reports imply that water permits would be issued and water resources managed without considering Indian water rights and without recognizing what effect those rights might have on state water development policies and on the security of state water permits. The state’s 1968 water plan does not mention Indian water rights.²⁸³ While the state consulted some federal agencies in preparing the water plan, the BIA was not consulted.²⁸⁴ Even as late as 1971 the state engineer questioned whether the Three Affiliated Tribes held reserved water rights.²⁸⁵ But, when tribes began asserting their *Winters*’ rights in the 1970s,²⁸⁶ state officials took notice. They quickly acknowledged the right and looked for ways to reach an accommodation with tribal governments.

For example, in 1976 when the Three Affiliated Tribes asserted its water rights, State Engineer Vern Fahy responded by acknowledging that the

279. State Water Permit No. 180 (Fort Berthold Reservation, 1949).

280. See 1950 N.D. STATE WATER CONSERVATION COMM’N SEVENTH BIENNIAL REPORT Supp. A at 35-46; N.D. State Eng’r, *Index: Dams for which Water Rights were Filed by the Works Progress Administration up to May 17, 1940*.

281. *Arizona v. California*, 373 U.S. 546 (1963), *decree issued*, 376 U.S. 340 (1964).

282. Thorson, *supra* note 27, at 460.

283. 1968 N.D. STATE WATER CONSERVATION COMM’N, NORTH DAKOTA INTERIM STATE WATER RESOURCES DEVELOPMENT PLAN (State Water Comm’n Project No. 322, 1968).

284. *Id.* at 10-11. In preparing the 1999 plan, however, tribes were consulted. 1999 N.D. STATE WATER COMM’N, 1999 STATE WATER MANAGEMENT PLAN 2, 25.

285. Letter from Milo W. Hoisveen, State Eng’r, to Arthur A. Link., U.S. Rep. (Sept. 20, 1971). In his response to a question about Indian water rights, Hoisveen premised his answer by stating, “if indeed it is finally decided that such exist.” Ten years earlier, however, Hoisveen had stated that he was aware of court decisions on Indian water rights and agreed that state water law did not apply to Indian lands within reservations. Letter from Milo Hoisveen, State Eng’r, to Robert F. Bennett, Dir., BIA Aberdeen Area Office (Dec. 4, 1961).

286. See *supra* notes 95-103 and accompanying text.

state is bound by *Winters* and related decisions.²⁸⁷ He added that the tribe has the rights of a “senior appropriator,” and in a water shortage the tribe’s rights are protected.²⁸⁸ Two years later, Mr. Fahy met with officials from the BIA and the Three Affiliated Tribes. At this meeting he acknowledged that *Winters* gives Indians “a very firm claim” on water.²⁸⁹ He said he was alarmed by litigation in the West between states and tribes and was looking for “common ground” to avoid litigation.²⁹⁰ He urged cooperation to jointly identify water resources and water needs. While recognizing that his ultimate goal of tribal and state accommodation might be utopian, he stated that it “would be remiss if we didn’t try.”²⁹¹ “[W]e are all tied together because of the Missouri River. It is a bond that should tie us . . . to cooperating with one another.”²⁹²

The conciliatory attitude expressed in this 1978 meeting set the tone for state policy over the next thirty years. At the meeting Mr. Fahy offered to help the Three Affiliated Tribes develop a tribal water administration program.²⁹³ He and his successor made similar offers to the Standing Rock Sioux, and the State Engineer’s Office recently expressed its willingness to join the Turtle Mountain Band in a cooperative study.²⁹⁴ While such offers may not have been accepted and while the relationship hasn’t always been smooth, some cooperation has occurred between the state engineer’s office and tribal water resource officials. During the course of this relationship it has not been uncommon for tribal representatives to express appreciation

287. Letter from Vern Fahy, State Eng’r, to Jerry C. Straus, Att’y, Three Affiliated Tribes (Nov. 2, 1976).

288. *Id.*

289. Transcript of Meeting Between the Three Affiliated Tribes and the State of North Dakota Water Commission at 2 (Jan. 30, 1978) [hereinafter Meeting Transcript].

290. *Id.* at 1.

291. *Id.* at 2.

292. *Id.* at 12; see also Letter from Vern Fahy, State Eng’r, to Juanita Helphrey, N.D. Indian Affairs Comm’n (Aug. 17, 1977) (stating that the water commission seeks “a closer working relationship” with tribes to manage water resources and asks for assistance in setting up meetings with tribal officials).

293. Meeting Transcript, *supra* note 289, at 12.

294. Memorandum from Vern Fahy, State Eng’r, to George Sinner, Governor (June 13, 1985) (stating that the tribe lacks knowledge of its groundwater “so I volunteered to contact USGS and help to work out a cooperative agreement on a reservation ground-water study I agreed to give them guidance in their planning efforts. . . .”); Letter from David A. Sprynczynatyk, State Eng’r, to Jesse Taken Alive, Chairman, Standing Rock Sioux (Oct. 19, 1993) (noting his willingness to share water resource data and “the technical capability we have to analyze [it] . . . and to help plan for the future”); Hearing on S.B. 2115 Before the H. Nat. Resources Comm., 59th Legis. Assem. (N.D. 2005) (testimony of Dave Ripley, Water Appropriation Div., State Water Comm’n) (explaining that the state is willing to cooperate with the Turtle Mountain to study the quantity and quality of water near the reservation).

for cooperation received from the state.²⁹⁵ State and tribal officials have always been willing to meet to discuss water issues. The relationship is replete with tribal-state meetings.²⁹⁶

295. Meeting Transcript, *supra* note 289, at 4 (statement of Hugh Baker, Three Affiliated Tribes) (noting that the state “did a real good job with providing us with information on ground water”); AUSTIN H. GILLETTE, CHAIRMAN, THREE AFFILIATED TRIBES, A REPORT TO THE TRIBAL MEMBERSHIP ON FORT BERTHOLD WATER RIGHTS 10 (circa 1981) [hereinafter GILLETTE REPORT] (referring to the state’s “conciliatory attitude”); Three Affiliated Tribes Water Management Plan to Settle Reserved Water Rights at 1, *enclosed in* Letter from Rich Schilf, Adm’r, Nat. Resources Dep’t, Three Affiliated Tribes, to Dr. Alonzo Spang, Sr., Superintendent, Fort Berthold Agency 1 (Oct. 28, 1988) [hereinafter Tribal Plan to Settle Water Rights] (describing “atmosphere” at a tribal-state meeting as “very positive”); Letter from P. Diane Johnson, Staff Att’y, Three Affiliated Tribes, to Julie Krenz, Asst. Att’y Gen. (May 2, 1991) (stating that the tribe and state are “working . . . in a joint effort [on] the Northwest Area Water Supply Project”); Letter from Jesse Taken Alive, Chairman, Standing Rock Sioux, to David Sprynczynatyk, State Eng’r (Nov. 2, 1993) (“Thank you for your willingness to cooperate, share information, and work with the Tribe toward assuring future coordination in water development on and near the reservation.”); Letter from Raphael J. DeCoteau, Chairman, Turtle Mountain, to Heidi Heitkamp, Att’y Gen. (Aug. 15, 1997) (noting a “continuing cooperative relationship” with Attorney General’s Office); Letter from Richard A. Monette, Att’y, Turtle Mountain Band, to Dale Van Eckout, U.S. Dep’t of Agriculture at 2 (Sept. 2, 1998) (noting the tribe’s “good relationship” with the state); Hearing on S.B. 2115 Before the H. Nat. Resources Comm. 59th Legis. Assem., (N.D. 2005) (statement of Gene Laducer, Turtle Mountain Tribe) (expressing appreciation for the cooperation of state officials in working on legislation).

296. *E.g.*, Memorandum from Jack Neckels, Director N.D. State Planning Div., to Arthur A. Link, Governor (Aug. 27, 1974) (providing a summary of a meeting with Standing Rock officials); N.D. STATE WATER COMM’N MEETING MINUTES 60 (Apr. 2-3, 1980) (directing staff to meet with Turtle Mountain officials); Memorandum from Milton O. Lindvig, Dir., Hydrology Div., to Vern Fahy, State Eng’r (Aug. 8, 1980) (discussing meeting with Turtle Mountain to discuss the Shell Valley Aquifer); Letter from Raymond Cross, Consultant, Three Affiliated Tribes, to Mike Dwyer, State Water Comm’n (Nov. 16, 1981) (referring to a state and tribal meeting to discuss the state’s Southwest Water Pipeline Project, state water plan, and the tribe’s water development plan); N.D. STATE WATER COMM’N MEETING MINUTES 8 (Nov. 30, 1981) (noting “recent discussions” with the Three Affiliated Tribes over quantifying water rights); N.D. STATE WATER COMM’N MEETING MINUTES 103 (Dec. 6, 1982) (noting a “series of meetings” with the Three Affiliated Tribes); Memorandum from Joseph J. Cichy, Asst. Att’y Gen., to Robert Wefald, Att’y Gen. (Apr. 8, 1983) (“Negotiations have proceeded through the preliminary stages regarding quantification of the Three Affiliated Tribes . . . reserved water right.”); Memorandum from Charles Carvell, Asst. Att’y Gen., to Nicholas Spaeth, Att’y Gen. (Sept. 28, 1989) [hereinafter Carvell Memo] (reviewing a meeting between Governor Sinner and the tribes where water rights were discussed); Letter from Rich Schilf, Adm’r, Nat. Resources Dep’t., Three Affiliated Tribes, to Vern Fahy, State Eng’r (Nov. 23, 1988) (referring to a state and tribal meeting on the state’s Northwest Area Water Supply Project); Memorandum from Jeffrey Mattern, MR&I Program Coordinator, to Dale L. Frink, Dir., Water Development Div. (Jan. 23, 1991) (discussing a meeting between state and Spirit Lake officials over a joint water supply project); Meeting Notes, Julie Krenz, Asst. Att’y Gen. (Aug. 14, 1997) (referring to meeting among Turtle Mountain, state, and federal officials to discuss water rights); Letter from Edward T. Schafer, Governor, to Richard Bad Moccasins, Exec. Dir., Mini Sose Intertribal Water Rights Coalition, Inc. (Mar. 10, 1998) (noting that the state met with Spirit Lake officials “on numerous occasions” to discuss Devils Lake flooding); Letter from David A. Sprynczynatyk, State Eng’r, to Raphael J. DeCoteau, Chairman, Turtle Mountain (Aug. 12, 1998) (referring to meeting with state, federal, and tribal officials to discuss a water permit application); Letter from Wayne Stenehjem, Att’y Gen., to Ron His Horse Is Thunder, Chairman, Standing Rock Sioux Tribe (Dec. 27, 2005) (accepting the tribe’s invitation to a meeting in Fort Yates on Missouri River issues).

The state has not initiated litigation on the question of quantifying tribal water rights, although the state could have forced the issue and, under the McCarran Amendment, litigated it in state court. State policy has been to neither initiate litigation nor demand negotiations; the state defers to tribal wishes on quantifying reserved water rights.²⁹⁷

B. TURTLE MOUNTAIN'S QUANTIFICATION EFFORT

The Turtle Mountain Band has considered quantifying its water right. It expressed interest in doing so in 1980 after it became concerned that appropriations from the Shell Valley Aquifer might exceed the rate of recharge.²⁹⁸ The state water commission responded favorably and directed its staff to begin discussing the issue with the tribe. The tribe, however—apparently due to a change in tribal administration—dropped its interest in the matter.²⁹⁹

In the late 1990s the tribe again became interested in quantification. The interest was sparked by a 1997 on-reservation water shortage.³⁰⁰ Some tribal members believed that the cause was due to state-sanctioned, over-appropriations from the Shell Valley Aquifer.³⁰¹ The problem, however, may have been due to problems with the tribe's water infrastructure.³⁰² Nonetheless, in early 1998 the tribe proposed negotiating an agreement for

297. *E.g.*, STATE WATER COMM'N MEETING MINUTES 107 (Nov. 30, 1981) ("State Engineer's position has always . . . been to quantify Indian water rights through negotiations."); 1989 N.D. STATE WATER COMM'N BIENNIAL REPORT 5 (declaring a desire to negotiate and "avoid litigation" with tribes); 1992 STATE WATER PLAN, *supra* note 6, at 65 ("Water rights disputes should be resolved through negotiation."); Letter from David A. Sprynczynatyk, State Eng'r, to Jesse Taken Alive, Chairman, Standing Rock Sioux Tribe (Oct. 19, 1993) ("[W]hen you feel the . . . Tribe is ready to discuss its reserved water right, I am ready to do so."); Letter from David A. Sprynczynatyk, State Eng'r, to Raphael J. DeCoteau, Chairman, Turtle Mountain Band of Chippewa Indians (Aug. 12, 1998) ("Please let me know when you would like to meet [to discuss the tribe's water rights]."); 2005 N.D. STATE WATER COMM'N A REFERENCE GUIDE: WATER IN NORTH DAKOTA 8 ("Every effort should be taken to cooperatively quantify Native American . . . water rights.").

298. STATE WATER COMM'N MEETING MINUTES 56-58 (Apr. 2-3, 1980).

299. *See supra* notes 114-16 and accompanying text.

300. Letter from Alysia E. LaCounte & Richard A. Monette, Att'ys, Turtle Mountain Band, to David Sprynczynatyk, State Eng'r (Jan. 7, 1998) [hereinafter LaCounte & Monette Letter].

301. Karen Tuomala, *H2O Scenario: Tribe Ready to Supply Water; Director has a Few Concerns*, TURTLE MOUNTAIN STAR (Rolla, N.D.), Aug. 3, 1998, at 1 (stating that the 1997 water shortages were caused by inadequate water supply); Logan J. Davis, *Is the Well Going Dry?*, TURTLE MOUNTAIN TIMES (Belcourt, N.D.), Oct. 6, 1997, at 1A, 4A (stating that non-Indian irrigation interferes with tribal water wells).

302. *See* Memorandum from Julie Krenz, Asst. Att'y Gen., to David Sprynczynatyk, State Eng'r (Feb. 9, 1998); Letter from David A. Sprynczynatyk, State Eng'r, to Alysia A. LaCounte & Richard A. Monette, Att'ys, Turtle Mountain Band (June 15, 1998); Karen Tuomala, *H2O: Growth, Stability Depend on a Healthy Shell Valley Aquifer*, TURTLE MOUNTAIN STAR (Rolla, N.D.), Sept. 28, 1998, at 1.

managing the Shell Valley Aquifer.³⁰³ A few months later it expanded its proposal, asking that the state enter quantification negotiations.³⁰⁴ The state responded, expressing its willingness to do so.³⁰⁵

The negotiations, however, were immediately side-tracked into discussing the format under which the state would exercise its McCarran Amendment authority. North Dakota statutes do not provide a specific procedure for either negotiating or adjudicating Indian water rights, but do contain general provisions for resolving questions concerning water rights.³⁰⁶ These statutes, however, were unsatisfactory to the tribe. To address the tribe's concerns, state and tribal officials drafted legislation that would establish a structure for adjudicating Indian water rights.³⁰⁷ The water commission delayed filing the bill to give all tribes time to review it.³⁰⁸ The reviews were unfavorable. The Three Affiliated Tribes, Spirit Lake Nation, and Standing Rock Sioux all questioned the bill.³⁰⁹

These objections killed not only the draft legislation but the Turtle Mountain Band's interest in negotiations.³¹⁰ It ended up opposing the bill's introduction, stating that "there is too much to lose and too little to gain from any negotiations with the state at this time."³¹¹ It was a dramatic policy reversal. The bill was not filed.³¹²

303. LaCounte & Monette Letter, *supra* note 300.

304. *See* Turtle Mountain Res. No. TMBC805-04-98 (Apr. 8, 1998) (declaring that the tribe "shall enter into negotiations with the State of North Dakota to quantify the Tribe's reserved water right"); Letter from Richard Monette, Att'y, Turtle Mountain Band, to Julie Krenz, Asst. Att'y Gen. (July 22, 1998) (suggesting that the state and tribe "commence negotiations"); *see also* Turtle Mountain Res. No. TMBC803-04-98 (Apr. 8, 1998) (requesting a federal negotiating team).

305. Memorandum from David A. Sprynczynatyk, State Eng'r, to Edward T. Schafer, Governor (Aug. 3, 1998); Letter from David A. Sprynczynatyk, State Eng'r, to Raphael DeCoteau, Chairman, Turtle Mountain Band (Aug. 12, 1998).

306. N.D. CENT. CODE ch. 54-40.2 (2008). State agencies, subject to gubernatorial consent, have general authority to enter into agreements with tribes. *Id.* Another statute gives the attorney general, after receiving a report from the state engineer, the authority to start litigation to settle water rights in a "stream system." *Id.* § 61-03-16 (2003). Other statutes give the water commission authority to consider and settle disputes over water rights. *Id.* §§ 61-02-42 to -43.

307. *See* STATE WATER COMM'N MEETING MINUTES 3 (Nov. 25, 1998).

308. *Id.*

309. Letter from Myra Pearson, Chair, Spirit Lake Tribe, to Edward Schafer, Governor (Dec. 1, 1998) (stating that the bill "would undermine" the tribe's "sovereign interests"); Letter from Tex Hall, Chairman, Three Affiliated Tribes, to Ed Schafer, Governor (Dec. 7, 1998) (stating that the bill was premature because the tribe was uninterested in negotiating water rights); Letter from Charles W. Murphy, Chairman, Standing Rock Sioux Tribe, to Edward T. Schafer, Governor (Dec. 8, 1998) (explaining his uncertainty about the bill).

310. Turtle Mountain Res. No. TMBC1216-12-98 (Dec. 8, 1998) (withdrawing support for the bill and asking that the state water commission not file it).

311. Turtle Mountain Res. No. TMBC805R-12-98 (Dec. 17, 1998).

312. STATE WATER COMM'N MEETING MINUTES 3 (Dec. 10, 1998).

In 2004, the Turtle Mountain band reopened discussions.³¹³ It was concerned about its ability to “protect and manage [its] present or future reserved water rights.”³¹⁴ But when the tribe and state began talking, the first issue was again a concern about the adequacy of existing state law to provide a negotiating and adjudication process appropriate for Turtle Mountain. A bill was again drafted to better define the process.³¹⁵ It was introduced but even Turtle Mountain did not like it. The tribe complained that it was one-size-fits-all legislation that did not account for the unique issues each tribe presents regarding water.³¹⁶ And other tribes did not support it as well.³¹⁷ The 2005 Legislature responded by directing that Indian water rights be studied during the legislative interim.³¹⁸

The issue was studied and another bill proposed to better define the negotiation and adjudication process.³¹⁹ Turtle Mountain, however, wanted a bill specific to it, asserting the uniqueness of its issues.³²⁰ It maintained this position before the 2007 Legislature.³²¹ Other tribes also expressed concerns about the bill.³²² The bill failed.³²³ The state and the Turtle Mountain Band have not commenced any further talks regarding the tribe’s water rights. The state has also engaged the Three Affiliated Tribes and the Standing Rock Sioux Tribe in extensive discussions about water. Neither exercise, however, bore clear results.

313. STATE WATER COMM’N MEETING MINUTES 5-6 (Nov. 17, 2004).

314. Turtle Mountain Res. No. TMBC2604-02-04 (Feb. 6, 2004).

315. STATE WATER COMM’N MEETING MINUTES 5-6 (Nov. 17, 2004).

316. Hearing on S.B. No. 2115 Before the S. Nat. Resources Comm., 59th Legis. Assem. (N.D. 2005) (testimony of Thomas Davis, Dir., Water Resources, Turtle Mountain Band).

317. *Id.* (testimony of Tex G. Hall, Chairman, Three Affiliated Tribes); Letter from Charles W. Murphy, Chairman, Standing Rock Sioux, to Dale Frink, State Eng’r (Jan. 31, 2005).

318. 2005 N.D. Laws ch. 510.

319. N.D. LEGIS. COUNCIL AGRIC. & NAT. RESOURCES COMM. MINUTES (Sept. 15, 2005; Nov. 17, 2005; Jan. 12, 2006; June 6, 2006; Aug. 3, 2006; and Sept. 21, 2006).

320. N.D. LEGIS. COUNCIL, AGRIC. & NATURAL RESOURCES COMM. MINUTES 3 (Sept. 15, 2005; Sept. 21, 2006) (testimony of Tom Davis, Dir., Water Resources, Turtle Mountain Band).

321. Hearing on H.B. 1025 Before the H. Nat. Resources Comm. 13, 15, 60th Legis. Assem. (N.D. 2007) (testimony of Tom Davis, Dir., Water Resources, Turtle Mountain Band).

322. *Id.* at 16-20 (testimony of Steven C. Emery, Att’y, Standing Rock Sioux); *Id.* at 20-22 (testimony of Jesse Taken Alive, Tribal Council Member, Standing Rock Sioux); *Id.* at 22-23 (testimony of Paul Banks, representing Three Affiliated Tribes Chairman Marcus Wells). In other states, water adjudication statutes have often been amended during ongoing adjudications. *See* A. Lynne Krogh, *Water Right Adjudications in the Western States: Procedures, Constitutionality, Problems & Solutions*, 30 LAND & WATER L. REV. 9, 11 (1995) (citing Montana, Idaho, and Arizona law); *see also* Scott B. McElroy & Jeff J. Davis, *Revisiting Colorado River Water Conservation District v. United States—There Must Be a Better Way*, 27 ARIZ. ST. L. J. 597, 600 (1995) (“[I]n Arizona, the parties have struggled for the last ten to fifteen years just to establish a procedure to deal with the complexities of the federal rights of the United States and Indian Tribes.”).

323. H. Journal, 60th N.D. Legis. Sess. 185 (2007).

C. THREE AFFILIATED'S QUANTIFICATION EFFORT

In the early 1980s, Austin Gillette, Chairman of the Three Affiliated Tribes, issued to tribal members a report on water. He stated that there is a growing demand for water from Lake Sakakawea, in particular, energy companies were interested in withdrawing water from the lake and it was the proposed source for the state's Southwest Water Pipeline Project,³²⁴ a project to distribute water throughout southwestern North Dakota.³²⁵ In light of these events, Chairman Gillette stated that the tribe needed a water plan "before irrigation, industrial and municipal uses of Lake Sakakawea develop above a critical level."³²⁶

The Chairman reported that the tribe and state had held meetings on water rights and noted that the state had a more amicable relationship with the Three Affiliated Tribes on Missouri River issues than it did with downstream states.³²⁷ He said that the tribe might want to take advantage of the state's "conciliatory attitude" and discuss with it a compact resolving the tribe's water right.³²⁸ The state water commission agreed to enter discussions.³²⁹ In light of decisions stating that the amount of water reserved is tied to the purpose for which the reservation was created, identifying the purpose for establishing the Fort Berthold Reservation was an important issue. Attorneys debated the issue and negotiations stalled.³³⁰ The tribe became concerned that the governing standard—practicably irrigable acres—would limit the amount of water it could obtain in a negotiation.³³¹

But within a few years the tribe renewed the talks. It asked the federal government to join them, a request supported by the state.³³² State and tribal officials met in September of 1988 at which time the tribe proposed a new concept for calculating tribal water rights. It did not want to base dis-

324. GILLETTE REPORT, *supra* note 295, at 3.

325. See N.D. CENT. CODE ch. 61-24.3 (2003).

326. GILLETTE REPORT, *supra* note 295, at 10.

327. *Id.* Two decades later North Dakota and the Three Affiliated Tribes would cooperate in litigation against the Corps over management of the Missouri River. For example, the tribe filed an amicus brief supporting the petition for certiorari that the state filed with the U.S. Supreme Court. Brief For Mandan, Hidatsa, and Arikara Nation and the Cheyenne River Sioux Indian Tribe as Amici Curiae in Support of Pet. for Cert., State of North Dakota and State of South Dakota v. U.S. Army Corps of Eng'rs (2005) (No. 05-611).

328. GILLETTE REPORT, *supra* note 295, at 10.

329. See N.D. STATE WATER COMM'N MINUTES 8 (Nov. 30, 1981).

330. See Letter from Ray Cross, Legal Dep't, Three Affiliated Tribes, to Joe Siche [sic], Counsel, State Water Comm'n (May 9, 1984); Letter from Joseph J. Cichy, Asst. Att'y Gen., to Ray Cross, Three Affiliated Tribes (Aug. 13, 1984).

331. Memorandum from Rosellen M. Sand, Asst. Att'y Gen., to Nicholas J. Spaeth, Att'y Gen. (Sept. 28, 1988) [hereinafter Sand 1988 Memo].

332. Letter from Donald Paul Hodel, Secretary, U.S. Dep't of the Interior, to Nicholas J. Spaeth, Att'y Gen. (Sept. 15, 1988).

cussions on PIA, or any other single standard; it did not want to settle its water right the traditional way, by quantifying a specific amount of water. Rather, it wanted an arrangement—a water management plan—that would authorize specific and various different kinds of uses and establish a regulatory regime to govern allocations of water to ensure that the water needs for each use could be fulfilled.³³³ The state responded favorably. It was willing to accommodate the tribe's desire to address the tribal water right through a management and regulatory regime rather than by quantifying a specific amount of water.³³⁴

A state official stated that using a management plan concept would be a “more contemporary standard,” one that recognized the reservation's development needs.³³⁵ The proposal would establish water uses and determine the amount of water needed to develop each use to its full potential.³³⁶ Tribal officials described it as “a dynamic system,”³³⁷ an approach that differed from typical tribal and state negotiations.³³⁸ The state engineer recognized the novelty.³³⁹ The focus was not on quantification, but on planning and water management.³⁴⁰

Despite two years of amicable talks and progress, the tribe, without explanation, discontinued the negotiations. The last negotiating session was in September of 1989, at which the tribe agreed to gather and present information at a December meeting, but the meeting never occurred.³⁴¹ Though the state encouraged continued discussions,³⁴² North Dakota and

333. Sand 1988 Memo, *supra* note 331; Tribal Plan to Settle Water Rights, *supra* note 295, at 1.

334. Sand 1988 Memo, *supra* note 331; *see also* Letter from Lawrin Hugh Baker, Chairman, Nat. Resources Comm., Three Affiliated Tribes, to Joe Christie, Deputy to the Asst. Secretary for Indian Affairs (June 19, 1989) [hereinafter Baker Letter] (stating that “[t]he Tribes and the State both feel that mutually acceptable water management is preferable to adjudication”).

335. Memorandum from Rosellen M. Sand, Asst. Att’y Gen., to Dave Sprynczynatyk, State Eng’r, and Pat Stevens, Asst. Att’y Gen. (Oct. 3, 1989).

336. *Id.* at 3.

337. Baker Letter, *supra* note 334, at 6.

338. Letter from Edward Lone Fight, Chairman, Three Affiliated Tribes, to Sen. Quentin Burdick (Sept. 1, 1989).

339. Letter from Vern Fahy, State Eng’r, to Edward Lonefight [sic], Chairman, Three Affiliated Tribes (Mar. 2, 1989) [hereinafter Fahy Letter] (stating that the proposal was not the “customary approach” in negotiating Indian water rights); *see also* Memorandum from Patrick Stevens, Asst. Att’y Gen., to Charles Carvell, Asst. Att’y Gen. 1 (Oct. 3, 1989) (stating that under the tribes proposal, its right would be “quantified based on water resources available and potential water uses as opposed to a traditional *Winters* right”).

340. Fahy Letter, *supra* note 339.

341. Memorandum from Patrick K. Stevens, Asst. Att’y Gen., to Nicholas J. Spaeth, Att’y Gen. (Mar. 9, 1990).

342. Letter from David A. Sprynczynatyk, State Eng’r, to Wilbur D. Wilkinson, Chairman, Three Affiliated Tribes (Nov. 19, 1990).

the Three Affiliated Tribes have never again discussed reserved water rights.

D. STANDING ROCK'S CANNONBALL RIVER STUDY

The state also had a cooperative endeavor with the Standing Rock Sioux Tribe, but it too ended without concrete results. In 1993, the state, tribe, and U.S. Bureau of Reclamation agreed to undertake a cooperative water management study of the Cannonball River Basin.³⁴³ The Cannonball River forms the reservation's northern boundary. The study had origins in the tribe's concern that non-Indian appropriators on the upper Cannonball were withdrawing so much water that there was little left in the river when it reached the reservation.³⁴⁴ Also motivating the tribe to study the basin was its desire to develop information on reservation water resources to prepare for quantifying its water right.³⁴⁵ But the tribe immediately became concerned that the study might compromise its water rights.³⁴⁶ This became a continuing, never allayed concern, even though the state assured the tribe that the study was "in no way an attempt to quantify Indian water rights," but was merely to collect data and develop the basin's hydrologic model to improve water management decisions.³⁴⁷

In late 1997, after several years of work, the Bureau—with state and tribal input—completed and circulated to the state and tribe the "Working Draft" of the "Cannonball River Basin Water Management Study." The study was to be issued in mid-1998, but the tribe continued to show concern about the study's affect on its reserved water right.³⁴⁸ The Bureau acknowledged these concerns and urged the tribe to submit its comments, promising to review tribal concerns and remove anything objectionable.³⁴⁹

Ultimately, the tribe did not approve the report, apparently fearing that it might be misused and compromise its water right. A final report was

343. Letter from David A. Sprynczynatyk, State Eng'r, to Jesse Taken Alive, Chairman, Standing Rock Sioux (Oct. 19, 1993).

344. STANDING ROCK STUDY, *supra* note 176, at 13 (stating that tribal water rights "cannot be enjoyed in the face of additional upstream diversions along the Cannonball River . . .").

345. Carvell Memo, *supra* note 296.

346. Memorandum from Linda Weispfenning, Env'tl. Scientist, to Dave Sprynczynatyk, State Eng'r, and Gene Krenz, Dir., Planning & Education Div. (Feb. 17, 1994).

347. Memorandum from David A. Sprynczynatyk, State Eng'r, to Jesse Taken Alive, Chairman, Standing Rock Sioux, et al. (Aug. 18, 1997).

348. *See* Letter from Peter Capossela, Att'y, to Shirley Martin, Dir., Dep't of Water & Nat. Resources, Standing Rock Sioux (Oct. 30, 1998) (asserting that the draft "has potential detrimental impacts on the Winters Doctrine Water Rights of the tribe").

349. Letter from Dennis E. Breitzman, Area Manager, Bureau of Reclamation, to Charles Murphy, Chairman, Standing Rock Sioux (July 27, 2000).

never issued.³⁵⁰ Since the failure of the Cannonball Study, the Standing Rock Sioux has repeatedly stated that it is not interested in any process by which its water right might be quantified, and, in fact, expressly opposes the idea.³⁵¹

VI. CONCLUSION

A legacy of the West is its continual and often bitter controversies over water.³⁵² This has not been the history of North Dakota's relations with the Standing Rock Sioux, the Three Affiliated Tribes, the Spirit Lake Nation, and the Turtle Mountain Band of Chippewa. According to a tribal official, "cooperation and common sense [have] always prevailed."³⁵³ It is true that state and tribal leaders have exercised some restraint and some good sense. They have not been overly aggressive in asserting their positions.³⁵⁴ They have avoided decisions that might precipitate litigation, and they have avoided actions that could poison their relations. But, in the broad context, the tribal official's comment that cooperation has "always prevailed" is not true. There have been cooperative efforts, but they have produced little and no cooperation is underway today. There are no institutions in place to facilitate cooperation or even substantive discussions. There are no protocols to provide for regular dialogue. The truth is, regarding water resources, North Dakota and North Dakota Indian tribes do not have a relationship. Tribes pursue their parochial interests; the state pursues its.

And so 100 years after *Winters*, the amount of water subject to control by North Dakota Indian tribes is unresolved and hence uncertain. But, this

350. Memorandum to File by Linda Weispfenning, Water Res. Planner, State Water Comm'n (Dec. 14, 2004).

351. Letter from Charles W. Murphy, Chairman, Standing Rock Sioux, to Edward T. Schaffer, Governor (Dec. 8, 1998) ("we refuse to negotiate"); *Standing Rock Comments on Master Manual FEIS*, *supra* note 161, at A1-152 to -153 ("no desire to negotiate our water right with the State, whether under threat of litigation or not."); Letter from Charles W. Murphy, Chairman, Standing Rock Sioux, to Dale Frink, State Eng'r (Jan. 31, 2005) (stating that while the tribe looks forward to working with the state "on common water issues," it has no interest now or in "the reasonably foreseeable future" in quantifying its water rights).

352. *E.g.*, Consejo de Desarrollo Economico de Mexicali, A.C. v. United States, 482 F.3d 1157, 1162 (9th Cir. 2007).

353. N.D. LEGIS. COUNCIL, AGRIC. & NAT. RESOURCES. COMM. MINUTES, at Exhibit Q (Sept. 15, 2005) (statement of Tom Davis, Dir., Water Res., Turtle Mountain Band); *see also* H. Journal, 59th N.D. Legis. Assemb., 77, 78 (Jan. 6, 2005) (statement by Charles W. Murphy, Chairman, Standing Rock Sioux) (stating that because of the cooperation between the tribes and the state over the past twenty years, they "have learned how to cooperate with one another in many different areas").

354. Bob Tucker, *State May Face Debate Over Indian Water Rights*, THE BISMARCK TRIBUNE, May 18, 1979, at 5 (quoting William Veeder) [hereinafter Veeder Statement] (observing that Indian water rights had not become a contentious issue in North Dakota perhaps because "what I call 'rednecks' are not as aggressive there").

may not be cause for lament. Based on experiences in other states, quantifying Indian water rights and establishing cooperative water management seems only possible through litigation, and such litigation is extraordinarily complex, costly, and time-consuming.

Parties to the litigation include three governments—tribal, state, and federal—and the myriad individuals, businesses, and entities that hold water rights under state law. In Idaho's *Snake River*³⁵⁵ adjudication over 160,000 claims were filed, including 20,506 for federal and Indian reserved water rights.³⁵⁶ In the 1990s South Dakota filed—though soon dismissed—an action to adjudicate Missouri River water rights, and in anticipation of the claims that would be filed printed 50,000 claim forms.³⁵⁷ The *Klamath Basin*³⁵⁸ adjudication in Oregon started thirty years ago but won't conclude "any time soon."³⁵⁹ The *Colorado River*³⁶⁰ adjudication was filed in 1952 and the final decree was issued in 2006.³⁶¹ A Wyoming Supreme Court decision in *Big Horn* was so fractured—each of the five justices issued an opinion—that one justice prepared a three-page "road map to the court's splintered offering."³⁶² And in that litigation, Wyoming state agencies and its court system spent from \$30 to \$40 million, while the *Snake River* case has cost Idaho \$20 million.³⁶³ The repeated need in adjudications for judicial guidance requires numerical appellations to track decisions. Thus, there is *Adair IV*,³⁶⁴ *Gila River VI*,³⁶⁵ and *Big Horn VII*.³⁶⁶ And, unfortunately, these expensive, lengthy adjudications do not necessarily provide a full or even final resolution. All issues do not get resolved and no matter

355. 764 P.2d 78 (Id. 1988).

356. Steven W. Strack, *Pandora's Box or Golden Opportunity? Using the Settlement of Indian Reserved Water Right Claims to Affirm State Sovereignty Over Idaho Water and Promote Intergovernmental Cooperation*, 42 IDAHO L. REV. 633, 638 (2006).

357. Telephone Interview with John Guhin, Asst. Att'y Gen., S.D. Att'y General's Office (Aug. 31, 2006).

358. *United States v. Braren*, 338 F.3d 971, 972-75 (9th Cir. 2003) (reviewing the history of the *Klamath Basin* litigation).

359. Blumm, *supra* note 209, at 1169.

360. *Arizona v. California*, 547 U.S. 150 (2006).

361. *Id.* at 150-52 (reviewing the history of the *Colorado River* litigation).

362. *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 835 P.2d 273, 301 (Wyo. 1992) (Golden, J., dissenting).

363. Thorson, *Dividing*, *supra* note 156, at 442.

364. Alexander Wood, Note, *Watering Down Federal Court Jurisdiction: What Role do Federal Courts Play in Deciding Water Rights?*, 23 J. ENVTL. L. & LITIG. 241, 257 n.101 (2008) (referring to *United States v. Braren*, 338 F.3d 971 (9th Cir. 2003) as "*Adair IV*").

365. Blumm, *supra* note 209, at 1186, n.191 (referring to *In re Gen. Adjudication of All Rights to Use All Water in the Gila River Sys. & Source*, 127 P.3d 882 (Ariz. 2006) as "*Gila River VI*").

366. Thorson, *supra* note 156, at 343 n.309 (referring to *In re Gen. Adjudication of all Rights to Use All Water in the Big Horn River Sys.*, 85 P.3d 981, 984 (Wyo. 2003) as "*Big Horn VII*").

how knowledgeable and far-sighted the negotiators may be, all the issues are seldom recognized and addressed.³⁶⁷ The Ak-Chin Indian Community in Arizona settled its water rights in 1978, but the “final” 1978 settlement was amended in 1984 and again in 1992.³⁶⁸ And litigation, no matter how “friendly” it may begin, often turns contentious and, not uncommonly, divisive.³⁶⁹ It can be a “life or death struggle.”³⁷⁰

The fact that Indian water rights have not been litigated in North Dakota may be a blessing, but the continuing uncertainty and lack of resolution cannot persist. The matter is ripe, if not urgent for the Turtle Mountain Band. It fears for the security of its water supply, which is located mostly off the reservation and over which the tribe is unable to exercise much control. The Spirit Lake Nation and the state each authorize appropriations from the same aquifer, and do so without exchanging information or discussing their overlapping regulatory regimes, thereby putting in jeopardy the resource they share and on which their people rely. The Standing Rock Sioux and Three Affiliated Tribes are content to leave their water rights unquantified, believing that those rights are secure and that the water, particularly that of Missouri River, will be there on that day when they call for it.

The Missouri River is also the primary resource for the State of North Dakota and its water projects. Since statehood, North Dakota officials have looked for ways to spread the Missouri’s bounty throughout the state.³⁷¹ Today Missouri River water is piped throughout southwestern North Dakota and will soon be piped to much of the north central part of the state.³⁷² The water source for North Dakota’s next huge project—supplying water to the Red River Valley—will likely be the Missouri.³⁷³ What role Indian reserved water rights will play in providing water for these projects and for

367. See generally A. Dan Tarlock, *The Illusion of Finality in General Water Rights Adjudications*, 25 IDAHO L. REV. 271 (1989).

368. ELIZABETH CHECCHIO & BONNIE G. COLBY, *INDIAN WATER RIGHTS: NEGOTIATING THE FUTURE* 49 (1993).

369. Thorson, *Dividing*, *supra* note 156, at 303.

370. John E. Thorson, Sarah Britton, & Bonnie G. Colby, *Introduction* to Kropf, *supra* note 89, at 3 (quoting John Echohawk, Exec. Dir., Native American Rights Fund).

371. 1922 N.D. STATE ENG’R TENTH BIENNIAL REPORT 19-20 (tracing interest in the idea to an 1889 report and an 1891 investigation); *Barnes County v. Garrison Diversion Conservancy Dist.*, 312 N.W.2d 20, 22 (N.D. 1981) (“Since the early 1920’s diversion of Missouri River waters into central and eastern North Dakota has involved two schemes . . .”).

372. N.D. STATE WATER COMM’N, 2007-2009 NORTH DAKOTA WATER DEVELOPMENT REP. 2-3 (Dec. 2006). The Southwest Water Pipeline Project holds a water permit for 17,100 acre-feet per year. 1999 STATE WATER PLAN, *supra* note 41, at 13. The Northwest Area Water Supply Project holds a water permit for 15,000 acre-feet per year. State Water Permit No. 01416A-01 (State Water Comm’n, 2003).

373. EXECUTIVE SUMMARY: FINAL ENVIRONMENTAL IMPACT STATEMENT, RED RIVER VALLEY WATER SUPPLY PROJECT 46 (Dec. 2007), available at <http://www.rrvwsp.com/>.

other non-Indian uses of the Missouri is unknown, as is the affect these uses will have on Indian water rights.³⁷⁴

Complacency about the Missouri River's future is not shared by others with interests in it. The State of Missouri fights to stop upstream appropriations from the river, believing that even small ones jeopardize its interests.³⁷⁵ Montana tribes on the river have ambitious water use plans.³⁷⁶ Environmentalists and recreational interests make demands.³⁷⁷ Federal laws such as the Endangered Species Act may trump state prior appropriation laws as well as Indian water rights.³⁷⁸ Will cities in the southwestern part of the United States seek to tap the river?³⁷⁹ Downstream interests insist that the Missouri River is "over-appropriated."³⁸⁰ And a tribal chairman from South Dakota believes that a battle for the river is brewing, one that will "be very contentious and very divisive and very combative."³⁸¹

374. The Three Affiliated Tribes is concerned that a venture the size of the Red River Valley Water Supply Project could "create powerful stakeholders" that would seek to limit the amount of Missouri River water dedicated to tribes. Transcript of Public Hearing (March 20, 2006), in RED RIVER VALLEY WATER SUPPLY PROJECT, ENVIRONMENTAL IMPACT STATEMENT, SUPPLEMENTAL & DRAFT EIS COMMENTS [hereinafter RED RIVER VALLEY EIS COMMENTS], available at <http://www.rvwsp.com/scoping.htm>, Doc. 88 at 11 (statement of Tex Hall, Chairman.) [hereinafter Hall Statement].

375. *E.g.*, Letter from Jeremiah W. Nixon, Att'y Gen., State of Missouri, to Signe Snortland, Bureau of Reclamation (Apr. 25, 2007) (opposing the use of Missouri River water to supplement water supplies in the Red River Valley); State of Missouri's Amicus Brief at 2, *Manitoba v. Norton*, No. 1:02:CV02057-RMC (U.S. Dist. Ct., D.C., Mar. 8, 2004) (opposing North Dakota's Northwest Area Water Supply Project because "water that leaves the basin before it flows through Missouri cannot be used by Missourians.").

376. Matthew Brown, Associated Press, *Fort Peck Tribe Hopes to Tap Missouri*, BISMARCK TRIBUNE, Mar. 25, 2007, at 4C (noting that the tribe hopes to irrigate up to half a million acres).

377. Jonathon Braden, *Water Wars: As the Missouri River Loses Water, the Number of Those Who Want to Use it is Growing But it's Not a 'Barges Versus Canoes' Issue*, THE COLUMBIA TRIBUNE (Columbia, Mo.), Nov. 18, 2007, at 1D, 4D.

378. See generally Brian A. Schmidt, Note, *Reconciling Section 7 of the Endangered Species Act with Native American Reserved Water Rights*, 18 STAN. ENVTL. L.J. 109 (1999); Tim Vollman, *The Endangered Species Act and Indian Water Rights*, 22 NAT. RESOURCES & ENV'T 39 (Fall, 1996); Adrian N. Hansen, *The Endangered Species Act and the Extinction of Reserved Indian Water Rights on the San Juan River*, 27 ARIZ. L. REV. 1305 (1995).

379. Editorial, *Thirst for Water Grows*, GRAND FORKS HERALD, Feb. 10, 2008, at 2D.

380. Seth Tupper, *Water Fight Brewing in South Dakota: As Climate Warms, Fight Could Erupt Over Missouri River's Precious Supply of Water*, THE DAILY REPUBLIC (Mitchell, S.D.), Dec. 15, 2007 (quoting Michael Jandreau, Chairman., Lower Brule Sioux Tribe) [hereinafter Jandreau Statement]; see also Associated. Press, *North, South Oppose N.D. Water Projects*, THE FARGO FORUM, May 5, 2008, at A8 ("The Missouri basin is already significantly depleted.") (quoting Doyle Childers, Dir. Missouri Dep't of Nat. Resources). North Dakota tribes do not disagree. Transcript of Public Hearing (March 1, 2007), in RED RIVER VALLEY EIS COMMENTS, *supra* note 374, at Doc. 205, 37-38 (statement of Ralph Walker, Dir., Standing Rock Rural Water Sys.) (stating that the Missouri River is "over-allocated"); Hall Statement, *supra* note 374, at 11-12 (declaring the river "over-appropriated").

381. Jandreau Statement, *supra* note 380.

To prepare for these contests, and to lessen the likelihood of a divisive one between them, North Dakota and Indian nations in this state must begin to build a relationship, the kind of relationship that should exist among neighbors who share life's most fundamental resource. Resolving in the short term all their differences over water or even many of them is unrealistic, but they need to establish a foundation of good will and trust. One hundred years after *Winters*, the time for a purposeful discourse among governments in North Dakota has arrived.