INDIAN WATER RIGHTS: HOW *ARIZONA V. CALIFORNIA* LEFT AN UNWANTED CLOUD OVER THE COLORADO RIVER BASIN

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The Colorado River is one of the most important rivers in the world. The river's 1,400-mile journey from the Rocky Mountains to the Sea of Cortez takes on waters from seven states and from the reservations of twenty-eight Indian tribes along the way, 244,000 square miles of river basin in all. The Colorado River is also heavily managed: Its waters are allocated through a complex body of laws collectively referred to as the "Law of the River," which includes an international treaty, two interstate water compacts, numerous federal and state statutes, and more than a dozen Indian water rights settlements. For thousands of years before the Law of the River, however, American Indians lived and irrigated within the Colorado River Basin, making due with its characteristically seasonal rains and difficult growing conditions. Today, in a cruel but all-too-common twist for tribes, twelve of the basin's twenty-eight tribes have not had their water rights completely quantified, leaving many of the basin's oldest inhabitants without a legally secure source of water. This begs the question of how the Law of the River developed such that the Colorado River is already over-allocated but Indian water rights are to a large extent unaccounted for, and tribes—occupying and using water in the basin since time immemorial—are left struggling for whatever remaining drops they can squeeze out of the basin. And, perhaps more to the point, the question arises how Arizona v. California recognized this exact issue in the Lower Colorado River Basin and could not fully resolve it. This article finally takes the position that tribes, the states, and the federal government must work together to settle Indian water rights claims to provide certainty to all Colorado River basin water users amidst growing undertainty from population growth and climate change.

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INTRODUCTION

The Colorado River is one of the most important rivers in the world. The river's 1,400-mile journey from the Rocky Mountains to the Sea of Cortez takes on waters from seven states—Colorado, Wyoming, Utah, Arizona, New Mexico, Nevada, and California—and from the reservations of twenty-eight Indian tribes along the way, 244,000 square miles of river basin in all.[1] Nearly forty million people rely on the river in some capacity.[2] The Colorado River is also one of the most heavily managed rivers in the United States, if not the world: its waters are allocated through a complex body of laws collectively referred to as the "Law of the River," which includes an international treaty, two interstate water compacts, numerous federal and state statutes, and more than a dozen Indian water rights settlements.[3] The Law of the River created a framework that made possible the development of the American Southwest in the twentieth century.

For thousands of years before the Law of the River, however, American Indians lived and irrigated within the Colorado River Basin, making do with its characteristically seasonal rains and difficult growing conditions.[4] Today, in a cruel but all-too-common twist for tribes, twelve of the basin's twenty-eight tribes have not had their water rights completely quantified,[5] leaving many of the basin's oldest inhabitants without a legally secure source of water.[6] The amount of water these tribes are entitled to is unknown.[7] What we do know is that

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1. Lawrence J. MacDonnell, *Colorado River Basin*, *in* WATER AND WATER RIGHTS 6 (Amy Kelley ed., 2009).

2. BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, EXECUTIVE SUMMARY, COLORADO RIVER BASIN WATER SUPPLY AND DEMAND STUDY 3 (2012) [hereinafter BOR STUDY SUMMARY]. All study report documents can be found at http://www.usbr.gov/lc/region/programs/crbstudy/finalreport/index.html.

3. *See* Lawrence J. MacDonnell, David H. Getches & William C. Hugenberg Jr., *The Law of the Colorado River: Coping with Severe Sustained Drought*, 31 J. AM. WATER RESOURCES ASS'N 825 (1995); Charles J. Meyers, *The Colorado River*, 19 STAN. L. REV. 1 (1966).

4. Interestingly, the first federally funded irrigation project was one benefitting the Colorado River Indian Reservation in 1867. *See* Act of March 2, 1867, 14 Stat. 514; *see alsoTen Tribes Partnership*, COLORADO RIVER WATER USERS ASSOCIATION http://www.crwua.org/colorado-river/ten-tribes (last visited June 3, 2014) [hereinafter *Ten Tribes Partnership*].

5. *See infra* Part III (identifying tribes).

6. One of the authors' families lives on the Navajo Reservation and relies exclusively on water hauled from the local chapter for household and stock water supplies.

7. Looming in the distance, with anticipation from both Indian and non-Indian corners, are the Navajo Nation's claims. The tribe has the largest reservation in the United States, comprising

the sixteen tribes in the basin that have quantified their rights have established the right to divert nearly 2.9 million acre-feet (maf) of water annually from the Colorado River system.[8] It appears, therefore, the remaining tribal claims leave a significant "cloud" over the certainty of existing non-Indian water rights and uses.[9]

Further clouding water rights in the basin is the actual state of the basin—including established water uses as well as stressors such as persistent drought, population growth, and climate change. In late 2012, the Bureau of Reclamation released the Colorado River Basin Water Supply and Demand Study ("Basin Study"), in which it acknowledged, among other observations, that the Colorado River is already over-allocated based on water supply.[10] The study also anticipated water demand to continue outpacing water supply in the basin—as it had over the last decade for the first time in the 100-year historical record—primarily due to population increases and climate change.[11]

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ten percent of the basin's total area. The tribe has potentially large water claims to the Colorado River mainstream in an amount that may upset present allocations of the river. *See generally* Matt Jenkins, *Seeking the Water Jackpot*, HIGH COUNTRY NEWS, Mar. 17, 2008, *available at* http://www.hcn.org/issues/366/17573.

8. BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, COLORADO RIVER BASIN WATER SUPPLY AND DEMAND STUDY C9-1 (2012) [hereinafter BOR STUDY APPENDIX C9], *available at* https://www.usbr.gov/lc/region/programs/crbstudy/finalreport/Technical%20Report%20C%20-%20Water%20Demand%20Assessment/TR-C_Appendix9_FINAL.pdf.

9. Simon H. Rifkind, SPECIAL MASTER REPORT 256 (1960) [hereinafter SPECIAL MASTER REPORT]; Arizona v. California, 373 U.S. 546 (1963) (describing how the amount of water from the Colorado River for the benefit of Indian Reservations was of such great magnitude that failure to adjudicate tribal water rights claims would leave a "cloud on the legal availability of substantial amounts of mainstream water for use by non-Indian projects."), *available at* http://hdl.handle.net/10974/312.

10. BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR,TECHNICAL REPORT C—WATER DEMAND ASSESSMENT, COLORADO RIVER BASIN WATER SUPPLY AND DEMAND STUDY 4 (2012) [hereinafter BOR DEMAND STUDY].

11. BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, STUDY REPORT, COLORADO RIVER BASIN WATER SUPPLY AND DEMAND STUDY SR6–SR7 (2012) [hereinafter BOR STUDY REPORT]. The study determined that, with respect to water demand,

> Colorado River demand for consumptive uses is projected to range between about 18.1 maf under the Slow Growth [] scenario and about 20.4 maf under the Rapid Growth [] scenario by 2060. The largest increase in demand is projected to be in the [municipal and industrial] category, due to population growth. Population within the Study Area is projected to increase from about

Yet, almost half of the Indian Tribes in the basin have not quantified their water rights in all the states in which they have claims. This begs the question of how the Law of the River developed such that the Colorado River is already over-allocated but Indian water rights are to a large extent unaccounted for, and tribes—occupying and using water in the basin since time immemorial—are left struggling for whatever remaining drops they can squeeze out of the basin. And, perhaps more to the point, the question arises how *Arizona v. California* recognized this exact issue in the Lower Colorado River Basin and yet chose not to fully resolve it. The Special Master's report in the case expressly recognized that Indian water rights were of such great magnitude that failure to adjudicate them would leave a "cloud" over the legal certainty of water for non-Indian projects in the basin.[12]

To examine these issues more thoroughly, Part I of this article explores the foundation of Indian water rights—the *Winters* decision—and discusses *Arizona v. California's* role in the Law of the River as it relates to Indian water rights, particularly by examining the Special Master's Report. Part II then describes the trend toward Indian water rights settlements after *Arizona v. California*. Part III highlights current tribal endeavors to secure Colorado River water, focusing on coalition building with non-Indians. Finally, Part IV concludes by making the point that Indian water rights in the Colorado River Basin are still in a state of legal uncertainty despite *Arizona v. California*, but tribal-state collaboration is improving this situation.

I. INDIAN WATER RIGHTS IN THE COLORADO RIVER BASIN

For over 100 years, Indian tribes have been recognized as having federally reserved water rights that date to the creation of their reservations. Over that same time period, courts have attempted to define the bounds of these rights, and few decisions have been as important as *Arizona v. California* in providing substance to interpret federally reserved Indian water rights. Since the first Indian water rights case, the Supreme Court has implied reserved Indian

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> 40 million in 2015 to between 49.3 million under the Slow Growth [] scenario and 76.5 million under the Rapid Growth [] scenario by 2060. Additionally, the water demand assessment confirmed that the Lower Division States have demand for Colorado River water beyond their 7.5 maf basic apportionment across all scenarios.

BOR STUDY SUMMARY, *supra* note 2, at 8. For comparison, the average consumptive use over the last ten years has been 15.3 maf, and the projected mean average flow at Lee's Ferry over the next fifty years is projected to decrease by approximately nine percent due to climate change. *Id.* at 3 & 7.

12. SPECIAL MASTER REPORT, *supra* note 9, at 256.

water rights when construing treaties and other legal instruments creating Indian reservations. But the quantification and breadth of a tribe's water right is left to state court general stream adjudications or, more recently, negotiated settlements. Tribal water rights have been frustratingly difficult to establish, and both the practice of doing so as well as the treatment of Indian water rights have changed significantly over time.[13] As competition for water resources increases with population growth and climate change, Indians and non-Indians alike are seeking assurances that their water rights are secure.

The *Winters v. United States* decision and, half a century later, the *Arizona v. California* decision positioned tribes to make sizeable water rights claims across the country. Looking back, what appeared to have been an opportunity for an explosion of water rights claims turned out to be only a slow drip, an opportunity largely inhibited by the systematic challenges in the processes used to assert these rights. Even though non-Indians and states fought the anomaly of Indian water rights throughout the twentieth century, the Indian reserved water rights doctrine remains strong today.

A. Winters v. United States

In its 1908 decision *Winters v. United States*, the Supreme Court had its first occasion to address Indian water rights. Against the objections of settlers in Montana, the Court ruled in favor of the Gros Ventre and Assiniboine Indians in a water disagreement.[14] The Court concluded the United States had impliedly reserved water rights necessary to meet the purposes of the tribes' reservation when it had entered into an agreement creating the Fort Belknap reservation, thereby giving the tribe the priority water right.[15] In simple terms, the Court held that when the federal government set aside land for the tribe (the creation of the reservation), water was also set aside. Now known as the "*Winters* doctrine," the Court's reserved rights principle has stood the test of time and provides a foundation for nearly all federal water rights claims today.

Winters involved a dispute over the Milk River in northern Montana. The conflict arose between settlers and Indians of the Fort Belknap Reservation, a reservation created by

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13. *See generally* Robert T. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 CAL. L. REV. 1133 (2010).

14. Winters v. United States, 207 U.S. 564, 577-78 (1908).

15. *Id.* at 576-77. *See generally* JOHN SHURTS, INDIAN RESERVED WATER RIGHTS: THE WINTERS DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT, 1880S-1930S (2000). *See also* Norris Hundley, Jr., *The "Winters" Decision and Indian Water Rights: A Mystery Reexamined*, 13 W. HIST. Q. 17 (1982).

a series of land cessions facilitated through agreements between the United States and the Gros Ventre and Assiniboine Indians in the second half of the nineteenth century.[16] The middle of the Milk River formed the reservation's northern boundary, and the tribe relied on it for water.[17] In 1889, the Bureau of Indian Affairs established an agency on the reservation and diverted water from the Milk River to serve its needs.[18] In 1896, the agency built an Indian irrigation project on the reservation, also using water diverted from the Milk River.[19] As was becoming common throughout the west, non-Indian settlers likewise had moved into the area to engage in agricultural pursuits, and diverted water from the Milk River for their own needs. In 1905, the upstream settlers' diversions combined with a severe drought prevented any water from reaching the downstream tribe's irrigation project.[20] William Logan, the reservation superintendent wrote to the Indian affairs commissioner about the drought:

> So far this Spring, . . . we have had no water in our ditch whatsoever. Our meadows are now rapidly parching up. The Indians have planted large crops and a great deal of grain. All this will be lost unless some radical action is taken at once to make the settlers above the Reservation respect our rights. To the Indians it either means good crops this fall, or starvation this winter.[21]

Due to the settlers' diversions, the tribe was left without water, and the federal government stepped in to help.

The United States filed suit on behalf of the tribe, seeking both a declaration of the tribe's water rights to 11,000 miner's inches (roughly 250 cubic feet/second) of water for irrigation and an injunction preventing twenty-one upstream irrigators from diverting from the Milk River.[22] The U.S. Attorney artfully pleaded several theories, being careful to advocate for both the prior appropriation doctrine as the preferred legal theory—in accord with local

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16. *See* Act of Apr. 15, 1874, 18 Stat. 28 (setting aside all of Montana east of the continental divide and north of the Missouri River as a reservation for several tribes); Act of Oct. 11, 1855, 11 Stat. 657, 659 (discussing the terms of a Treaty with the Blackfoot and other tribes). Most of the 1874 reservation was ceded in 1888. Act of May 1, 1888, 25 Stat. 113.

17. *Winters*, 207 U.S. at 566.

18. *Id.*

19. *Id.*

20. Richard B. Collins, *Indian Allotment Water Rights*, 20 LAND & WATER L. REV. 421, 423–24 (1985).

21. Hundley, *supra* note 15, at 20 (quoting William R. Logan to Francis E. Leupp, June 3, 1905, Fort Belknap Indian Agency Papers, Box 20, Records of the Bureau of Indian Affairs, RG 75, Federal Archives and Records Center, Seattle).

22. *Id.* at 23.

custom—as well as the riparian doctrine for thoroughness if the court chose to apply it to lands reserved by the federal government.[23] Specifically, the U.S. Attorney argued that: (1) the Indians had put the water to use prior to the non-Indians and the prior appropriation doctrine gave the Indians priority of use; (2) a federal riparian right applied that forced the settlers to curtail their use so as to provide water to the Indians, who bordered the river; or (3) the Indians maintained "other rights" to accomplish the purposes for which the reservation was created, a somewhat ambiguous claim aimed to harness whatever treaty rights the court found suitable.[24]

The federal district court granted a temporary restraining order and a preliminary injunction on the same day the U.S. Attorney submitted the complaint.[25] Both the settlers and the U.S. Attorney then frantically worked to prove-up their arguments before the case went before the judge. At trial, the settlers appeared to have the upper hand when they proved that they possessed an earlier appropriation date than the tribe (due to actual use of water) and that the Indians were using less than half of the water the U.S. Attorney claimed on the Indians' behalf.[26] As a matter of necessity, the U.S. Attorney's argument therefore shifted from one based on prior appropriation theory to riparian law, which he had initially disfavored.

Less than two months later, the district court judge issued his final order, a general injunction against the settler's diversions supported by a rationale that took both parties by surprise: "In my judgment, . . . when the Indians made the [agreement] granting rights to the United States, they reserved the right to the use of the waters of Milk River, at least to an extent reasonably necessary to irrigate their lands."[27] The judge reasoned that the purposes of the 1888 agreement, including provisions for livestock and agricultural equipment to make them into "self-supporting, pastoral and agricultural people," were the basis for a reservation of water.[28] In 1906, the Ninth Circuit affirmed, upholding the district court's reasoning.[29] Interestingly, the settlers and the federal government both subsequently appealed to the Supreme Court. The settlers sought an outright reversal, while the federal government appealed hoping the Court would affirm the ruling and future water disputes between tribes

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23. *Id.*
24. *Id.* at 23–24.
25. *Id.* at 24–25.
26. *Id.* at 26.
27. *Id.* at 26 (quoting United States v. Mose Anderson et al.: Memorandum Order (9th Cir. 1905), Box 6659, Records of the U.S. Ninth Circuit Court of Appeals, RG 21).
28. *Id.* at 26–27.
29. *See* Winters v. United States, 143 F. 740 (9th Cir. 1906).

and non-Indians could be avoided. The Supreme Court took the case, and issued its decision in January 1908.

In upholding the lower courts' decisions, the Supreme Court employed the same reasoning underlying those rulings, affirming that the United States had impliedly reserved water rights through the 1888 agreement creating the Fort Belknap Reservation, with a priority date of May 1, 1888.[30] Although water rights were not expressly discussed in the agreement, the Court concluded that Congress's purpose when creating the Fort Belknap Reservation had been to make the Indians a "pastoral and civilized" people, and in an arid location such as the Fort Belknap Reservation, the Court reasoned that water was necessary to do so.[31] In reaching its conclusion, the Court set the table for tribes to bring water rights claims that conflicted with the claims or rights of non-Indians.

B. Treatment of Indian Water Rights in the Basin Between Winters and Arizona v. California: The Colorado River Compacts

Looking back, the timing of the 1908 *Winters* decisions was critically important for tribes in the Colorado River Basin. Although tribal water rights were largely ignored during the basin's early development, *Winters* left an indelible mark on the basin rooted in Supreme Court jurisprudence that we today cannot ignore. But, between the 1908 *Winters* and 1963 *Arizona v. California* decisions, the most significant water-related development, the Colorado River Compact, did just that. The Compact acknowledged the existence of Indian water rights but effectively ignored them.

Following closely behind the Reclamation Act of 1902, water politics in the Colorado River Basin heated up as the federal government searched for reliable water sources to serve

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30. Winters v. United States, 207 U.S. 564, 577 (1908). The question of who reserved the waters—either the tribe or the federal government—was not clear in *Winters*: The Ninth Circuit clearly references the tribes who made the reservation (see main text), while the Supreme Court references the reservation by the federal government. *Id.* ("That the *government did reserve them* we have decided, and for a use which would be necessarily continued through years.") (emphasis added). Three years before *Winters*, the Supreme Court concluded that a "treaty was not a grant of rights to the Indians, but a grant of rights from them[ ]—a reservation of those not granted." United States v. Winans, 198 U.S. 371, 381 (1905). Thus, although *Winters* is unclear on the party making the reservation, a treaty reserves the tribe's right to the continued use of certain activities, including water use.

31. *Winters*, 207 U.S. at 576 (stating "It was the policy of the government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. . . . The lands were arid, and, without irrigation, were practically valueless.").

the surging western population. The Interior Department's 1919 Report of the All-American Canal Board recognized the benefits of constructing a large reservoir along the mainstream of the Colorado River and building a canal to deliver water from it to California's Imperial Valley.[32] The following year Congress passed a bill authorizing a report on diversions to be made from the Colorado River for irrigation.[33] Both signaled that the pivotal role played by the Colorado River in providing irrigation and water supplies was a national concern that could best be tackled first and foremost by the federal government, with the cooperation of the basin states.[34]

By the time the Colorado River Compact negotiations began in 1922, the *Winters* decision was largely dormant and its validity questioned by states and private citizens. There had not been enough time for the decision to make a strong impression. Thus, when the basin states met to negotiate the compact, neither tribal leaders nor the federal government represented tribal interests. Undoubtedly, the tribes should have been represented by the United States in its trustee capacity.[35] But, at the time, the federal government was focused on allotting Indian lands and assimilating Indian people.[36] The United States was not in the business of asserting Indian rights, especially water rights, as they thought tribal governments and Indian reservations would be dissolved. They were, effectively, attempting to break up tribes and fold Indian people into the general population.

Consequently, the Compact did not make an allocation for Indian water rights in either the Upper or Lower Basins. The lack of attention to Indian water rights was no mere oversight. It was intentional. The Colorado River Commissioners—the negotiating body chaired by then Secretary of Commerce Herbert Hoover—briefly discussed the issue and concluded that the water rights of Indians were "negligible."[37] The compact did, however, include a type of savings clause regarding Indian tribes. Article VII, the "wild Indian article" as Hoover called it, states in its entirety: "Nothing in this compact shall be construed as

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32. *Id.* at 554.

33. *Id.* at 554–55.

34. *Id.*

35. The United States has a trust responsibility—derived from historical treaties where tribes would allow the use of land by, or cede land to, non-Indians in exchange for goods, services, and protection—that requires it to manage Indian resources, including water rights, in a manner most beneficial to the Indians.

36. *See generally* CHARLES WILKINSON, BLOOD STRUGGLE 47–56 (2005) (discussing allotment and assimilation policy in the first third of the twentieth century).

37. NORRIS HUNDLEY, JR., WATER AND THE WEST: THE COLORADO RIVER COMPACT AND THE POLITICS OF WATER IN THE AMERICAN WEST 211–12 (2009).

affecting the obligations of the United States of America to Indian tribes."[38] Hoover later commented about why Article VII had been inserted:

> This article was perhaps unnecessary. It is merely a declaration that the states, in entering into the agreement, disclaim any intention of affecting the performance of any obligations owing by the United States to Indians. It is presumed that the states have no power to disturb these relations, and it was thought wise to declare that no such result was intended.[39]

Little did the Commissioners know that such a provision, thought to be merely an insignificant gesture, would leave unresolved an issue that could potentially alter their final agreement a century later.

Ultimately, the Compact divided the annual volume of water available for consumptive use from the Colorado River system between the Upper and Lower Basins, with the epicenter located at Lee's Ferry, but it did not apportion this water use to individual states. Instead, the Upper and Lower Basins were left to apportion amongst themselves. The Upper Basin states worked together and accomplished this task in 1948 by creating the Upper Colorado River Basin Compact.[40] Article XIX of the compact mirrored the "wild Indian article" of the Colorado River Compact, stating: "Nothing in this Compact shall be construed as: . . . [a]ffecting the obligations of the United States of America to Indian tribes . . . ."[41] The states with interests in the Lower Basin—Arizona, California, Nevada, New Mexico, and Utah—were unable to reach a similar agreement. Arizona refused to agree to California's terms for water distribution and vice versa.[42] Arizona subsequently invoked the Supreme Court's

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38. Colorado River Compact, art. VII, COLO. REV. STAT. § 37-61-101 (2014).

39. RAY LYMAN WILBUR & NORTHCUTT ELY, THE HOOVER DAM POWER AND WATER CONTRACTS AND RELATED DATA WITH INTRODUCTORY NOTES 401 (1933) (Correspondence between Herbert Hoover, then Secretary of Commerce, to Rep. Carl Hayden, Jan. 30 1923).

40. Upper Colorado River Basin Compact, art. XVIII, 63 Stat. 31, COLO. REV. STAT. § 37-62-101 (2014) (Arizona reserved its rights and interests under the Colorado River Compact as a state of the Lower Basin.).

41. *Id.* art. XIX. The Upper Basin Compact also provides that water use of "wards" of the federal government will be counted against the entitlement of the state in which the use is made. *Id.* art. VII. Although the compact expressly uses the term "Indian tribe" in article XIX, this provision is likely a crude attempt to encompass tribal uses.

42. Frank J. Trelease, *Arizona v. California: Allocation of Water Resources to People, States, and Nation*, 1963 SUP. CT. REV. 158, 160–63 (1963).

original jurisdiction to resolve this conflict, beginning decades of litigation between the states over their respective rights to the Colorado River.

C. Arizona v. California

Although the case was litigated primarily as an interstate dispute, the Supreme Court's 1963 *Arizona v. California* decision[43] had a major impact on Indian water rights. It was the first opportunity the Supreme Court had to reexamine the *Winters* decision and the validity of federally reserved Indian water rights. Ultimately, the Court reaffirmed *Winters* and announced the standard by which Indian water rights would be quantified as based upon the amount of "practicable irrigable acreage" on an Indian reservation.[44] While the United States initially brought claims on behalf of twenty-five Indian tribes, the Court quantified the water rights of only five tribes on the Colorado River mainstream in the Lower Basin.[45] In doing so, the case left the water rights of the remaining twenty tribes left unresolved. The Special Master may have had valid reasons to refrain from adjudicating the other twenty tribes' claims, but, on the river, this set the stage for decades of water development without due consideration for Indian water rights.

Arizona v. California was initiated in 1952 when Arizona—which had fought against implementation of the Colorado River Compact for decades prior to ratifying it in 1944—filed a quiet title action for Colorado River water in the Supreme Court. Arizona asked the Court to clarify its rights to the Colorado River as well as to determine the allocation method and amount of water each state should be apportioned in the Lower Basin.[46] Nevada and the United States intervened in the proceeding, and New Mexico and Utah were joined in their capacities as Lower Basin states. The United States asserted federal reserved water rights for twenty-five Indian tribes, national forests, parks, recreation areas, and monuments located in the Lower Basin.[47]

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43. 373 U.S. 546 (1963); *see generally* Lawrence J. MacDonnell, Arizona v. California *Revisited*, 52 NAT. RESOURCES J. 363 (2012). For a thorough collection of *Arizona v. California* materials, see the University of Colorado Law Library's *Arizona v. California* collection at http://lawlibrary.colorado.edu/arizona-v-california-collection (last visited June 3, 2014).

44. Arizona v. California, 373 U.S. 546, 600-01 (1963).

45. *Id.* at 595.

46. *See* MacDonnell, *supra* note 42, at 367–75.

47. SPECIAL MASTER REPORT, *supra* note 9, at 221; *see also* Findings of Fact and Conclusions of Law Proposed by the United States of America, *Arizona v. California*, 51, No. 9, Original, 1959 Term (U.S.).

The Supreme Court appointed a Special Master, Simon Rifkind, to conduct proceedings and to recommend a decree of the division of the Colorado River's waters. After hearing extensive testimony over two years, the Special Master issued his 433-page report in late 1960.[48]

1. The Special Master Report

As to the ultimate controversy between the states, Rifkind concluded the Boulder Canyon Project Act governed Colorado River water allocation among the Lower Basin states, not the Colorado River Compact or the doctrine of equitable apportionment that California had championed.[49] Rifkind allocated Lower Colorado River water as follows: Of the first 7,500,000 acre-feet (af) of such water, 2,800,000 af for use in Arizona, 4,400,000 af for use in California, and 300,000 af for use in Nevada; any surplus water would be shared 50/50 between California and Arizona.[50]

With respect to the tribes' water rights, Rifkind's Report made important, far-reaching conclusions. First, the report determined that adjudication of only five tribes' claims to water from the Colorado River mainstream was appropriate. The other twenty claims to water from Lower Basin tributaries were dismissed. Second, the Special Master applied the *Winters* doctrine to conclude the United States had impliedly reserved water sufficient to support the tribes' reservations, breathing life into the doctrine. Third, the report quantified Indian water rights for both present and future needs based on the practicably irrigable acreage within each tribe's reservation.[51] Fourth, the report made a foreboding reference to tribal water rights in the basin, noting that the Secretary of Interior, charged with administering water rights in the basin, should have the ability to know how much water each Indian reservation was entitled

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48. *See* SPECIAL MASTER REPORT, *supra* note 9, at 221.

49. Arizona v. California, 373 U.S. at 565 (stating:

> We agree with the Master that apportionment of the Lower Basin waters of the Colorado River is not controlled by the doctrine of equitable apportionment or by the Colorado River Compact. It is true that the Court has used the doctrine of equitable apportionment to decide river controversies between States. But in those cases Congress had not made any statutory apportionment. In this case, we have decided that Congress has provided its own method for allocating among the Lower Basin States the mainstream water to which they are entitled under the Compact. Where Congress has so exercised its constitutional power over waters courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress.).

50. SPECIAL MASTER REPORT, *supra* note 9, at 305–06.

51. SPECIAL MASTER REPORT, *supra* note 9, at 262.

to so that other users interests would be secure. Only decreed tribal water rights, the Special Master claimed, would enable the Secretary to fulfill all of his delivery obligations to users in order of priority in times of shortage.[52] In support of this assertion, the report made an ironic statement, particularly as the report is now partially to blame for the uncertainty in the basin stemming from the lack of adjudicated Indian water rights:

> [T]he claims of the United States to water from the Colorado River for the benefit of Indian Reservations are of such great magnitude that failure to adjudicate them would leave a cloud on the legal availability of substantial amounts of mainstream water for use by non-Indian projects.[53]

At the time, the Special Master and the states were concerned only with the water in the mainstream, and the United States' claims to tributary water may have overwhelmed the dispute. Unfortunately, passing on the opportunity to address tributary claims replaced the cloud over the mainstream with many more clouds over individual tributaries.

a. Limiting the Tribal Claims to only the Five Tribes' Mainstream Claims

As noted above, the report did not comprehensively address all of the United States' twenty-five Indian water claims. Instead, it recommended adjudicating only tribal claims to the mainstream of the Colorado River and its primary tributary in the Lower Basin, the Gila River, leaving other tributary claims untouched. The Special Master concluded that adjudicating water rights exclusively for these two water bodies was appropriate because there were genuine controversies between water users on these rivers.[54] In making this conclusion, the Special Master first determined that equitable apportionment principles governed tributary claims because neither the Compact nor the Boulder Canyon Project Act displaced otherwise applicable equitable apportionment law.[55] Further, because the other tributaries were not over-appropriated and tributary users were not impacting mainstream flows and rights sufficient to demand immediate intervention, the Special Master concluded, under equitable apportionment standards, that he did not have the authority to adjudicate them.[56] The Gila

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52. *Id.* at 256.

53. *Id.*

54. *Id.* at 255 (noting that the Gila River and its interstate tributaries were already over-appropriated, thus controversies were "real and immediate" and required judicial attention). Rifkind determined that the tributary claims were largely against individual users within Arizona and considered it to be "inexpedient in this case to adjudicate such purely local claims" because there were no competing interests between mainstream and tributary users to warrant judicial intervention. *Id.* at 332.

55. *Id.* at 316–18.

56. *Id.* at 318–21. Rifkind stated:

River, on the other hand, was over-appropriated and projected future supplies were insufficient to meet existing needs, therefore requiring adjudication.[57] Ultimately, the water rights of only five Indian tribes on the mainstream were adjudicated: the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, the Colorado River Indian Tribes, the Quechan Indian Tribe of the Fort Yuma Reservation, and the Cocopah Indian Community.

b. Winters *Upheld to Support the Five Tribes' Water Rights*

Based on the *Winters* doctrine, the Special Master reiterated how the United States may impliedly reserve water rights to accomplish the purposes of Indian reservations. He stated:

> [T]he *Winters* case has been cited . . . as establishing that the United States may, when it creates an Indian Reservation, reserve water for the future needs of that Reservation, and that appropriative water rights of others established subsequent to the reservation must give way when it becomes necessary for the Indian Reservation to utilize additional water for its expanding needs.[58]

The United States did not need to expressly reserve waters for the benefit of the five Indian tribes, the Special Master determined, as the intent to do so was implied through the circumstances surrounding creation of the reservations:

> In the present case I have found that the United States intended to reserve mainstream water for the reasonable future needs of the [five Indian tribes.] As to each it is apparent that it was intended that the Indians would settle on the Reservation land and develop an agricultural economy. The land, however, is too arid to support an economy without irrigation from the Colorado River. It would be unconscionable for the United States to have coerced or induced Indians onto a Reservation without providing the water necessary to make the lands habitable. I refuse to accept this possibility as to any of the mainstream Indian Reservations

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> Since, then, there is no occasion to determine mainstream rights to tributary inflow at the present time, since such an occasion may never arise, and since, even if it should arise, a more intelligent determination can be made in the future, it would violate [equitable apportionment] precedent to adjudicate these rights in this case.

Id. at 320. This phrase indicates the Special Master was acutely aware of the then-present situation in the basin, but perhaps naïve about the future, both in terms of water availability and collective willingness to tackle the issue.

57. *Id.* at 325.

58. *Id.* at 258.

> since there is no evidence as to any of them that such was the case. As the Court of Appeals stated in the *Walker River* case, . . . "It would be irrational to assume that the intent was merely to set aside the arid soil without reserving the means of rendering it productive."[59]

The Special Master thereby found that the five Indian tribes on the mainstream had federal reserved water rights to fulfill the agricultural purposes of their reservations. Rifkind's next task was creating a mechanism to add substance to his findings and to calculate the amount of water the tribes were due.

c. Five Tribes Water Rights Included Present and Future Needs Quantified by the "PIA" Standard

The United States claimed that each Indian reservation had the right to "divert and consume the amount of water necessary to irrigate all irrigable acreage on the reservation and to satisfy related needs, subject only to the priority of appropriative rights established before a particular reservation was created and water reserved for its benefit."[60] This argument contemplated water sufficient for both the present and future needs of the tribes. It was an attempt to clarify and expand the *Winters* doctrine, which was then unclear as to the methodology for quantifying Indian water rights.

California resisted the United States' tribal claims, arguing the federal government had not intended to reserve water for all irrigable lands on Indian reservations, but only water in an amount the tribes historically had used. California sought to narrow the application of *Winters* to only the Fort Belknap Reservation and circumstances of that case.[61] Arizona did not take issue with the application of *Winters*, but alleged the United States had reserved water only to satisfy the requirements of Indians living on reservations at a particular time, not for a future date.[62]

The Special Master disagreed with the two states, however, and awarded water for both present and future needs for the five Indian reservations located on the Colorado River mainstream in the Lower Basin. In agreeing with the United States' argument, the Special Master stated:

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59. *Id.* at 259–60.

60. *Id.* at 254.

61. *See* Response of the California Defendants to Brief in Support of Proposed Findings of Fact and Conclusions of Law of the United States of America at 11, *Arizona v. California*, 1958 Term (U.S.) (No. 9 Original).

62. SPECIAL MASTER REPORT, *supra* note 9, at 255.

> Invariably the United States intended that the Indian tribes settled on a Reservation would remain there for generations, and the possibility that other Indians would be settled on the Reservation could not be excluded. Certainly the possibility of expanding populations, expanding agricultural development, and hence expanding water needs must have been apparent at the time each Reservation was created. . . . Since the Indians could remain on these Reservations and develop their society and economy only if water from the Colorado River was available to meet their future needs, I have found that the United States, when it reserved water, reserved it for all of such needs.[63]

Hence, the Special Master awarded water for present and future tribal water needs to support the agricultural and domestic purposes of the reservations.

To provide the tribes with water sufficient to support these purposes, the Special Master determined the tribes' water rights would be quantified based on the amount sufficient to irrigate all of the "practicably irrigable acreage" within the reservations.[64] The quantity of water must be enough, the Special Master reasoned, to make the lands productive at a future time, and "[o]nly by reserving water in this manner could the United States ensure that the Reservation lands would be usable when needed to support an Indian economy."[65]

Specifically, the Special Master quantified the five Indian reservations' water rights based on the water needed for agricultural, stock, and related domestic purposes.[66] Because the purpose of these reservations was to "enabl[e] the Indians to develop a viable agricultural economy; other uses, such as those for industry, . . . were not contemplated at the time the Reservations were created."[67] The report noted, however, that the tribes' water rights may be used for purposes other than agriculture in the future. But since the United States had only

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63. *Id.* at 260–61.

64. *Id.* at 262 ("The magnitude of the water rights created by the United States is measured by the amount of irrigable land set aside within a Reservation, not by the number of Indians inhabiting it.").

65. *Id.* This language, "when needed," indicates that the water need not be put to immediate use, or that a tribe would be in danger of losing their water rights if not immediately developed.

66. *Id.* at 265.

67. *Id.*

based claims on the agricultural purposes of the reservations, that question was not presented.[68]

2. The Arizona v. California *Supreme Court Decision*

The Supreme Court confirmed most of the findings and recommendations of the Special Master. The Court held the 1928 Boulder Canyon Project Act established the allocation scheme for mainstream water in the Lower Basin. Again, of the first 7,500,000 af of mainstream Colorado River water, California, Arizona, and Nevada would receive 4,400,000 af, 2,800,000 af, and 300,000 af, respectively, and Arizona and California would each get one-half of any surplus.[69]

With respect to Indian (and other federal) water rights, the Court agreed with the Special Master's limited adjudication of only the five mainstream tribes' water rights, the conclusions of law, and his proposed decree.[70] It took little work for the Court to conclude the tribes maintained reserved water rights under *Winters*. Analogizing to *Winters*, the Court noted how the five tribes' reservation lands were arid, and how "[i]f the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries."[71] It was impossible, the Court continued,

> to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorching sands—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.[72]

The Court concluded that the tribes' water rights vested at the creation date of their reservations, certainly prior to the enactment date of the Boulder Canyon Project Act, and that the tribes were entitled to priority under the Project Act.[73] The Court also confirmed that

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68. *Id.* ("This does not necessarily mean [ ] that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses. . . . I hold only that the amount of water reserved, and hence the magnitude of the water rights created, is determined by agricultural and related requirements, since when the water was reserved that was the purpose of the reservation.").

69. Arizona v. California, 373 U.S. 546, 564–65 (1963).

70. *Id.* at 595.

71. *Id.* at 598.

72. *Id.* at 599.

73. *Id.* at 600.

federally reserve water rights for Indian reservations could be established by treaty, executive order, or statute.[74]

Importantly, the Court bolstered the *Winters* doctrine by upholding the Special Master's practicably irrigable acreage ("PIA") standard by which Indian rights would be quantified for both present and future needs.[75] Although the Court's discussion of this issue was abbreviated, it concluded the PIA standard to be "the only feasible and fair way by which reserved water for the Indian reservations can be measured."[76] Ultimately, the Court awarded the tribes about 1,000,000 acre-feet of water to be used on approximately 135,000 acres of land.[77]

This decision was favorable to Indian tribes foremost because it upheld the *Winters* doctrine and announced the standard by which Indian water rights would be quantified. The decision, however, was also in some ways a missed opportunity to resolve the claims of the twenty Indian tribes on the Lower Basin tributaries. These claims were likely quite substantial. While the Court limited its adjudication for the valid reasons explained above, by failing to quantify large Indian water rights claims, the limited scope of the adjudication seems to have frustrated the case's primary purpose of providing certainty about water rights in the basin.[78] Further, because the claims of twenty tribes were not adjudicated, a considerable amount of water was appropriated in the Lower Basin without consideration of these tribes' water rights claims.

II. THE RISE OF INDIAN WATER RIGHTS SETTLEMENTS AFTER

74. *Id.* at 598. Arizona argued that water rights could not be reserved by Executive Order, only through treaty, like in *Winters*. The Court easily discarded this argument, explaining that the reservations at issue were treated as reservations by Congress, the executive branch, and the public, and had received appropriations. Thus, the method of reservation creation was insignificant to the Court because no genuine controversy existed as to whether the lands were, in fact, Indian reservations. *Id.*

75. *Id.* at 600–01. Now commonly referred to as the "PIA" standard, the quantification method has become the hallmark by which Indian water rights are quantified and has been applied in almost every Indian water rights case since *Arizona v. California*. *See generally* Martha C. Franks, *The Uses of the Practicably Irrigable Acreage Standard in the Quantification of Reserved Water Rights*, 31 NAT. RESOURCES J. 549 (1991).

76. *Id.* at 601.

77. *Id.* at 596.

78. Certainly, the scope of *Arizona v. California* was limited to the tribes in the Lower Basin. The water rights of the Upper Basin tribes could not have been considered in the case because the Upper Basin states were not parties to the litigation.

Despite its shortcomings, *Arizona v. California* had positive real-world implications for tribes and states nationwide. For one, the decision laid to rest any doubts about the legal basis of Indian reserved water rights claims. The *Winters* doctrine lived and had the potential to provide significant amounts of water to tribes. Also, combined with the passage of the state-friendly McCarran Amendment[79] in 1952—authorizing the adjudication of federal water rights in state court by waiving the federal government's sovereign immunity with respect to federal reserved water rights in general stream adjudications—*Arizona v. California* jumpstarted Indian water rights adjudications.

After the decision, tribes and states hustled to the courthouse doors. By the late 1970s, however, tribes, states, and the federal government—troubled with the challenges of maintaining years of litigation in general stream adjudications—began entering into negotiated settlement agreements to resolve Indian water rights claims. The systematic problems associated with the settlement process, however, have precluded most tribes from resolving their water claims in this fashion, leaving the majority of Indian water rights throughout the country unquantified.

A. Tribal Sovereignty, Self-Determination, and Water Rights

In Indian communities, the effort to assert water rights was catalyzed by a revival of Indian tribal sovereignty in the 1950s and 1960s, as tribal members returned from serving in World War II and brought back to the reservations a sense of purpose and pride, and most importantly, leadership.[80] Tribes stood their ground and fought against the federal government's termination policy of the 1950s and forced a policy change to one encouraging tribal self-determination by the 1970s.[81] This effort produced the Indian Self-Determination and Education Assistance Act of 1975,[82] a statute providing tribes with authority to contract

79. 43 U.S.C. § 666 (2014). *See also* Elizabeth McCallister, *Water Rights: The McCarran Amendment and Indian Tribes' Reserved Water Rights*, 4 AM. INDIAN L. REV. 303 (1976). The McCarran Amendment was not a positive motivating factor supporting negotiated Indian water rights settlements. Rather, state courts were empowered to adjudicate Indian water rights in a venue traditionally hostile to Indian tribes, and tribes looked for ways out of state courts. *See also* Colo. River Conserv. Dist. v. United States, 424 U.S. 800, 809-13 (1976) (concluding the McCarran Amendment allowed state courts to adjudicate Indian water rights); United States v. Dist. Ct. for Eagle Cnty., 401. U.S. 520 (1971).

80. *See generally* WILKINSON, *supra* note 36, at 89–112.

81. *Id.* at 177–205.

82. 25 U.S.C. § 450 (2014).

directly with the Bureau of Indian Affairs ("BIA") for planning and administration of federal programs, thereby giving tribes the opportunity to receive funding to run tribal programs and to build tribal infrastructure.[83] Tribes felt the weight of the federal government ease a bit, and they began to rebuild their communities and economies with their own visions, not the BIA's.

The tribes' visions included water rights as a critical part of developing tribal economies and preserving tribal life-ways. Litigating water rights proved to be difficult, however. Tribes were faced with enormous costs, lengthy time commitments, and the uncertainty of litigation, particularly in state courts. Beginning in the late 1970s tribes increasingly sought negotiated settlement agreements with states, local water users, and the federal government to quantify their water rights rather than litigating their claims.[84] The settlement process offered more flexibility and reduced the amount of time and financial resources required to quantify Indian water rights as compared to litigation. Settlements also expanded the range of options for satisfying tribes' present and future needs for water, and settlements were more likely than court proceedings to result in "wet," rather than "paper," water for tribes.

B. Modern Indian Water Rights Settlements

The benefits of pursing settlements have proved over time to be meaningful for tribes. As of 2014, there have been twenty-nine Indian water rights settlements nationwide.[85]

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83. This statute allowed the Ute Mountain Ute Tribe to hire its own construction crew to build infrastructure associated with the Animas La Plata project, the major feature of the Colorado Ute Indian Water Rights Settlement of 1988. *See* U.S. DEP'T OF THE INTERIOR, NEWS RELEASE: SECRETARY KEMPTHORNE ANNOUNCES $14.8 MILLION RECLAMATION CONTRACT TO UTE MOUNTAIN UTE UNDER ANIMAS-LA PLATA PROJECT (2008), *available at* http://www.doi.gov/news/archive/08_News_Releases/093008b.html.

84. In 1989, the federal government established a policy, still in effect today, favoring negotiated settlements over litigation. *See* Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 48, 9223–25 (Mar. 12, 1990).

85. The Ak-Chin Indian Community was the first tribe to enter into a negotiated water rights settlement, in 1978. The tribe irrigates 16,000 acres and employs over eighty individuals, the majority tribal members, on its Arizona farm. For a list of water settlements through 2013, see Native American Rights Fund, *Settlements Approved By Congress* (Aug. 2013), http://narf.org/water/2013/materials/settlements.pdf (last visited June 3, 2014).

Although each settlement is different, they tend to have common components.[86] Generally, Indian water rights settlements (1) allocate water among tribal, state, federal, and private water users, and bind them to the settlement agreement; (2) quantify and set a priority date for tribal water rights; (3) designate uses to which water can be put and designate the source(s) of water to meet tribal water rights; (4) define management of and jurisdiction over water; and (5) include a financial component for building water infrastructure to deliver wet water to a reservation; (6) include a waiver of water rights claims as a condition of settlement; (7) include a contribution from state or local governments in proportion to the benefits received; and (8) require approval by Congress and a federal court.[87]

Although the settlement process is considered to be more efficient than litigation, it still presents significant challenges. For one, settlements still require substantial time, money, and effort. Water users—tribes included—often lack sufficient financial resources to fund the legal and technical work required to reach a settlement agreement. Closer to home, tribal leaders face significant emotional barriers when settling water rights claims. Under a tribal worldview, water is sacred and rights to it should not be compromised.[88] Tribal leaders have

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86. *See* BONNIE G. COLBY, JOHN E. THORSON & SARAH BRITTON, NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST 79–92 (2005) (discussing settlement components).

87. *Id.* A frustrating component to many Indian water rights settlements is the limitation imposed on water transfers and marketing, particularly for tribes in the Colorado River Basin. For example, when an initial version of the Colorado Ute water rights bill was distributed containing out-of-basin transfer provisions, basin congressmen were outraged, calling it "unconscionable" to allow out-of-state sale or lease provisions in a settlement, and claiming it would upset the Law of the River. Because these settlements are negotiated, parties (states) can withhold support necessary for settlement approval until marketing or lease provisions are removed. Indian water rights scholar Daniel McCool has explained, "[t]he loss of interstate marketing rights may well be the greatest tribal 'give' in the give-and-take process of negotiation." DANIEL MCCOOL, NATIVE WATERS: CONTEMPORARY INDIAN WATER RIGHTS SETTLEMENTS AND THE SECOND TREATY ERA 175 (2002) (hereinafter MCCOOL, NATIVE WATERS). McCool also writes, "[t]hroughout the West it is common for water owners to 'convert their water rights to money,' but the same notion applied to Indians appears to be objectionable to some people." *Id.* at 169. This restriction hinders the opportunity of tribes to use their resources to their greatest benefit, and might impair tribes' ability to participate in geographically broad-based transfers if such transfers become more commonplace in the future. *See generally id.* at 160–77.

88. *See, e.g.*, Diné Water Rights Coalition, *Our Water, Our Youth, Our Ancestors* (Nov. 15, 2010), *available at* http://dinewaterrights.org/2010/11/our-water-our-youth-our-ancestors/ (discussing proposed water settlement as giving up "inherent rights" and stating, "[i]f this decision is allowed to stand, we the Navajo people of today will give up forever, with the stroke of a pen, an irreplaceable part of what [our ancestors] fought for with dignity, unrelenting courage, tears, prayers and offering").

a hard time settling water rights claims because doing so requires compromises and negotiation of a sacred resource. Tribal members often criticize tribal leaders for compromising water rights, viewing such bargains as "selling-out" tribal rights by, for example, agreeing to a smaller amount of water in a settlement agreement than may have been awarded in a court proceeding.

Further, once a tribe is internally committed to pursuing its water rights claims through a negotiated settlement, obtaining federal support can be a significant hurdle. Most tribes that would like to settle their water rights claims cannot secure such support.[89] Because federal rights are involved, most settlements require the participation of the federal government, through the Interior Department, Justice Department, and eventually, Congress. The federal government, however, often lacks the resources to participate fully in Indian water rights settlements. For example, the Interior Department's Indian Water Rights Office staffs only four people. Additionally, in 2011, there were only fourteen appointed federal Indian water rights negotiation teams, twenty-one federal Indian water rights implementation teams, and three assessment teams.[90] Yet, over a hundred Indian tribes likely have reserved water rights claims requiring federal participation to quantify.

Next, once a settlement agreement is reached among all parties, Congress must ratify it as a congressional bill, as settlements usually include federal financial support, federal claim waivers, or leasing authority of federal rights. Congress requires parties to present to them a signed and finalized settlement agreement. In some cases, Congress may revise the settlement agreement to achieve the settlement bill's passage. Settlement parties must work together to obtain congressional approval, drawing from their own support networks, usually assisted by lobbyists. At the same time, the Interior, Agriculture, and Justice Departments, as well as the Office of Management and Budget, develop their positions regarding the settlement to make formal recommendations to Congress.[91]

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89. *See* MCCOOL, NATIVE WATERS, *supra* note 87, at 56 ("By the early 1990s tribes were literally lining up for federal negotiation teams, but the Department of the Interior did not have the money to field all of the requested teams.").

90. Bureau of Reclamation, *Water Rights Negotiations, Implementations, and Assessments—Reclamation Federal Team Representatives as of June 21, 2011*, http://www.usbr.gov/native/waterrights/teammembers_wtrrights_new.html (last visited June 3, 2014).

91. COLBY ET AL., *supra* note 86, at 69.

One of the greatest challenges with the congressional process is that no permanent federal funding source exists for Indian water rights settlements.[92] In a budget-tight political climate, the lack of available funding can be a non-starter. Congress typically draws settlement funding from the Interior Department's discretionary funds, which cuts into Interior's other tribal program funding. Recently, Congress has used the Bureau of Reclamation's Reclamation Fund to fund several settlements, although this practice has been limited and does not appear to be a permanent policy change.[93] Nor does the Reclamation Fund include adequate funding to support future settlements. Unfortunately, these funding sources do not adequately support Indian water rights settlements, and the federal government has sought ways to minimize its financial liability, requiring states and tribes to assist in funding the settlements.[94] To address Indian water rights in a committed and meaningful manner, the federal government must identify and prioritize funding mechanisms for water settlements.

III. CURRENT EVENTS AND THE FUTURE OF INDIAN WATER RIGHTS IN THE COLORADO RIVER BASIN

Since the Supreme Court's *Arizona v. California* 1963 decision, some of the Lower Basin's twenty tribes with unquantified water rights have attempted to enter into settlement agreements or water contracts with the Secretary of Interior as well as initiate legal proceedings to assert their water rights. Some of the tribes have been successful, while others have not. Overall, *Arizona v. California* and the subsequent Indian water rights settlements in the basin have helped ease the cloud of uncertainty over water availability in the Lower Basin. But, the problems associated with litigation and settlements, as discussed above, have prevented more tribes from quantifying their water rights in the decades since *Arizona v. California*. And yet, even for the tribes with quantified water rights, there is still much work that needs to be done to enable these tribes to actually use the water guaranteed to them under the settlements.

A. Unquantified Water Rights in the Basin

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92. On Indian water rights funding, see generally MCCOOL, NATIVE WATERS, *supra* note 87, at 50–72.

93. Tribes would like to see the Reclamation Fund, whose purpose is to fund western water projects, to be a primary source for settlement funding. *See* The National Congress of American Indians, *Use of the Reclamation Fund for Indian Water Rights Settlements*, http://www.ncai.org/attachments/Resolution_ameOMwycvcgUJDjPPXzJXwbYeCnHPqOdcsJPzraFmUxNGiHQRbO_DEN-07-069.pdf (last visited June 3, 2014).

94. *See* COLBY ET AL., *supra* note 86, at 69–75.

The remaining legal discomfort lies with the twelve tribes in the Colorado River Basin that have not quantified all of their water rights in the various states where these rights exist.[95] In the Upper Basin, these tribes include the Navajo Nation and the Ute Mountain Ute Tribe.[96] As these two tribes possess Upper Basin water rights claims, *Arizona v. California* had no effect on their claims, and we do not discuss them further. The Lower Basin tribes—with claims initially asserted by the federal government, but ultimately unquantified, in *Arizona v. California*—that have yet to quantify are the Havasupai Tribe, Hopi Tribe, Hualapai Tribe, Kaibab Band of Paiute Indians, Navajo Nation, Pascua Yaqui Tribe, San Carlos Apache Tribe, San Juan Southern Paiute Tribe, Tohono O'odham Nation, Tonto Apache Tribe, and Yavapai Apache Nation.[97] The amount of water needed to fulfill these tribal water rights is unknown. Based on the aggregate size of the tribes' reservations, it is likely to be quite significant. In fact, as recently described by the Bureau of Reclamation in its Basin Study, these unquantified water rights "will be a factor impacting Basin-wide water availability" in the future.[98]

Herein lies the central problem: What water sources can tribes draw from to fulfill their water rights? The Basin Study acknowledged that the Colorado River Basin is already over-allocated with respect to water supply, and it anticipated future water demands would further overwhelm supplies.[99] There simply is no obvious water source left in the Colorado River system for these tribes so long as current water uses continue. So, maybe current water uses need to be reduced? Or, maybe the tribes' rights need to be bargained for? In either event, because these unquantified Indian water rights are likely senior in the basin and demand priority in times of water shortages, they could potentially limit the amount of water available for junior non-Indian projects.

Ironically, this is exactly the cloud of legal uncertainty the Special Master sought to remove by adjudicating the water rights of the five mainstream tribes in *Arizona v. California*. Certainly his work cleared the skies for these five tribes, but it left the majority of tribes with unquantified water rights and the basin under cloudy conditions. Therefore, as it stands, fifty-one years after *Arizona v. California*, only eight of the twenty tribes with Lower Basin claims have been able to quantify all of their water rights.

B. Quantified Indian Water Rights

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95. BOR STUDY APPENDIX C9*, supra* note 8, at C9-33 to C9-34.
96. *Id.*
97. *Id.*
98. BOR DEMAND STUDY, *supra* note 10, at C9-38.
99. *See id.,* BOR STUDY REPORT*,* notes 10 & 11, and accompanying text.

Twenty-two tribes in the Colorado River Basin have quantified at least a portion of their water rights, although these tribes may have additional outstanding claims in other basin states.[100] These tribes have established the right to divert 2.9 maf of water from the Colorado River and its Upper Basin tributaries, a number that will grow as the remaining rights in the Lower Basin are quantified. With historical average annual flows of about 15.0 maf at Lee's Ferry, and projected average annual flows of only 13.7 maf in the future due to climate change, tribal water rights are clearly significant in the basin, representing roughly twenty percent of the historical levels. This water is crucial for tribes, as they use it for irrigation, recreation, domestic purposes, commercial enterprises, wildlife, environmental flows, habitat restoration, municipal and industrial uses, mining, power generation, and cultural activities.[101]

There are five Upper Basin tribes with quantified rights to water from the Colorado River or its tributaries, including the Jicarilla Apache Nation, Navajo Nation, Southern Ute Indian Tribe, Ute Indian Tribe of the Uintah and Ouray Reservation, and Ute Mountain Ute Tribe.[102] These rights were secured in settlement agreements and adjudications.[103]

The six Lower Basin tribes with quantified rights to water from the Colorado River mainstream or its tributaries include the Chemehuevi Indian Tribe, Cocopah Indian Tribe, Colorado River Indian Tribes, Fort Mojave Indian Tribe, Hopi Tribe, and Quechan Indian Tribe.[104] With the exception of Hopi, the water rights of these tribes were secured in *Arizona*

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100. Because tribal boundaries cross watersheds and state lines, a tribe may be subjected to numerous adjudications or settlements, and only a portion of a tribe's total water claims may have been fully adjudicated. Navajo is an example of this, as Navajo has water claims to the mainstream of the Colorado River, the Little Colorado River, and the San Juan River. Further, as Navajo lands cover areas of Utah, Arizona, and New Mexico, Navajo has claims to waters in both the Upper Basin as well as the Lower Basin.

101. Statement of T. Darryl Vigil, Chairman of the Colorado River Basin Tribes Partnership, before the Subcommittee on Water and Power of the Senate Committee on Energy and Natural Resources, regarding the Bureau of Reclamation's Colorado River Basin Water Supply and Demand Study, July 16, 2013 [hereinafter Vigil Testimony], *available at* http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=3b025835-a56a-4a20-b2fe-32ba8366c285.

102. BOR STUDY APPENDIX C9, *supra* note 8, at C9-4.

103. *Id.*

104. *Id.*

v. California. Hopi acquired its water rights through a land purchase that included the attached water rights.[105]

Finally, Lower Basin tribes also have water rights to Central Arizona Project water.[106] These eleven tribes include the Ak-Chin Indian Community, Fort McDowell Yavapai Nation, Gila River Indian Community, Pascua Yaqui Tribe, Salt River Pima-Maricopa Indian Community, San Carlos Apache Tribe, Tohono O'odham Nation, Tonto Apache Tribe, White Mountain Apache Tribe, Yavapai-Apache Nation, and Yavapai-Prescott Tribe.[107] These water rights were secured through water rights settlements and secretarial decisions allocating water to tribes.

C. Challenges to Implementation of Quantified Water Rights

Although the tribes just identified have successfully navigated the process for obtaining quantified water rights, significant issues remain in implementing their settlements and court decrees.[108] With respect to decreed rights, wet water is often not available, and tribes struggle to deliver water to the reservation when it is. Negotiated settlements have challenges, too. For one, getting money through the congressional appropriations process to implement a settlement can be a difficult and lengthy endeavor that delays both the construction of water infrastructure and the settlement benefits to all parties.[109] Second, other federal considerations, such as the Endangered Species Act, have had a significant impact on implementing

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105. *Id.* at C9-23. The Hopi Tribe has rights to divert water from the Colorado River at Cibola, Arizona. These rights were established through the Tribe's purchase of farmland with existing water rights within the Cibola Valley Irrigation and Drainage District, Contract No. 04-XXX-30-W0432, December 14, 2004. *Id.*

106. *Id. See also* John B. Weldon, Jr. & Lisa M. McKnight, *Future Indian Water Settlements in Arizona: The Race to the Bottom of the Waterhole?*, 49 ARIZ. L. REV. 441 (2007) (discussing CAP's role in Indian water settlements and alternatives once CAP water is unavailable for future settlements).

107. BOR STUDY APPENDIX C9, *supra* note 8, at C-4.

108. *See generally* Celene Hawkins, *Beyond Quantification: Implementing and Sustaining Tribal Water Settlements*, 16 U. DEN. WATER L. REV. 229 (2013) (describing difficulties tribes face in implementing water settlements after ratification).

109. Vigil Testimony, *supra* note 101. Moreover, the project costs often escalate well beyond those enumerated in the settlement as years go by without project initiation, creating yet another obstacle in obtaining additional funding necessary to meet inflation and cost increases.

settlements in the basin.[110] Third, non-Indian use of designated tribal water continues, making it harder for tribes to stop such uses.[111]

Challenges to the implementation of Indian water rights settlements will be exacerbated by the anticipated significant water shortages in the basin in the coming decades.[112] Junior water rights may be left unfulfilled to meet senior needs, including tribal needs. The continued lack of implementation of Indian water rights settlements in the basin has frustrated the purpose of the settlements and of equal importance, *Arizona v. California*.

IV. MOVING FORWARD: TRIBES AS BASIN PARTNERS

To address the issues described above and related others, the ten tribes with direct diversions from the Colorado River and its tributaries formed the Colorado River Basin Tribes Partnership ("Partnership") in 1992 for the purpose of strengthening tribal influence over the management and utilization of Colorado River water resources.[113] The Partnership joined the Colorado River Water Users Association in 1996 and has participated fully in the larger Association. Three members of the Partnership sit on the Association's board of trustees.[114]

The Partnership has been an effective organization. Most recently, it ensured that tribal water rights would be considered in the Bureau of Reclamation's Basin Study, which initially did not include tribal participation during the report's development.[115] The Partnership

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110. *Ten Tribes Partnership*, *supra* note 4.

111. Vigil Testimony, *supra* note 100.

112. *See* BOR STUDY REPORT, *supra* note 11 and accompanying text.

113. *Ten Tribes Partnership*, *supra* note 4. The member tribes located in the Upper Basin are the Ute Indian Tribe of the Uintah and Ouray Reservation, Ute Mountain Ute Tribe, Southern Ute Indian Tribe, Navajo Nation, and Jicarilla Apache Nation. The Tribes located in the Lower Basin are the Chemehuevi Indian Tribe, Cocopah Indian Tribe, Colorado River Indian Tribes, Fort Mojave Indian Tribe, Navajo Nation, and Quechan Indian Tribe. While there are sixteen tribes with quantified water rights, only the ten-partnership tribes have direct diversions from the Colorado River mainstream and were invited to be members of this organization.

114. *Id.*

115. Vigil Testimony, *supra* note 101. The Bureau purposefully excluded tribes because it felt the study did not have any bearing on tribal rights, was only an initial study to determine supply and demand, and the study was not creating a policy or decision-making tool. It is safe to say this was not a situation where the federal government thoughtlessly excluded tribes, and, to their credit, the Bureau subsequently worked hard to ensure tribal concerns were addressed. However, the tribes were correct in raising the issue to the Bureau—despite the agency's likely correct position that the report would not negatively affect tribes—because tribes must feel empowered to assert their sovereign status

engaged the Bureau of Reclamation, protesting their exclusion, and testified before the Senate Energy and Natural Resources Committee about the issue.[116] Reclamation responded favorably, and the result was a collaborative agreement between the agency and Partnership to conduct a tribally focused study to address tribal supply and demand imbalances in the basin.[117] This type of cooperation is a good example of government-to-government collaboration regarding water management that potentially can lead to resolving water shortages in the basin.

Tribes have often been viewed as adversaries by states and private water users, much as states have been viewed as adversaries to tribes. This perception, however, is changing. As the Partnership has shown, the Colorado River Basin is a proving ground for collaboration. In the future, tribal-state collaboration may be the most effective way—if not the only way—of resolving disputes over water in the basin. The primary obstacle for non-Indians to overcome is fear of the unknown and a willingness to allow tribes to become empowered through recognition and development of their water rights. In most cases, tribal water rights are senior. Far from being a detriment to non-Indians, however, this places tribes in an ideal position to become meaningful partners with local, state, and federal entities in meeting water needs of other communities in times of shortages. Flexible uses of tribal water rights through marketing, leasing, or voluntary transfers could provide water to junior users in times of shortages, while allowing tribes to use their water rights in a mutually beneficial manner, and to receive economic benefits from this resource.[118]

Compared to non-Indians, the obstacles for tribes are much greater, however, and the tribes' relative lack of political power has not enabled them to enjoy as much success as non-Indian parties. For a tribe to obtain a water settlement, the parties, the settlement benefits, and a favorable political climate must align over many years. We can only hope that the looming uncertainty—and accompanying need for legal assurances—regarding water rights will improve the process.

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to protect their rights, especially since history has shown the federal government's fleeting institutional memory on issues important to Indian tribes.

116. *Id.*

117. BUREAU OF RECLAMATION, RECLAMATION COLLABORATES WITH COLORADO RIVER BASIN TRIBES PARTNERSHIP IN TRIBALLY FOCUSED WATER STUDY (Sep. 18, 2013), *available at* http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=44627.

118. *See* COLBY, THORSON & SARAH BRITTON, NEGOTIATING TRIBAL WATER RIGHTS:, *supra* note 87 (marketing and leasing restrictions).

CONCLUSION

The Special Master in *Arizona v. California* attempted to remove the "cloud" of uncertainty Indian water rights placed over water availability in the basin by quantifying the water rights of the five tribes located on the Lower Colorado River. But his effort only scratched the surface. Although the Special Master ardently upheld the *Winters* doctrine as applicable to the tribes' claims, it is hard not to look at the decision as an opportunity missed. True, the Special Master may not have had authority to entertain all Lower Basin tributary claims, but his deference to "a more intelligent" future determination of tributary water rights claims has yet to occur. Perhaps he could have given more guidance, and a mandate, to courts to adjudicate tribal claims when water became scarce. The Indian water rights settlement agreements in the basin entered into since *Arizona v. California*, however, have surely helped to increase certainty amongst water users in the basin.

The current and projected water shortages identified in the Bureau of Reclamation's Basin Study serve as a call to action to resolve Lower Basin water rights claims. Future water shortages will make quantification of Indian water rights more difficult due to greater demand on a more limited resource. Tribes, states, and the federal government should work together to settle Indian water rights as a matter of urgency and as a matter of human rights. This requires commitments from federal and state partners. Final court decrees and settlement agreements quantifying Indian water rights can only be achieved with adequate resources and good will. By making tribes true partners with federal and state governments, and treating water as a common resource to support all citizens, the future in the Colorado River Basin might look less cloudy, even if the rains are welcome.