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Thomas W. Clayton

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COMMENTS

THE POLICY CHOICES TRIBES FACE WHEN DECIDING WHETHER TO ENACT A WATER CODE

Thomas W. Clayton*

Introduction

For many tribes in the West, water rights represent the one resource, not taken away, that can aid them in economic and social development.¹ At the same time, unquantified Indian reserved rights create a cloud of uncertainty over the rights of water users under state law, and threaten the states' ability to oversee further development of their lands.²

Like the scope of tribal self-government, the scope of reserved water rights has come under increasing attack.³ When tribes consider exercising jurisdiction over their water rights through the enactment and

* Member, Gibbs, Feyder, Myers, Peters & Hoffman law firm, Sioux Falls, South Dakota. J.D., 1992, University of South Dakota. Member, 1992, South Dakota Bar Association. The author wishes to thank the Rocky Mountain Mineral Law Foundation for providing the funds necessary to research this comment. He also wishes to thank Frank Pommersheim, Professor, University of South Dakota School of Law, for his invaluable input.

1. Tribal water rights were first recognized in *Winters v. United States*, 207 U.S. 564 (1908), and are commonly referred to as *Winters* rights. The *Winters* doctrine has come to symbolize the Native American hope to establish an independent and self-sufficient existence. "My boy is 8 years old; he walks around saying Winters Doctrine. We understand that." DANIEL MCCOOL, *COMMAND OF THE WATERS* 226 (1987) (epigram quoting Ernest Stevens, Vice President, National Congress of American Indians, at a 1974 hearing of the U.S. Senate Committee on Interior and Insular Affairs, Subcommittee of Indian Affairs); see also Walter Rusinek, Comment, *A Preview of Coming Attractions? Wyoming v. United States and the Reserved Rights Doctrine*, 17 *ECOLOGY L.Q.* 355, 363 (1990) (*Winters* doctrine has been praised as "a Magna Carta for the Indian") (quoting Norris Hundley, Jr., *The Dark and Bloody Ground of Indian Water Rights: Confusion Elevated to Principle*, 9 *W. HIST. Q.* 454, 463 (1978)).

2. Comment, *Indian Reserved Rights: The Winters of Our Discontent*, 88 *YALE L.J.* 1689, 1690 (1979); FRANK J. TRELEASE, *FEDERAL-STATE RELATIONS IN WATER LAW* 128-30 (National Water Commission Legal Study No. 5, 1971) [hereinafter TRELEASE, *FEDERAL-STATE RELATIONS*]; *Arizona v. California*, 460 U.S. 605, 623 n.15 (1983) (*Arizona II*) (quoting Report from Simon Rifkind, Special Master to the Supreme Court in *Arizona v. California*, 373 U.S. 546 (1963) (*Arizona I*) at 263-64 (Dec. 5, 1960)).

3. See Rusinek, *supra* note 1, at 400-03 (scope of water rights); Thomas W. Clayton, Note, *Brendale v. Yakima Nation: A Divided Supreme Court Cannot Agree over Who May Zone Nonmember Fee Land Within the Reservation*, 36 *S.D. L. REV.* 329, 351 n.262 (1991) (scope of self-government).

enforcement of tribal water codes, a challenge to both the extent of the water right and the scope of jurisdictional authority may be anticipated.⁴

This comment identifies the issues that tribes face when deciding whether to enact a comprehensive water code. It begins with a brief overview of water law affecting tribal authority over reserved water and other water within the boundaries of the reservation.⁵ It focuses on the jurisdictional issues that arise when a tribe attempts to enforce its water code. It then identifies precedents that have and will continue to shape a tribe's jurisdictional authority. Finally, it provides guidelines that will assist tribes in enacting and enforcing effective tribal water code(s).

I. *Winters Rights: An Historical Overview*

Tribal water rights stem from two sources.⁶ One is through historical use that predates the creation of the reservation.⁷ Tribes that have historically relied on water for fishing developed an aboriginal right to an amount of water necessary to preserve their fishing economy.⁸ The other source, most familiar to plains and desert tribes, is the agreement or treaty that established the reservation.⁹ The seminal case

4. See e.g., *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, Nos. 91-83, -84, -91, -92, -93, -94, -96, -97, 1992 WL 119212 (Wyo. June 5, 1992) (*Big Horn II*) (the Wind River Reservation tribes could not "call" their quantified *Winters* rights water to maintain in-stream flows for their fishery — a valid use under the tribal water code — since the treaty quantifying the right did not include such use and Wyoming state law did not recognize the instream flow as a beneficial use of water). For a discussion of *Big Horn II*, see *infra* notes 210-28 and accompanying text.

5. Indian reservations include land and resources held in trust by the United States for the benefit of Indian tribes, separate and apart from the public domain. Such reservations were created through treaties with tribes or by Executive Orders.

6. A third source stems from Spanish law, where certain pueblos in southwestern America were granted rights by the Crown in the early 1400s. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 580 (2d ed. 1980) (citing *New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977)).

7. See generally *United States v. Winans*, 198 U.S. 371 (1905) (treaties reserve Indian rights not granted to the United States); William H. Veeder, *Indian Prior and Paramount Rights of the Use of Water*, 16 ROCKY MTN. MIN. L. INST. 631 (1971).

8. Cf. *Confederated Colville Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981). See generally *Nevada v. United States*, 463 U.S. 110 (1983); COHEN, *supra* note 6, at 442-43.

9. See *Winters v. United States*, 207 U.S. 564 (1908) (federal government withdrew land and water rights from the public domain and exchanged them with the Assiniboine and Gros Ventre tribes in consideration for their agreement to remain within the boundaries of that land and become a "civilized and pastoral people"); COHEN, *supra* note 6, at 575-76 ("Indian water rights are property rights predicated on federal law.").

of *Winters v. United States*¹⁰ pronounced the reserved rights doctrine.¹¹ There, the Supreme Court held that the agreement reserving a homeland for the Gros Ventre and Assiniboin tribes — the Fort Belknap Reservation — impliedly reserved an amount of water necessary to ensure that the land would be economically productive for agricultural use.¹² However, the Court was unclear as to whether the tribes or the United States originally owned the water that provided the “benefit of the bargain” which validated the treaty.

First, the Court stated that the tribes ceded vast amounts of land and water in exchange for protection of their sovereign dominion over the land and water they reserved for themselves.¹³ Second, it found that the reserved right arose from the government’s power to withhold water from the public domain, which was then given to the tribes in exchange for their agreement to remain within the reservation boundaries.¹⁴ At any rate, the contract creating the reservation is not affected by the opinion’s ambiguity as to which entity originally owned the water. Indian reserved water rights arise from the tribes’ exchange of promises with the United States creating the reservation and are an

10. 207 U.S. 564 (1908).

11. *Id.* at 576-77.

12. *Id.* at 575-76.

13. *Id.* at 576. The Court stated:

The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters without which they would be valueless, and “civilized communities could not be established thereon.” And this, it is further contended, the Indian knew and yet made no reservation of the waters. . . . The Indians had command of the lands and the waters, — command of all their beneficial use, whether kept for hunting, “and grazing roving herds of stock,” or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? . . . *The government is asserting the rights of the Indians.*

Id. (emphasis added). Later in its opinion, the Court cited *United States v. Winans*, 198 U.S. 371 (1905). In *Winans*, the Supreme Court found that a treaty “was not a grant of right to the Indians, but a grant of right from them, — a reservation of those not granted.” *Winters*, 207 U.S. at 578 (quoting *Winans*, 198 U.S. at 381).

14. *Winters*, 207 U.S. at 577. “The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be.” *Id.*; see U.S. CONST. art. IV, § 3, cl. 2; see also COHEN, *supra* note 6, at 576.

Under this analysis, the United States took the land and water from the tribes and then gave it back. See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823). The Court cited contract law as the source of the right. *Winters*, 207 U.S. at 577. In the contract, the government reserved the land and water in exchange for the tribes’ cession of vast tracts of land or their prerogative to roam them. *Id.* (“That the government did reserve them we have decided, and for a use which would necessarily continue through years. This was done May 1, 1888, and it would be extreme to believe that within one year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste . . .”).

aspect of federal, not state, law.¹⁵ The *Winters* doctrine marked a clear departure from the federal government's policy of deference to state water laws.¹⁶ The Supreme Court made it clear that the state never "owned" the water that became the benefit of the bargain between the United States and the tribes.¹⁷

A. *Indian and Federal Reserved Law v. State Water Law*

The differences between Indian and derivative federal reserved water law, embodied in the *Winters* doctrine, and state water law are significant. First, Indian reserved rights are the source of federal reserved water law, separate and distinct from state law that controls the right to use state-controlled water.¹⁸ Second, under the *Winters* doctrine, the amount of water that is reserved is the amount necessary to meet the present and future needs of the reservation(s).¹⁹ Under state prior appropriation law, the amount of water that one may use is limited to that amount which is put to present use.²⁰ Third, there is no need to actually use the water in order to maintain rights to it.²¹ The western states' prior appropriation doctrine holds that in order to maintain rights to water, it must be diverted and put to beneficial use.²² Fourth, Indian reserved water rights have a priority date as of the establishment of the reservation.²³ Under state prior appropriation law, a user's priority date is established either at the date that a permit is filed or the date that the water is diverted and put to beneficial use, whichever is sooner.²⁴ Fifth, and most significant, the *Winters* doctrine articulates

15. See COHEN, *supra* note 6, at 576.

16. States were officially authorized to define the rights of water users within their borders by the Supreme Court in *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 164-65 (1935). One commentator noted that while the Supreme Court had affirmed Congress' ability to regulate state-owned, non-navigable water when it was essential to preserve the beneficial use of federal government property, such as navigable waters, see *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899)), the Court had also confirmed that the states controlled non-navigable waters within their boundaries in *Kansas v. Colorado*, 206 U.S. 46, 94 (1907). McCool, *supra* note 1, at 46. McCool also noted that *Winans* could have been interpreted as placing Indian reserved water out of the reach of both federal and state control. *Id.* He concluded that "[T]he Court could have gone in any number of directions." *Id.* Congress' policy of deference, however, was pervasive. *Id.* at 49-50.

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

18. COHEN, *supra* note 6, at 576.

19. *Arizona v. California*, 373 U.S. 546, 601 (1963) (*Arizona I*); McCool, *supra* note 1, at 45.

20. McCool, *supra* note 1, at 45.

21. *Id.*

22. *Id.*

23. *Winters v. United States*, 207 U.S. 564, 575-77 (1908).

24. DAVID H. GETCHES, *WATER LAW IN A NUTSHELL* 93-99 (1984) [hereinafter GETCHES, NUTSHELL] (relation-back doctrine).

sovereign ownership of water. By contrast, the various state doctrines determine individual ownership of water. As such, *Winters* rights should not be compared solely to individual users' rights, but also to state sovereign ownership of water.

However, tribal reserved water rights are not entirely divorced from state law.²⁵ The tribes' reserved rights are located on the state-law time line that distinguishes senior from junior appropriators.²⁶ As such, tribal reserved rights are subject to other users who have a priority earlier in time under state law. As a practical matter, tribal reserved rights are rarely, if ever, usurped by senior appropriators. Because tribes are generally the senior water rights holders in any given water system, and because Indian reserved water rights have not been extensively quantified, great uncertainties arise over the amount of water reserved to the tribes and the amount of water left for the states to administer for economic development and growth.²⁷

B. Quantification of *Winters* Rights

1. Purpose of the Reservation

Quantification of Indian reserved water rights involves an examination of the purpose for which the reservation was created.²⁸ This entails a study of the agreement,²⁹ treaty,³⁰ or executive order³¹ that

25. COHEN, *supra* note 6, at 576 ("Indian water rights cannot be understood apart from the prior appropriation system, recognized in one form or another in all of the mainland western states.").

26. *Id.*

27. Joint Statement of Department of Water Resources of Arizona, Colorado River Board of California, and Colorado River Commission of Nevada on House Bill 2642 Before the Committee on Interior and Insular Affairs, House of Representatives (Sept. 16, 1987), in *Natural Resources Law Ctr., Natural Resource Development in Indian Country* (University of Colorado School of Law Ninth Annual Summer Program, June 8-10, 1988). The statement said:

[U]ncertainty as to the magnitude of Indian water rights claims if and when they will actually be exercised makes administration of rights difficult and subjects long standing junior appropriators to having their use cut back or terminated, disrupting the economies they represent. This is an unavoidable consequence of the *Winters* right generally.

Id.

28. *Winters v. United States*, 207 U.S. 564, 576 (1908) (the purpose of the agreement which established the reservation was to provide the tribe with an agricultural economy); *Arizona v. California*, 373 U.S. 546, 596 (1968) (*Arizona I*) (the five reservations along the Colorado River were established to facilitate Indian agriculture).

29. *Winters*, 207 U.S. at 575.

30. *In re Rights to Use Water in Big Horn River*, 753 P.2d 76, 95-99 (Wyo. 1988) (*Big Horn I*) (examination of the Second Treaty of Fort Bridger revealed that the purpose for establishing the Wind River Reservation was to create an agricultural community), *aff'd by an equally divided Supreme Court per curiam*, 492 U.S. 406, *reh'g denied*, 492 U.S. 938 (1989).

31. *Arizona I*, 373 U.S. at 596 (the Chemehuevi, Cocopah, Yuma, Colorado River, and Fort Mohave reservations were created by executive orders for the purpose of establishing an agricultural economy).

established the reservation. From a tribal point of view, the purpose of the reservation is to provide the tribes with an inviolable permanent homeland.³² Under the "homeland" purpose of the reservation, water reserved would include amounts for agriculture, livestock, domestic and municipal use, mineral development, industrial and other business use, wildlife, recreation, fishing, religious purposes, and aesthetic enjoyment.³³

Courts have not construed the purpose of the reservation so broadly, however, and have limited quantification to the purpose for which the federal government, and not the tribes, established the reservation.³⁴ That purpose, invariably, was to "civilize" the tribes by supporting and encouraging agricultural activities.³⁵ However, a narrow construc-

32. *Confederated Colville Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981) (executive order creating the reservation was to provide a home for the tribes); see Treaty with the Sioux, Apr. 29, 1868, art. 15, 15 Stat. 635, 640 ("The Indians herein named agree that when the agency-house or other buildings shall be constructed on the reservation named, they will regard said reservation their *permanent home*, and they will make no permanent settlement elsewhere.") (emphasis added).

33. See *Big Horn I*, 753 P.2d at 98-99. This list includes, but is not exclusive of, the uses to which water could be put in conjunction with establishing a permanent homeland.

34. See *id.* (Wyoming Supreme Court rejected the United States government's claim that water was also reserved for instream fisheries, mineral and industrial development, and municipal, domestic, commercial, livestock, wildlife, and aesthetic purposes). See *supra* notes 29-33 (describing the singular purpose of the agreements, executive orders, and treaties that established the reservations as agricultural).

35. See *Big Horn I*, 753 P.2d at 95-98. The Wyoming supreme court cited various portions of the Treaty with the Shoshones and Bannacks, particularly article VII, to support its holding that the Wind River Reservation was an "agricultural reservation." *Id.* at 95 (citing Treaty with the Shoshones and Bannacks, July 3, 1868, art. 7, 15 Stat. 673, 675). The court also cited article XII, which purported to award \$500 annually to the tribes' ten best farmers, to support its contention. *Id.* at 96 (citing Treaty with the Shoshones and Bannacks, July 3, 1868, art. 12, 15 Stat. 673, 676). The court summed up its analysis as follows:

Article 7 [of the treaty] refers to "said agricultural reservations." Article 6 authorizes allotments for farming purposes; Article 8 provides seeds and implements for farmers; in Article 9 "the United States agreed to pay each Indian farming a \$20 annual stipend, but only \$10 to 'roaming' Indians;" and Article 12 establishes a \$50 prize to the ten best Indian farmers. The treaty does not encourage any other occupation or pursuit. The district court correctly found that the reference in Article 4 to a "permanent homeland" does nothing more than permanently set aside lands for the Indians; it does not define the purpose of the reservation. Rather, the purpose of the permanent-home reservation is found in Articles 6, 8, 9, and 12 of the treaty.

Id. at 97. Here, the canons of construction, which were established to contravene the government's superior bargaining power, negotiating skills, and knowledge of the language, were noted but not followed. See COHEN, *supra* note 6, at 222 ("In construing Indian treaties, the courts have required that treaties be liberally construed to favor

tion of the reservation's purpose does not necessarily result in quantifying a significantly less amount of water.³⁶ It has, however, been utilized to prevent tribes from employing their *Winters* rights to purposes not originally articulated in the contract creating the reservation.³⁷

2. Method of Quantification: "Practicably Irrigable Acreage"

The actual method for quantifying the amount of water reserved for agricultural purposes was introduced in *Arizona v. California*.³⁸ In *Arizona*, the United States government asserted the claims of five Indian reservations to water in the Colorado River.³⁹ The special master⁴⁰ determined that the purpose for creating the five reservations along the Colorado River was to facilitate agricultural development.⁴¹ In order to objectively calculate that amount, he multiplied the number of acres on the reservation that could sustain crops by the amount of

Indians, that ambiguous expressions in treaties must be resolved in favor of the Indians, and that treaties should be construed as the Indians would have understood them."); see also *Walton*, 647 F.2d at 47 (canons of construction were applied in interpreting the executive order creating the reservation).

The Wyoming court's finding that water was reserved solely for agricultural purposes tracked *United States v. New Mexico*, 438 U.S. 696 (1978). The *New Mexico* Court held that the amount of water reserved to the federal government was only that amount necessary to ensure that the original purpose of the reservation was not defeated. *New Mexico*, 438 U.S. at 700. Secondary purposes do not fall within the scope of the federally reserved water right, and the federal user must follow state law in order to obtain water for those purposes. *Id.* at 702. For a full discussion of *New Mexico*, see *infra* notes 60-105 and accompanying text.

36. The difference is significant where the reservation does not contain a great amount of practicably irrigable acreage (PIA) and where the tribe has a specific, present need for a large quantity of water for other purposes. See David M. Dornbusch, *The Wind River Litigation: Effects of the Wyoming Supreme Court's Decision on the Wind River Reservation's Water Use and Implications for Other Reservation Water Rights at 7*, in *Natural Resources Law Ctr., Natural Resource Development in Indian Country* (University of Colorado School of Law Ninth Annual Summer Program, June 8-10, 1988) ("Using PIA as the exclusive measure of the tribes' water rights resulted in a reasonable water rights quantification in Wind River, because the Reservation has such a large irrigated agriculture requirement, and the non-agricultural claim was only 4 percent of the irrigated claim."). However, if a tribe's reservation is predicated on an agricultural purpose but the reservation contains little or no practicably irrigable acreage, the tribe may not receive sufficient water to serve either its present or future needs.

37. *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, Nos. 91-83, -84, -91, -92, -93, -94, -96, -97, 1992 WL 119212, at *3 (Wyo. June 5, 1992) (*Big Horn II*).

38. 373 U.S. 546 (1963) (*Arizona I*).

39. *Id.* at 595.

40. The special master was appointed by the court to organize the evidence and recommend solutions to the various issues raised.

41. *Arizona I*, 373 U.S. at 596.

water required to grow them.⁴² This method became known as the "practicably irrigable acreage" (PIA) standard.

He determined, and the Supreme Court agreed, that the standard must be able to quantify sufficient water to meet both the present and future needs of the tribes based on the requirements of their existing resources.⁴³ The PIA standard met those requirements. First, it provided a fixed amount of water that could be put to use for a palpable, then-extant agricultural purpose.⁴⁴ Second, it "feasibl[y] and fair[ly]"⁴⁵ quantified a sufficient amount of water to fulfill future as well as present needs. Third, this objective method avoided awarding speculative, insupportable amounts and provided the certainty that the states sought. In a subsequent opinion, the Supreme Court confirmed that tribes could apply water to functions other than agriculture if they chose to, even though the water had been quantified under the PIA standard.⁴⁶

The PIA standard was resisted by the state of Arizona.⁴⁷ Arizona's attorneys argued that the master should award an amount of water necessary to satisfy the "reasonably foreseeable needs" of the tribes.⁴⁸ This amount was calculated by multiplying the number of tribal mem-

42. *Id.* at 600.

43. *Id.*; see also COHEN, *supra* note 6, at 589.

44. See COHEN, *supra* note 6, at 589.

45. *Arizona I*, 373 U.S. at 601.

46. *Arizona v. California*, 439 U.S. 419, 422 (1979). In his report to the Supreme Court in the first *Arizona* opinion, the master stated:

[The fact that the PIA standard was employed to quantify the extent of the tribes' water right] does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agriculture and related uses The measurement used in defining the magnitude of the water rights is the amount of water necessary for agriculture and related purposes because this was the initial purpose of the reservation, but the decree establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow.

Rifkind, *supra* note 2, at 265-66, *quoted in* *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981) (although the *Winters* right was quantified under the PIA standard grounded in the executive agreement establishing the reservation, upon petition the court permitted the tribes to use such water for an instream flow to promote their salmon spawning industry); see also COHEN, *supra* note 6, at 592-93 (Department of the Interior has determined that Indian reserved rights may be used for any beneficial purpose). The inability to sell water off-reservation is the main exception to tribes' right to beneficially use their water. As *Big Horn II* demonstrates, however, any tribal use that infringes on existing state-sanctioned uses are strongly resisted by the state. *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, Nos. 91-83, -84, -91, -92, -93, -94, -96, -97, 1192 WL 119212, at *1-4 (Wyo. June 5, 1992) (*Big Horn II*).

47. *Arizona I*, 373 U.S. at 596-97.

48. *Id.* at 600-01.

bers by an amount of water that each would need.⁴⁹ The Supreme Court rejected this standard, stating that it unfairly eliminated the amount of water necessary for future uses.⁵⁰

Arizona also urged the Supreme Court to oversee an "equitable apportionment" proceeding between the state and the tribes.⁵¹ The Court rejected this alternative on the ground that the proceeding applied to states only, and that reservations were not states.⁵²

C. Damage Control: Reducing the Amount of Indian Reserved Rights

As soon as the pervasive effect that Indian reserved rights posed to non-Indian users was recognized,⁵³ the states and Supreme Court endeavored to synthesize those rights with the realities of Western development and scarcity resulting from that development.⁵⁴

Following *Arizona*, the Supreme Court responded to the states' fears that Indian and other federal reserved water rights caused uncertainty for current users under state law, and undermined development and growth. First, it narrowed the source of federal reserved water rights to the specific purpose for which the reservation was created.⁵⁵ Second, after a twenty-year battle⁵⁶ the Court broadened the "McCarran Amendment"⁵⁷ to enable states to join tribes in state-court river system

49. *Id.*

50. *Id.* at 601.

51. *Id.* at 596-97. "Equitable apportionment" refers to the Supreme Court proceeding, based on original jurisdiction, to resolve disputes between the states. See *Kansas v. Colorado*, 206 U.S. 46, 83 (1907). See generally A. Dan Tarlock, *The Law of Equitable Apportionment Revisited, Updated, and Restated*, 56 U. COLO. L. REV. 381 (1985). Arizona's lawsuit against California was an equitable apportionment proceeding to resolve each state's claim to a share of the Colorado River under the Colorado River Compact of 1922. *Arizona I*, 373 U.S. at 550-51.

52. *Arizona I*, 373 U.S. at 597.

53. See A. Dan Tarlock, *One River, Three Sovereigns: Indian and Interstate Water Rights*, 22 LAND & WATER L. REV. 633, 636 (1987) [hereinafter Tarlock, *One River*] ("Potential *Winters* rights claims in Arizona alone stand at 31.3 million acre-feet, many times the state's share of the Colorado River.") Legend has it that Los Angeles would not have built its aqueduct siphoning the Colorado River had it known that the reservations along the river would be awarded one million acre-feet of water. See TRELEASE, *FEDERAL-STATE RELATIONS*, *supra* note 2, at 129. The full amount of disruption that will be caused by quantification of Indian reserved rights has never been calculated. *Id.* at 128.

54. Tarlock, *One River*, *supra* note 53, at 658.

55. See *Cappaert v. United States*, 426 U.S. 128, 139 (1976); *United States v. New Mexico*, 438 U.S. 696, 699 (1978).

56. PETER W. SLY, *RESERVED WATER RIGHTS SETTLEMENT MANUAL* 10 (1988).

57. 43 U.S.C. § 666 (1988). The McCarran Amendment was enacted in 1953, permitting states to join the United States as a party in order to adjudicate rights on a river system where the United States had complied with state law for the use of water. As such, it contemplated waiver of sovereign immunity only where the United States acted as a private water user, not as the owner of a federal reserved right.

adjudications to resolve uncertainties concerning water available for river basin appropriations.⁵⁸ Finally, the Court has proceeded on an ad hoc basis to prevent requantification of Indian reserved rights when those rights were incorrectly tabulated, through either unavoidable lack of information or governmental incompetence, in the original adjudication.⁵⁹

1. *Narrowly Construing the "Purpose of the Reservation":
Federal Reserved Rights*

In *United States v. New Mexico*⁶⁰ the Supreme Court resolved a dispute over the extent of federal reserved rights in the Gila National Forest. The Court focused its attention on the users under state law who faced dislocation due to the creation of federal reservations and the water they consumed.⁶¹ Specifically, the Court held that only the primary purpose for creating a federal reservation was relevant when determining the extent of the reserved right and if secondary purposes conflicted with a primary purpose, those purposes did not give rise to a reserved right and state law must be followed in appropriating water to satisfy state interests.⁶² The Court found that when Congress passed the Organic Administration Act of 1897,⁶³ it impliedly reserved water necessary to preserve the Gila Forest's watershed and timber producing capability.⁶⁴ It found that in securing favorable conditions for water flows, Congress intended to ensure that appropriators under state law would receive the most water that the forest would yield year after year.⁶⁵

When Congress enacted a second law, the Multiple-Use Sustained-Yield Act of 1960,⁶⁶ for the additional purposes of providing recreation, range production, and adequate habitats for wildlife and fish in national forests, those purposes were secondary to the primary purposes enunciated in the Organic Administration Act.⁶⁷ The Rio Mimbres

58. See e.g., *United States v. District Court for Eagle County*, 401 U.S. 520 (1971); *Colorado River Cons. Dist. v. United States*, 424 U.S. 800 (1976); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983).

59. See e.g., *Arizona v. California*, 460 U.S. 605 (1983) (*Arizona II*); *Nevada v. United States*, 463 U.S. 110 (1983). See generally Roger Florio, Note, *Arizona v. California: Finality as a Water Management Tool*, 33 CATH. U.L. REV. 457 (1984).

60. 438 U.S. 696 (1978).

61. *Id.* at 706 ("To the anguish of Western settlers, reservations were frequently made indiscriminately.").

62. *Id.* at 702, 715.

63. Act of June 4, 1897, ch. 2, 30 Stat. 11, 34 (codified as amended at 16 U.S.C. §§ 473-482 (1985)) (Organic Administration Act).

64. *New Mexico*, 438 U.S. at 707.

65. *Id.* at 715.

66. Multiple-Use Sustained-Yield Act of 1960, Pub. L. No. 86-517, 74 Stat. 215 (codified as amended at 16 U.S.C. §§ 528-531 (1992)).

67. *New Mexico*, 438 U.S. at 714-15.

River, flowing from the Gila National Forest, was completely appropriated. This elevated secondary purposes to the status of a reserved right (governed by 1960 priorities) resulting in a "gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators."⁶⁸

In reaching its decision the Court distinguished between the primary and secondary purposes of each act and then focussed its inquiry on the legislative histories of the respective acts. First, the Court found that secondary purposes defeated the primary purpose of securing favorable water flows for downstream use and, secondly, that the legislative history of the Multiple-Use Act revealed that the expanded purposes were to be "supplemental to, not in derogation of" the purposes elicited from the Organic Administration Act.⁶⁹ Finally, the Court determined that Congress did not intend to reserve water for those conflicting secondary purposes.⁷⁰

In reality, the Court did not deny a reserved right for the "secondary" purposes found in the 1960 Multiple-Use Act because they conflicted with those of the 1897 Organic Act. Those purposes did not and were not intended to conflict with the earlier Act.⁷¹ Rather, the Court denied a reserved right for those purposes because they conflicted with water appropriators under state law.⁷² In essence, Congress' additional purposes prevented state and private appropriators from maximizing their use of the water.

As a result, *New Mexico* is memorable in two ways. First, its dictum advanced the misconception that Indian reserved rights are subsumed

68. *Id.* at 705.

69. *Id.* at 714.

70. *Id.* at 715.

71. A comparison of the language and purposes reveals that it was possible to preserve the watershed and also reserve water for recreational, range, and fish and wildlife purposes without creating a conflict. *Id.* at 713. The 1960 Multiple-Use Act fully intended that the purposes would complement each other rather than conflict. The Act reiterated the purposes of the earlier 1897 Organic Act and specifically stated that the new purposes were supplemental to, and not in conflict with, the original purposes. The Act states:

It is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the [Organic Administration Act of 1897].

16 U.S.C. § 528 (1976), quoted in *New Mexico*, 438 U.S. at 713.

72. *New Mexico*, 438 U.S. at 715. The Court stated: "A reservation of additional water could mean a substantial loss in the amount of water available for irrigation and domestic use" It concluded that this "defeat[ed] Congress' principal purpose of securing favorable conditions of water flow." *Id.*

by the federal reserved rights doctrine.⁷³ Second, it enunciated the Supreme Court's paramount interest in protecting appropriators under state law when federal reserved rights pose a threat to their water supply.⁷⁴ This has subsequently become known as the "sensitivity doctrine."⁷⁵

While *New Mexico* involved only federal reserved water rights, there was no attempt on the part of the Court to distinguish Indian reserved water rights from federally reserved water rights. Rather, the decision lumped the two together.⁷⁶ Consequently, Indian reserved water rights are drawn into the web spun by these decisions, which were crafted in response to states' fears that quantifying great amounts of federally reserved water would hinder state economic development and growth.

By failing to distinguish between Indian and federal reserved rights, the Supreme Court has sanctioned state adjudicatory proceedings that ignore substantial distinctions only to minimize or eliminate portions of the Indian reserved right.⁷⁷ The differences between Indian and federal reserved rights are numerous.

73. *Id.* at 698-99. "Substantial portions of the public domain have been withdrawn and reserved by the United States for use as Indian reservations, forest reserves, national parks, and national monuments." *Id.* at 699. The opinion further identified Indian reserved rights with the "appurtenance" requirement enunciated in *Cappaert v. United States*, 426 U.S. 128 (1976), concerning federal reserved rights. *Id.* at 700 (citing *Cappaert*, 426 U.S. at 138). The fact that the Colorado River was appurtenant to the five Indian reservations in *Arizona I* has also added to this misconception. See *New Mexico*, 438 U.S. at 700 (citing *Arizona I*, 373 U.S. at 595-601); see also *Winters v. United States*, 207 U.S. 564 (1908).

74. *New Mexico*, 438 U.S. at 705 ("[The possibility that federal reserved rights may reduce the water available for state and private appropriators] must be weighed in determining what, if any, water Congress reserved for use in the national forests.").

75. *Id.* at 718 (Powell, J., dissenting) ("I agree with the Court that the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and Congress' policy of deference to state law.").

76. *Id.* at 698-99, 700; *Cappaert*, 426 U.S. at 138 ("[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. . . . The doctrine applies to Indian reservations and other federal enclaves . . .").

77. See William H. Veeder, *Indian Water Rights in the Concluding Years of the Twentieth Century* 34-44 (The Newberry Library, Center for the History of the American Indian, Occasional Paper Series, 1982) (the United States Justice Department's failure to distinguish between Indian and federal reserved water rights resulted in state jurisdiction to adjudicate Indian reserved rights under the McCarran Amendment); cf. *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, Nos. 91-83, -84, -91, -92, -93, -94, -96, -97, 1992 WL 119212, at *2 (Wyo. June 5, 1992) (*Big Horn II*) (Wyoming Supreme Court accepted the opportunity to apply federal reserved rights doctrine to the Indian reserved rights doctrine to reject tribal "call" pursuant to a tribal code for a use not permitted under state water law).

2. *Indian Reserved Rights Versus Federal Reserved Rights*

First, Indian reserved rights accrue from the treaty or agreement which created the reservation. In *Winters*, the Supreme Court viewed the agreement that established the reservation as a contract between the United States and the tribes.⁷⁸ The Court explored the intent of both the tribes and the United States when it determined that the agreement had impliedly reserved sufficient water to fulfill the agricultural purpose of the reservation.⁷⁹

Other treaty language has been interpreted by the Ninth Circuit Court of Appeals in *Confederated Colville Tribes v. Walton*.⁸⁰ In *Walton*, the court scrutinized the "executive agreement" that created the reservation and treated it as though it were also a contract.⁸¹ This inferred that the United States' trust responsibility to the tribes required such an interpretation.

On the other hand, *New Mexico* involved an inquiry into Congress' intent only, because in those cases statutes were the source of the federal reservations.⁸² As such, Indian reserved rights providing for tribal homelands were not established in the same manner as federal reserved rights for the purpose of preserving national forests⁸³ and monuments.⁸⁴

This crucial distinction, of the bilateral agreement between sovereigns as opposed to a unilateral action on the part of Congress, goes to the heart of the nature of the right. Indian reserved rights are reserved for people, whereas federal reserved rights are reserved for federally owned property management. The failure of the United States Justice Department to maintain this distinction⁸⁵ has resulted in a narrowing

78. *Winters v. United States*, 207 U.S. 564, 577 (1908); see Rusinek, *supra* note 1, at 365-66 (the result of a bilateral agreement, a treaty should be analyzed to include the intent of the tribe as well as Congress when determining the purpose of the reservation).

79. *Winters*, 207 U.S. at 575-76 ("It was the policy of the government, it was the desire of the Indians, . . .").

80. 647 F.2d 42 (9th Cir. 1981).

81. *Id.* at 47.

82. *United States v. New Mexico*, 438 U.S. 696, 706-07 (1978); *Cappaert v. United States*, 426 U.S. 128, 131-32 (1976).

83. See *United States v. District Court for Eagle County*, 401 U.S. 520, 523 (1971) (United States reserved water for proper management of the White River National Forest); *New Mexico*, 438 U.S. at 707-08 (United States reserved water to protect the watershed and provide for timber growth in the Gila National Forest).

84. See *Cappaert*, 426 U.S. at 142 (United States reserved water for Devils Hole Monument in order to preserve desert pupfish habitat).

85. See Veeder, *supra* note 77, at 42. Veeder stated that the Justice Department's failure to distinguish between Indian reserved rights and federal reserved rights in its briefs in the *Eagle County* litigation directly enabled the Colorado Supreme Court, and later the United States Supreme Court, to consider them both as federal reserved rights.

of the scope of the right, as well as state jurisdiction to determine the extent of that right.⁸⁶ It has also enabled at least one state to intrude on sovereign tribal regulatory authority to determine the uses to which quantified *Winters* rights will be put.⁸⁷

Second, the states do not benefit from Indian reserved rights as they do from federal reserved rights.⁸⁸ States cannot tax the trust property that the water is applied to,⁸⁹ or Indian personal property that applies the water,⁹⁰ nor can the states tax Indian income derived from use of the water on reservation lands.⁹¹ On the other hand, states can and do benefit from the use of federal reserved water.⁹² For example, private interests harvest the timber from national forests and use federal lands for grazing cattle.⁹³ Those interests are taxable at the state level for sales and income earned from such activities.

Id. As a consequence, Indian reserved rights were subject to adjudication in state court proceedings as a subset of federal reserved rights. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 810-11 (1976); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 556-57 (1983).

86. See *San Carlos*, 463 U.S. at 566 n.17. The Court stated:

[The tribes' arguments that the McCarran Amendment waived United States sovereign immunity, but not tribal sovereign immunity] suffers from the flaw that, although the McCarran Amendment did not waive the sovereign immunity of Indians as *parties* to state comprehensive water adjudications, it did (as we made quite clear in *Colorado River*) waive sovereign immunity with regard to the Indian *rights* at issue in those proceedings.

Id. As such, by subsuming Indian reserved rights to an overarching federal reserved rights doctrine, the Court was able to distinguish between jurisdiction over the *right* and jurisdiction over the *person*. As a result, the Court was able to overlook the fact that people, not trees or pupfish, are the ultimate users of Indian reserved rights. It is akin to stating that *in rem* jurisdiction does not affect the owner of the *res* because he does not have to show up in court.

87. See *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, Nos. 91-83, -84, -91, -92, -93, -94, -96, -97, 1992 WL 119212 (Wyo. June 5, 1992) (*Big Horn II*).

We are persuaded by *United States v. New Mexico* . . . wherein the United States Supreme Court held that water is impliedly reserved only to the extent necessary to meet the primary purpose(s) for which a reservation is made We hold that the Tribes . . . must comply with Wyoming water law to change the use of their reserved future project water from agricultural purposes to any other beneficial use.

Id. at *4.

88. See Michael Lieder, Comment, *Adjudication of Indian Water Rights Under the McCarran Amendment: Two Courts are Better Than One*, 71 GEO. L.J. 1023, 1053-54 (1983).

89. COHEN, *supra* note 6, at 405.

90. *Bryan v. Itasca*, 426 U.S. 373, 378-79 (1976).

91. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 165 (1973).

92. See Lieder, *supra* note 88, at 1054.

93. *Id.* at 1054 n.245.

Third, water reservations necessary to fulfill unilateral federal purposes are supplied from appurtenant sources.⁹⁴ The amounts necessary to satisfy the purposes of Indian reservations, however, cannot be restricted to appurtenant sources without, in certain instances, decreasing the amount of the entitlement and imposing great hardship.⁹⁵ Further, the western states themselves by necessity have done away with the appurtenance requirement.⁹⁶ "Appurtenance" is a requirement of riparian law⁹⁷ that would foreclose development of the West if adhered to.⁹⁸ The only purpose for imposing this discriminatory requirement on Indian reservations is to minimize the *Winters* right. In fact, the appurtenance requirement underscores the true difference between Indian and federal reserved rights, and why they should be treated separately: The primary beneficiaries of Indian reserved rights are the people who live on the reservation and whose uses are subject to change. The primary beneficiaries of federal reserved rights are either natural resources and wildlife with needs unchanged for centuries, or people who live off the reservation.⁹⁹

Fourth, Indian uses consume much more water than federal reserved rights. It is easy to emphasize "minimal need"¹⁰⁰ and survival amounts¹⁰¹ when the reserved water is used to protect a narrow scientific purpose¹⁰² or serve the needs to maintain property.¹⁰³ However, when a community plans on using an amount of water that is presently fixed but must sustain them forever,¹⁰⁴ such an emphasis is not only inappropriate, it is reminiscent of the tattered assimilation and termination eras of bygone years.

Finally, the United States bears a trust responsibility to the tribes that it does not owe to its federal land reservations. To fulfill that responsibility, it is charged with protecting the tribes from overweening,

94. *United States v. New Mexico*, 438 U.S. 696, 700 (1978) (citing *Cappaert v. United States*, 426 U.S. 128, 138 (1976)).

95. For instance, the Pine Ridge and Rosebud Sioux Indian Reservations, located within the state of South Dakota, may not have sufficient quantities of water within their boundaries to satisfy the extent of their entitlement. The "appurtenance" requirement would result in unfair hardship to those reservations, especially considering that the Rosebud Reservation was once appurtenant to the Missouri River. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

96. *See Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 443 (1882); *Irwin v. Phillips*, 5 Cal. 140 (1855).

97. *GETCHES, NUTSHELL*, *supra* note 24, at 28.

98. *See generally Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).

99. *See New Mexico*, 438 U.S. 696, 696; *Cappaert*, 426 U.S. 128, 136.

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

101. *New Mexico*, 438 U.S. at 700.

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

103. *New Mexico*, 438 U.S. at 707.

104. *See United States v. Nevada*, 463 U.S. 110 (1983).

intrusive state actions that encroach on tribal property or self-government.¹⁰⁵

In sum, when the distinctions between Indian and federal reserved rights are blurred, the amount of the Indian reserved rights can only be decreased with the consequence that the tribes must rely on state law to augment their share. This means that tribes become subject to state jurisdiction, if there is room at the end of the priority line for diverting water and if their initial entitlement is not enough to fulfill the purpose of the reservation. Such a result can only undermine tribal sovereignty.

D. The New Policy: Settlement of Indian Reserved Rights

The current Department of the Interior policy focuses on the negotiation and settlement of Indian reserved rights claims rather than litigation.¹⁰⁶ The purpose of settling claims rather than litigating them is to save costs and avoid the uncertainties inherent in the trial process.¹⁰⁷

One commentator stated that the Department's focus on saving the cost of adjudication does not benefit the tribes.¹⁰⁸ Rather, such cost-saving benefits the Department to the detriment of the tribes.¹⁰⁹ Placing the Department's interests ahead of the tribe's connotes a breach of fiduciary duty. Settlement of Indian water rights may not be less expensive than a general adjudication because tribes must still be able

105. See, e.g., *Seminole Nation v. United States*, 316 U.S. 286 (1942).

106. Eileen Shimizu, *Indian Water Rights: An Examination of the Current Status of the Department of Interior's Guidelines and the Opposition to Them*, 38 *FED. B. NEWS & J.* 88, 88 (1991) (citing Criteria and Procedures for Indian Water Rights Settlements, 55 *Fed. Reg.* 9223 (1990)). The guidelines were shaped by presidential proclamation when President Bush signed the Puyallup Tribe of Indians Settlement Act of 1989, Pub. L. No. 101-41, 103 Stat. 83 (codified at 25 U.S.C.S. § 1773a-j (Law. Co-op Supp. 1992)). President Bush stated that disputes regarding Indian water rights should be resolved through negotiated settlements rather than litigation. *Id.*

Since 1983, the Department of the Interior has been encouraging settlement through a "carrot" approach. See *Sly*, *supra* note 56, at 92 n.88. *Sly* noted that as a rule, the Bureau of Indian Affairs (BIA) will not pay for outside tribal counsel. *Id.* (citing 25 C.F.R. § 89.40). However, private attorney fees may be paid if the BIA and the tribe determines that a "substantial possibility of a negotiated settlement exists." *Id.* (quoting 25 C.F.R. § 89.41(e)).

107. But see Shimizu, *supra* note 106, at 89-90. Shimizu stated that the Department of the Interior's criteria for determining whether to negotiate or litigate essentially revolve around saving the time and cost of litigating. *Id.* at 90. She noted that the only beneficiaries under these rules are the states and the federal government. *Id.* The proposed criteria for determining whether settlement negotiations should be entered into, or continued after they have been initiated, should include whether settlement negotiations are in the best interests of the tribe. *Id.*

108. *Id.*

109. *Id.*

to prove the full extent of their practicably irrigable acreage in order to support their bargaining stance and maximize the amount of the entitlement.

The settlement process may result in a lesser entitlement than adjudication would achieve.¹¹⁰ However, diminishment of a *Winters* claim is not the automatic result of such a negotiation.¹¹¹ Further, tribes

110. See Tarlock, *One River*, *supra* note 53, at 663. Tarlock stated that the efficacy of exchanging *Winters* rights for the actual delivery of water depended on the individual agreement. *Id.* The Navajo-New Mexico water settlement agreement called for the Navajo Nation to waive its *Winters* rights in return for the construction and actual delivery of a certain amount of water. *Id.* The waiver may be limited to the tribe's rights to water out of the Navajo reservoir and its tributaries, which permits the tribe to pursue other sources to fulfill the rest of its entitlement. *Id.* The Colorado-Ute agreement is similar. The Ute tribes exchanged some of their *Winters* entitlement for actual delivery of water from off-reservation projects. *Id.* at 668-69. However, if the projects are not completed as planned the tribes are free to pursue their full entitlement through adjudication. *Id.* at 669.

111. Where states perceive a community of interest with tribes, negotiations can result in benefits to both parties. See Marcia Beebe Rundle, The Montana Reserved Water Rights Compact Commission at 1, in *Natural Resources Law Ctr., Natural Resource Development in Indian Country* (University of Colorado School of Law Ninth Annual Summer Program, June 8-10, 1988) (under the Fort Peck agreement, "the parties institutionalized communications between the governments, created a structure to resolve disputes over water uses, and established a process for cooperative management and joint leasing of shared water resources.").

The Fort Peck agreement provided the tribes with 1.05 million acre-feet. Tarlock, *One River*, *supra* note 53, at 667. The tribes originally maintained that they needed over two million acre-feet. Minutes of the Eleventh Meeting, Montana Reserved Water Rights Compact Commission 2 (Feb. 5, 1982), quoted in John P. Guhin, *The Law of the Missouri*, 30 S.D.L. REV. 347, 472 (1985). The total amount is based on the number of practicably irrigable acres within the reservation, although apparently only one half of the acres are owned by the tribes or Indians. *Id.* Of that amount, a maximum of 950,000 acre-feet may be diverted from surface sources, including the Missouri River; the balance of the entitlement may be satisfied from groundwater sources. Rundle, *supra*, at 11-12. Thus, for settlement purposes groundwater is recognized as a legitimate source for satisfying the *Winters* rights.

The pact provides for the protection of a small amount of preexisting state and federal uses from a potential tribal call, based on its date-of-the-reservation priority. *Id.* The pact also sanctions off-reservation marketing of reserved water with the option of state participation in a joint water-marketing plan. *Id.* at 13; Tarlock, *One River*, *supra* note 53, at 667. To date, however, the Montana congressional delegation has not been able to achieve Congress' approval of this portion of the agreement. Steven J. Shupe, Off-Reservation Marketing of Indian Water at 6, in *Natural Resources Law Ctr., Natural Resource Development in Indian Country* (University of Colorado School of Law Ninth Annual Summer Program, June 8-10, 1988).

Administration of the respective water rights is specified in the agreement. For a discussion of jurisdictional issues in the context of negotiated settlements, see *infra* notes 333-47 and accompanying text.

Finally, the agreement paved the way for the Department of the Interior approval of the tribes' water code. *SLX*, *supra* note 56, at 155. For a discussion of the Department of Interior's moratorium on approval of tribal codes, see *infra* notes 388-99 and

may benefit from exchanging *Winters* rights for other valuable considerations.¹¹²

Tribes and states are able to resolve complex and extremely sensitive issues relating to jurisdiction over water users,¹¹³ availability of ground-

accompanying text.

The Fort Peck agreement was partly the result of Montana's desire to keep as much water as possible within the borders of its State. See Tarlock, *One River*, *supra* note 53, at 666; see also Guhin, *supra* at 472. Looking forward to an equitable apportionment of the Missouri River, the state has decided to join with the tribes in its state to protect each party's respective rights. Montana is among the most liberal states in the West concerning its recognition of beneficial uses. Unlike any other state in the Missouri basin, Montana recognizes that recreation and fish and wildlife consume water for beneficial purposes. GETCHES, NUTSHELL, *supra* note 24, at 102.

At least one other state has expressed its disapproval of Montana's strategy and skepticism as to its ability to succeed. See Guhin, *supra* at 475. The disagreement may be resolved by an equitable apportionment proceeding that removes quantified Indian rights from the amount of water available in the Missouri River prior to the state-by-state allocations. Under this procedure, state borders will ultimately hold the sum of both the Indian reserved and state apportioned amounts. However, the total amount that each state will receive will be proportionally reduced by the total amount of Indian reserved rights to the Missouri River. This way, Indian reserved rights will be deducted from all the basin states, not only the states which contain reservations. Essentially, all states, not only states having reservations within their borders, will be responsible for living up to the nation's treaties.

If Indian reserved rights are not deducted from the amount of the river subject to apportionment beforehand, then the gross amount that each state receives will be larger. However, that gross amount will be subsequently reduced in order to satisfy the Indian reserved rights within each state. This results in an unfair burden to the states having reservations within their borders, and unfair benefit to lower basin states which do not contain reservations or which have enough rainfall that tribal needs are not critical. South Dakota's policy assumes that the river will be apportioned without removing Indian rights beforehand. As a result, South Dakota intends to minimize Indian reserved rights before and after any apportionment proceeding in order to maximize the state's amount. See Guhin, *supra* at 476; see also John H. Davidson, Address on Native American Law Day, Vermillion, S.D. (Apr. 7, 1989); in ISSUES AND DEVELOPMENTS IN INDIAN WATER LAW 25-26 (1989).

112. The quality of the representation and the relative bargaining powers of each party will affect the final outcome of a negotiated settlement. See *Nevada v. United States*, 463 U.S. 110; Shimizu, *supra* note 106, at 90.

113. See *supra* notes 110-11 and accompanying text (discussing the Fort Peck and Colorado Ute agreements). Most agreements resolve the issue of jurisdiction to hear or review disputes by referring to "courts of competent jurisdiction." *SLY*, *supra* note 56, at 155-56. This inevitably implies federal and state court jurisdiction, but not necessarily tribal court jurisdiction. See Rundle, *supra* note 111, at 14-15. *Winters* rights settlements and adjudications underscore the necessity for tribal enactment of water codes to administer water rights, regulate competing uses, and adjudicate disputes between users. See generally Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329 (preservation of tribal sovereignty depends on the enactment of laws that secure the just and equitable treatment of everyone within the reservation). Without an effective tribal water code, disputes involving tribal members will be settled in a nontribal forum.

water to satisfy tribes' water entitlements,¹¹⁴ delivery of reserved water from federal projects after it has been quantified,¹¹⁵ shortage sharing,¹¹⁶ off-reservation marketing of water,¹¹⁷ and new or altered uses that directly affect other users under different jurisdictional regimes.¹¹⁸ In sum, every issue that can be litigated can also be settled. The most important prerequisite is the perception by each party that negotiating to achieve a mutually beneficial resolution is in each entity's best interests.¹¹⁹

II. Jurisdictional Issues

Introduction

Where one appropriator is using an amount of water to the detriment of the other, quantification of *Winters* rights is helpful in determining the relative priorities in time of the users.¹²⁰ However, quantification will not resolve every conflict between member users and non-Indian users on fee lands within the reservation.¹²¹ For instance, quantification

114. See Tarlock, *One River*, *supra* note 53, at 647-48 (in its settlement, the Papago tribe released any claims to groundwater in exchange for delivery of surface water to satisfy its reserved rights); Rundle, *supra* note 111, at 11 (Assiniboiné and Gros Ventre tribes may use groundwater to augment their reserved right); *cf. In re Rights to Use Water in Big Horn River*, 753 P.2d 76, 99-100 (Wyo. 1988) (*Big Horn I*) (groundwater is not included in the Arapahoe and Shoshone tribes' adjudicated entitlement), *aff'd by an equally divided Supreme Court per curiam*, 492 U.S. 406, *reh'g denied*, 492 U.S. 938 (1989).

115. See SLX, *supra* note 56, at 29 (discussing Colorado-Ute settlement requiring delivery of quantified right from two federal projects in Southwest Colorado); see also Tarlock, *One River*, *supra* note 53, at 663-64, 668-70 (discussing Navajo-New Mexico, Ute-Utah, and Colorado-Ute settlements).

116. See Shimizu, *supra* note 106, at 90.

117. See SLX, *supra* note 56, at 30 (discussing Fort Peck Agreement permitting off-reservation marketing of Indian reserved water with notice and state benefit-sharing) (citing Lee Herold Storey, *Leasing Indian Water off the Reservation: A Use Consistent with the Reservation's Purpose*, 76 CALIF. L. REV. 179 (1988); David H. Getches, *Management and Marketing of Indian Water: From Conflict to Pragmatism*, 58 COLO. L. REV. 515 (1988)) [hereinafter Getches, *From Conflict to Pragmatism*].

118. See SLX, *supra* note 56, at 156 (under the Fort Peck Agreement, tribal transfers of water rights are subject to review in the state's water courts); see also Rundle, *supra* note 111, at 14 (under the Fort Peck Agreement, the tribe and state agree to exchange information regarding new or changed uses on a quarterly basis).

119. John A. Folk-Williams, *The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights*, 28 NAT. RESOURCES J. 63, 71 (1988).

120. The tribal user, with a priority date as of the date of the reservation, will have a superior right to a nonmember user under state law.

121. As testament to the true complexity of the subject, quantification settles the issue of how much water the tribe is entitled to, but not necessarily the source of water the tribe may tap to satisfy its entitlement. See *In re Rights to Use Water in Big Horn River*, 753 P.2d 76, 100 (Wyo. 1988) (*Big Horn I*) (tribes may not use groundwater to

will not resolve conflicts over priorities of *uses* between nonmembers and members.¹²² Further, many tribes have not quantified their *Winters* rights. Tribal governments have the authority to regulate the use of water by Indians on tribal lands pursuant to validly enacted water codes.¹²³ Their ability to regulate the conduct of non-Indians on fee lands within the reservation, however, is another matter.

Jurisdiction to regulate the uses and quality of water within tribal borders is discussed below. First, the section explores tribal regulatory jurisdiction following the adjudication of *Winters* rights (proprietary jurisdiction). Second, it discusses the resolution of jurisdictional issues

satisfy their quantified amount), *aff'd by an equally divided Supreme Court per curiam*, 492 U.S. 406, *reh'g denied*, 492 U.S. 938 (1989). It is conceivable that a state court may attempt to require a tribe to explore sources outside of the reservation to satisfy its entitlement even though there is a sufficient supply within the reservation, if nonmembers using water on fee lands under state permits would be disrupted in their use.

122. See *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, Nos. 91-83, -84, -91, -92, -93, -94, -96, -97, 1992 WL 119212, at *3-4 (Wyo. June 5, 1992) (*Big Horn II*) (adjudication of Indian reserved water rights delineates the limits of legally permitted uses for such water; a tribal water code providing for uses not included in the treaty or document creating the reservation will not be respected by the state engineer who monitors the adjudication decree if such uses are not included in the treaty under which the right was quantified, unless the tribe applies for a permit and the use is recognized as a beneficial use under state law).

For example, a nonmember irrigator is diverting water from a creek on the Rosebud Sioux Reservation under a state permit. His diversion causes the creek to run dry. The nonmember's conduct is "beneficial" under state law, and does not conflict with other beneficial uses; South Dakota does not recognize uses that benefit wildlife, promote aesthetics, or involve maintaining instream flows. Here, quantification will not provide the tribe with the means to enjoin the nonmember's activity. On the other hand, the tribe could enact a water code which states that priorities of use include promoting wildlife, aesthetics, and maintaining instream flows. As a result, its Office of Water Resources could require that the nonmember stop diverting water from the stream and instead obtain his water from a well that is deep enough to avoid disrupting the stream's hydrological relationship to the Ogallala Aquifer.

123. See COHEN, *supra* note 6, at 232-37, 246-52 (sovereignty provides a traditional basis for tribal authority to regulate the conduct of its members within the reservation; tribes have the authority to choose and organize their form of government, to legislate, and to administer their laws). Tribes retain all sovereignty not withdrawn by treaty, congressional statute, or precedent. *United States v. Wheeler*, 435 U.S. 313, 313 (1978). While congressional enactment of Public Law 280 transferred criminal and civil jurisdiction to certain states, regulation of Indian trust water rights was specifically excluded from state jurisdiction. SLV, *supra* note 56, at 73 (citing 25 U.S.C. § 1322 (1982)). Tribes also share the authority to administer irrigation water with the Secretary of the Interior when the project is within their borders. *Joint Bd. of Control v. United States*, 832 F.2d 1127, 1131 (9th Cir. 1987) (construing 25 U.S.C. § 381 (1982)). However, the ability of tribes, who formed their governments under the Indian Reorganization Act, to enforce water codes has been frustrated by the Department of the Interior's moratorium on the approval of such codes. For a discussion of the moratorium, see *infra* notes 388-99 and accompanying text.

through the negotiated settlement of such claims. Finally, the section addresses tribal enforcement of a water code without quantification (territorial jurisdiction).

Jurisdiction over water, particularly over nonmember users on fee lands within the reservation, has developed its own case law. These opinions have emanated from the Ninth Circuit and are not binding outside of its respective boundaries. However, these cases are persuasive and may be followed in other circuits.

There are many variables involved. First, the user must be defined. Users within the reservation include: (1) the tribe on trust land or allotment land held in trust; (2) the tribe on "disestablished" land reacquired from non-Indians; (3) individual tribal members and other Indians on allotment land; (4) non-Indian purchasers of allotment land ("Walton users"); and (5) non-Indian purchasers of "surplus" reservation land, or fee land.

Second, ownership of the water must be determined. Whether or not the Indian right has been quantified, both tribal and state water may exist within the borders of the reservation. This occurs where there is sufficient water on, under, or flowing through the reservation to satisfy the Indian entitlement plus an amount of "excess" water, to which the state claims ownership.¹²⁴ Where there is no quantification, the existence of non-Indian users is seen as *de facto* evidence of state water ownership.¹²⁵

Third, where "excess" water exists on the reservation, the tribe's interest in maintaining unified jurisdiction over the waters within its borders is weighed against the state's interest in regulating water used by nonmembers on fee lands.¹²⁶ The extent to which the adjudicated

124. See *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984); *Holly v. Totus*, 655 F. Supp. 548 (E.D. Wash. 1983) (*Holly I*), *rev'd sub nom.* *Holly v. Watson Totus*, 749 F.2d 37 (9th Cir. 1984), *on remand sub nom.* *Holly v. Confederated Tribes & Bands of Yakima Nation*, 655 F. Supp. 557 (E.D. Wash. 1985) (*Holly II*), *aff'd sub nom.* *Holly v. Totus*, 812 F.2d 714 (9th Cir. 1987), *cert. denied*, 484 U.S. 823 (1987).

125. Telephone Interview with Jim Goodman, Water Engineer, Department of Environment and Natural Resources, South Dakota (June 26, 1991) (South Dakota requires non-Indians on fee lands within the reservation to apply for a state permit to use water).

126. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51-53 (1981); *Anderson*, 736 F.2d at 1363-66; *Holly II*, 655 F. Supp. at 558-59. The courts followed an orthodox pattern of applying *Montana v. United States*, 450 U.S. 544 (1981), to the tribe's interests in jurisdiction over nonmembers' use, followed by a preemption analysis of the state's assertion of jurisdiction. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

Following *Montana*, the Court in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), eliminated the preemption analysis and focused entirely on whether the tribe had any legitimate authority to regulate the conduct of nonmembers on fee lands. *Brendale*, 492 U.S. at 455-57 (Blackmun, J., dissenting) (*Montana* reversed the presumption of tribal regulatory jurisdiction over conduct on fee lands to a presumption of state regulatory jurisdiction).

water system transcends the reservation's boundaries determines, in large part, the state's interest in jurisdiction over nonmembers' use within the reservation.¹²⁷

A. Regulatory Jurisdiction After the Right Has Been Adjudicated

The most recent quantifications of Indian reserved rights specify whether the tribe or state has authority to administer the respective water rights.¹²⁸ Administration or monitoring refers to the determination of whether there is a sufficient quantity of water to serve all the competing users. While the administration of rights is an aspect of regulatory jurisdiction, regulation of water quality and enforcing priorities of uses are different topics that cannot be resolved by quantification.¹²⁹ Below are cases dealing with the enforcement of water rights when tribal and nonmember uses conflict, and tribal assertion of authority to regulate uses that violate code provisions.

*Colville Confederated Tribes v. Walton*¹³⁰ involved the Colville tribes' attempt to prevent Walton, a non-Indian purchaser of allotment lands, from using surface and groundwater in a water system wholly contained within the reservation.¹³¹ Walton had applied for permits to use water under state law and was using the water on allotment parcels.¹³² The trial court quantified the tribes' entitlement from the No-Name Creek Basin by using the PIA standard.¹³³ It found that the tribes were entitled to 666.4 of the 1000 acre-feet in the system; the balance constituted "excess" water that non-Indians on fee land were entitled to appropriate.¹³⁴

127. *Anderson*, 736 F.2d at 1366. The issue here is not whether Indian use has a "spillover" effect off the reservation. Cf. *Rice v. Rehner*, 463 U.S. 713 (1983). Rather, the issue involves pure prior appropriation law: whether junior appropriators within the reservation must be regulated to protect the interests of downstream senior appropriators. *Anderson*, 736 F.2d at 1361.

128. See *In re Rights to Use Water in Big Horn River*, 753 P.2d 76, 114-15 (Wyo. 1988) (*Big Horn I*) (Wyoming state engineer may enforce Indian reserved rights against non-Indian users), *aff'd by an equally divided Supreme Court per curiam*, 492 U.S. 406, *reh'g denied*, 492 U.S. 938 (1989). Phase III of the *Big Horn* litigation will determine the rights of non-Indian users within the reservation. Included will be a determination of the jurisdictional limits of both the state and the tribes to enforce their respective water codes.

129. In fact, the Wyoming Supreme Court applied aspects of the quantification phase of the *Big Horn* litigation to undermine tribal sovereign authority to enforce the Wind River Water Code's regulation of beneficial uses. See *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, Nos. 91-83, -84, -91, -92, -93, -94, -96, -97, 1992 WL 119212, at *3-4 (Wyo. June 5, 1992) (*Big Horn II*).

130. 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981).

131. *Id.* at 44-45, 52.

132. *Id.* at 45.

133. *Id.*

134. *Id.* The quantification was not limited to surface water only, but also included

The Ninth Circuit Court of Appeals first determined that Walton, as a purchaser of allotted lands, was entitled to a reserved water right.¹³⁵ Next, the court addressed the issue of which government had the authority to regulate the use of a non-Indian purchaser of an allotment. It held that, considering the fact that the water system was entirely contained within the reservation, only tribal law applied.¹³⁶ As such, Walton's state permits were void and the state had no regulatory authority within the basin.¹³⁷

In support of its ruling, the court found that the state was preempted from exerting its regulatory authority in this instance.¹³⁸ First, it found

groundwater. *Id.* The court refused to award the tribes additional water to maintain their fishery. *Id.* at 46. However, the trial court did grant the tribes' separate motion to use their agricultural entitlement to support spawning in No Name Creek. *Id.* The tribes subsequently pumped groundwater, as part of their agricultural entitlement, into the creek during spawning season. *Id.*

The Ninth Circuit applied the "specific purpose" test, propounded in *New Mexico*, in order to determine the extent of the tribes' water entitlement. *Id.* at 47. It found that the specific purpose of the reservation was to provide a home for the tribes. *Id.* The Colville Reservation was established by Executive Order. *Id.* at 44. The court noted that Indian reservations were "created for the Indians, not for the benefit of the government." *Id.* at 47. This was a radical departure from other courts' focus on the government's purpose for establishing reservations; namely, to "civilize" tribes; pressing an agrarian life on them to achieve this purpose. *See Winters v. United States*, 207 U.S. 564, 575-76 (1908). In order to satisfy that purpose, the tribes were entitled to water for agriculture and for maintenance of their traditional fishing vocation. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47-48 (1981). However, the Ninth Circuit did not award any more water for maintaining the fishery. *Id.* at 48. It held that the method of quantifying the right, the PIA standard, did not limit the uses to which the tribes could put the water. *Id.* As such, the tribes received their entitlement of reserved water for the fishery from the district court's decree based on the PIA standard. *Id.* Further, the *Walton* court did not disturb the lower court's finding that state water also existed in the basin. *Id.* at 46.

135. *Walton*, 647 F.2d at 50. "Because the use of reserved water is not limited to fulfilling the original purposes of the reservation, Congress had the power to allot reserved water rights to individual Indians, and to allow for the transfer of such rights to non-Indians." *Id.* at 49. After examining the general purpose of the Dawes Act, it concluded that Congress intended this. *Id.* The original allottee received a proportion of the reserved water in the basin that corresponded with the percentage of irrigable acreage that he owned, which he was free to sell to the non-Indian purchaser. *Id.* at 50, 51 (citing *United States v. Athtanum Irrigation District*, 236 F.2d 321, 342 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957)) (non-Indian purchasers of allotted land are permitted to "participate ratably" with Indian allottees in the use of reserved waters). The non-Indian purchaser was entitled to the lesser of (1) the original allottee's ratable share, or (2) the amount of water that the Indian allottee was actually using at the time of the sale plus an amount that the purchaser appropriated with "reasonable diligence" after title passed. *Id.* at 51. The purchaser was entitled to a date-of-reservation priority, and was susceptible to losing his right due to nonuse. *Id.*

136. *Id.* at 51.

137. *Id.*

138. *Id.* (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)).

that state regulation would infringe on tribal self-government.¹³⁹ Citing *Montana v. United States*,¹⁴⁰ the court found that "[r]egulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. Especially in arid and semi-arid regions of the West, water is the lifeblood of the community. Its regulation is an important sovereign power."¹⁴¹

Second, the state was preempted from issuing permits to use the excess water because the system was located entirely within the reservation; as such, there was no impact on state water rights off the reservation.¹⁴² Finally, concurrent state and tribal regulation would result in the same type of confusion that Congress sought to avoid when it deferred to state water law on nonreservation land.¹⁴³ Although this two-step "preemption" test is no longer applied — the court does not consider whether the state is preempted, since state regulatory jurisdiction over nonmember conduct on fee land is now presumed¹⁴⁴ — the *Montana* test focusing on whether tribal interests are sufficiently threatened to justify regulatory jurisdiction over nonmembers' use of water may remain valid.¹⁴⁵

In sum, the *Walton* court held that non-Indian purchasers of allotment land, or "Walton users," were entitled to the same ratable share of reserved water that the original allottees were granted and were subject to tribal regulatory jurisdiction.¹⁴⁶ Further, the "excess" water was also subject to tribal regulation due to the unique hydrological and geographical circumstances of the basin.¹⁴⁷

Another case from the Ninth Circuit Court of Appeals further defined the contours of tribal regulatory jurisdiction. *United States v. Anderson*¹⁴⁸ involved the determination of water rights to a basin not

139. *Id.* at 52.

140. 450 U.S. 544 (1981).

141. *Walton*, 647 F.2d at 52 (citing *Montana*, 450 U.S. at 566).

142. *Id.* at 53.

143. *Id.* The fact that *Walton* was not using a state resource, but a tribal resource, never entered into the court's preemption analysis.

144. See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 409 (1989) (Supreme Court applied a "changed circumstances" test involving such factors as the prevalence of fee lands, non-member population, and county government services to determine whether the tribe or the county had regulatory zoning authority over non-members on fee lands within the reservation). Unlike zoning, however, the regulation of water is not built out of conflicting civil views toward land use and development. Like fish and game, water is a palpable, renewable resource. As such, it has the distinction of being both an object of regulation and the guiding force and perhaps ultimately the main limitation of a community's growth.

145. See *supra* notes 256-60 and accompanying text.

146. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 49-50 (9th Cir. 1981).

147. *Id.* at 52.

148. 736 F.2d 1358 (9th Cir. 1983).

entirely contained within the reservation, as was the case in *Walton*.¹⁴⁹ The adjudication of the Chamokane Basin system included the Chamokane River, tributaries, and connected groundwater.¹⁵⁰ Regulatory jurisdiction over the basin was also at issue.

The Spokane Indian Reservation, like many reservations, was “squared” for allotment and opened for settlement under the Dawes Act.¹⁵¹ Some parcels were acquired under the Homestead Act,¹⁵² others were allotted, and most of the land was reacquired by the tribe and returned to trust status.¹⁵³ The Ninth Circuit Court of Appeals addressed the priority dates and regulatory issues that arose from this history.

First, the court held that where the tribe reacquired “surplus” land — land sold through the Homestead Act — and that land carried a perfected water right under state law, the tribe obtained a state water right with a priority date as determined by state law.¹⁵⁴ The court found that once the land was severed from the reservation and sold as part of the public domain, any reserved rights were also severed and lost forever.¹⁵⁵ The tribe, as subsequent purchaser, also purchased any attached water right.¹⁵⁶ Second, where it reacquired surplus land with no water right or an abandoned right, the priority date was held to be the date of reacquisition, not the date of the reservation.¹⁵⁷ The court found that the tribe’s purchase under this circumstance was analogous to creating a new reservation.¹⁵⁸ Third, where the tribe reacquired allotment land from non-Indians, the priority date was the date of the reservation.¹⁵⁹ The court determined that if the Walton users lost any part of their reserved right, that right was also lost to the reacquiring tribe.¹⁶⁰

Next, the court addressed the jurisdictional dispute between the tribe and state. As in *Walton*, it applied *Montana* to determine whether the tribe’s interests were sufficiently threatened to invoke administrative and regulatory jurisdiction.¹⁶¹ It found that the tribe’s interest in protecting its water rights from encroaching non-Indians did not translate into jurisdiction over non-Indians because (1) the right was quan-

149. *Id.* at 1361.

150. *Id.*

151. *Id.*

152. Act of May 29, 1908, ch. 217, 35 Stat. 458.

153. *Anderson*, 736 F.2d at 1361.

154. *Id.* at 1361, 1363.

155. *Id.* at 1362-63.

156. *Id.* at 1363.

157. *Id.* at 1361.

158. *Id.* at 1363.

159. *Id.* at 1361-62.

160. *Id.*

161. *Id.* at 1364-65.

tified, and (2) a federal water master was appointed to administer the competing rights according to their priority.¹⁶² As a result, it held that the state could administer non-Indians' use of "excess" or nonreserved water on fee lands within the reservation.¹⁶³ The master, not the state, would be in charge of shutting off water used by the tribe on reacquired surplus land with an attached state water permit.

The court next found that the state was not preempted from jurisdiction over non-Indians who used excess water on fee lands within the reservation.¹⁶⁴ It found that "[t]he weight of the state's interest depends, in large part, on the extent to which waterways or aquifers transcend the exterior boundaries of Indian country."¹⁶⁵ It found that the Chamokane Basin uses affected fee users both on and off the reservation, whereas *Walton* involved only allotment purchasers within a hydrological basin entirely contained by the reservation.¹⁶⁶

Since the river in question originated outside the reservation, abutted it for only a short distance, and then departed to flow into the Spokane River, a physical contrast with the facts in *Walton* was also manifest.¹⁶⁷ Because of this, the court held that the state had a legitimate interest in regulating the use of non-Indians that did not infringe on the tribes' health or welfare.¹⁶⁸ Further, because a federally appointed water master monitored the adjudicated rights, the tribes' interest in regulating all users on the Chamokane River within the reservation was not as critical as in *Walton*.¹⁶⁹

In sum, the state had the authority to issue and enforce its permits for excess water within the reservation. The source of the authority arose from the existence of excess water, the hydrological circumstances, and potential effect on non-Indian users off the reservation, but not from the mere issuance of permits or the user's non-Indian status.

162. *Id.* at 1365.

163. *Id.* The court noted that the state should issue permits for excess water only. *Id.* If the state issued permits for nonexistent excess water, the loss was to be borne by the permittee. *Id.* However, four years earlier the *Walton* court observed that unused Indian reserved water was available for appropriation by non-Indians. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46 (9th Cir. 1981). It is unclear whether the state of Washington, when it issues permits, distinguishes between "excess" water and unused Indian reserved water. Such a distinction would put non-Indian users on notice that their water may be called at a later date, creating certainty by permitting such users to invest accordingly.

164. *Anderson*, 736 F.2d at 1365-66. The court took note of the federal government's basic deference to state water law, then distinguished *Walton* by comparing the users and basins in adjudication. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 1366.

168. *Id.*

169. *Id.*

In *Holly v. Confederated Tribes & Bands of Yakima Indian Nation*,¹⁷⁰ the federal district court held that the tribe's assertion of "territorial" jurisdiction over all water users was not sufficient to confer regulatory jurisdiction over non-Indian users of excess water within the reservation.¹⁷¹ The water rights in question had been adjudicated more than fifty years ago, under the assumption that the appurtenant land was properly opened for non-Indian settlement.¹⁷² Subsequent litigation proved that the United States had erroneously deeded this land.¹⁷³ Some of the land was returned to trust status, but the vast majority remained in non-Indian hands and the tribes were awarded compensatory damages.¹⁷⁴ In its water code, the tribe asserted that all of the water within, underneath, or flowing through the reservation was reserved for the use of their members.¹⁷⁵ Since the tribes' government was revitalized under the Indian Reorganization Act of 1934, its constitution stipulated that enacted ordinances required approval by the Department of the Interior.¹⁷⁶ The tribes' water code was not approved because pressure from various state organizations caused the Department to impose a moratorium on approvals, pending the adoption of regulations governing tribal water codes.¹⁷⁷

The tribes nonetheless attempted to enforce the code against non-Indians using excess water within the reservation.¹⁷⁸ In its first holding, the district court denied tribal regulatory jurisdiction over non-Indians due to the nonseverability of a clause providing criminal penalties for code violations, not because the code had not received Department approval.¹⁷⁹ In an unpublished opinion,¹⁸⁰ the Ninth Circuit remanded the case for further deliberations.¹⁸¹

In its second opinion, the district court again held that the tribes did not have sovereign regulatory jurisdiction over non-Indian users of excess water simply because they resided within the borders of the reservation.¹⁸² Basing its conclusion on *Montana*, the court found that non-Indians' use of excess water did not threaten or directly affect the

170. 655 F. Supp. 557 (E.D. Wash. 1985) (*Holly II*).

171. *Id.* at 559.

172. *Holly v. Totus*, 655 F. Supp. 548, 551-52 (E.D. Wash. 1983) (*Holly I*).

173. *Id.* at 551.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 550. The existence of excess waters was stipulated to by the parties. *Holly v. Confederated Tribes & Bands of Yakima Indian Nation*, 655 F. Supp. 557, 559 n.2 (E.D. Wash. 1985) (*Holly II*).

179. *Holly I*, 655 F. Supp. at 553.

180. 749 F.2d 37 (9th Cir. 1984).

181. *Holly II*, 655 F. Supp. at 577.

182. *Id.* at 559.

tribe's political integrity, economic security, health, or welfare.¹⁸³ It found that the non-Indians maintained a "peaceful co-existence" with Indian users and the tribes.¹⁸⁴ As such, the tribes did not possess "territorial" jurisdiction based on *Montana*.¹⁸⁵ Further, the court held that since the non-Indians were not using Indian reserved water, the tribes could not assert proprietary jurisdiction.¹⁸⁶

In *In re Rights to Use the Water in Big Horn River (Big Horn I)*,¹⁸⁷ the Wyoming Supreme Court affirmed that the Shoshone and Arapahoe tribes were entitled to 477,000 acre-feet of surface water under the PIA standard.¹⁸⁸ The lower court ruled that the state engineer had the "primary regulatory responsibility" for administering the adjudicated decree.¹⁸⁹ The United States government argued that either the tribes or a special master should administer the decree.¹⁹⁰ The Wyoming Supreme Court upheld the state engineer's authority to administer the decree against non-Indians. The state water engineer was given authority to enter the reservation in order to monitor private appropriators' uses to prevent their infringement on tribal users.¹⁹¹ In conjunction with this authority, the water engineer may also "incidentally monitor" tribal use of "excess" water.¹⁹² He was not given authority to physically shut off the gates of tribal members who may be using more water than their entitlement.¹⁹³ Rather, he could only observe the violations and file suit on behalf of the state to enjoin them.¹⁹⁴ He did have concurrent authority to shut off non-Indians' gates upon determining that they were infringing on tribal reserved rights.¹⁹⁵

The *Big Horn I* court found that state administration of reserved water rights was not preempted by federal law.¹⁹⁶ However, the McCarran Amendment did not directly mandate state administration.¹⁹⁷

183. *Id.* at 558-59.

184. *Id.* at 559.

185. The court specifically refused to determine whether the state or the federal government had the authority to regulate lands using "excess" water. *Id.* at 559-60.

186. *Id.*

187. 753 P.2d 76 (Wyo. 1988), *aff'd by an equally divided Supreme Court per curiam*, 492 U.S. 406, *reh'g denied*, 492 U.S. 938 (1989).

188. *Id.* at 101, 105-06.

189. *Id.* at 114.

190. *Id.* at 114-15.

191. *Id.* at 115.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 114.

197. *Id.* at 114-15; *cf. Holly v. Confederated Tribes & Bands of Yakima Indian Nation*, 655 F. Supp. 557, 560 (E.D. Wash. 1985) (*Holly II*) (the McCarran Amendment "was not meant to address 'the entire field of water law litigation involving the federal government.'").

Yet in this case, it was possible that the state could adequately administer the decree because the United States admitted that an independent water master could adequately enforce the decree in lieu of the court itself, through the appointment of a special master.¹⁹⁸ Apparently, this left the door open for the appointment of any appropriate person to administer the decree, including Wyoming's water engineer.

Where users under state law encroach on Indian reserved rights, the *Big Horn I* court specified that the tribes must first lodge a complaint with the state engineer.¹⁹⁹ If he does not satisfactorily protect their rights, the tribes may then file suit in court to enjoin the uses.²⁰⁰ However, where the state engineer is granted authority to administer the respective water rights rather than a United States water master, a jurisdictional time bomb is created.

In *In re the General Adjudication of All Rights to Use Water in the Big Horn River System (Big Horn II)*,²⁰¹ the Wyoming Supreme Court expanded the water engineer's narrowly circumscribed authority to merely *administer* or *monitor* the amounts of water that each governmental entity was entitled.²⁰² The Court held that the water engineer must not comply with a tribal "call" for water to be used for a legitimate tribal purpose if water was not originally reserved for that purpose and the use is not recognized under Wyoming state law.²⁰³

The Shoshone and Arapahoe tribes enacted an interim water code to regulate their adjudicated entitlement in *Big Horn I*.²⁰⁴ Among the legitimate uses under the code was the maintenance of an instream flow to maintain a fishery and provide for groundwater recharge and water recreation.²⁰⁵ In order to implement this use, the tribes made a "call" to the engineer to provide sufficient adjudicated water to fulfill this use.²⁰⁶ Enforcing the call would potentially require the engineer to shut off water supplied to nonmember users since the tribes' right to the water was superior in time.

The engineer refused.²⁰⁷ The tribes, in compliance with *Big Horn I*, filed a complaint in state district court requesting that the engineer be held in contempt and that he be replaced with a special master.²⁰⁸ The

198. *Big Horn I*, 753 P.2d at 115.

199. *Id.*

200. *Id.*

201. Nos. 91-83, -84, -91, -92, -93, -94, -96, -97, 1992 WL 119212 (Wyo. June 5, 1992).

202. *Id.* at *5-6.

203. *Id.* at *5.

204. *Id.* at *1.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at *2.

district court held that the tribes' use was legitimate and enforceable; the tribes were not required to comply with the strictures of Wyoming state law.²⁰⁹ It also removed the state engineer as administrator of all the parties' water rights and replaced him with a tribal administrator.²¹⁰

The Wyoming Supreme Court reversed the district court.²¹¹ It held that the tribes were restricted to using their adjudicated right for the narrow agricultural purpose for which the right was quantified.²¹² Since there was no treaty provision regarding a fishery flow right, the tribes' adjudicated amount did not include water for an instream flow.²¹³ As such, they were precluded from using their adjudicated right for that purpose.²¹⁴

The Wyoming Supreme Court applied the purely federal reserved rights doctrine utilized in *United States v. New Mexico* rather than the Indian reserved rights doctrine: If the tribes wished to use water for any purpose not enumerated in the treaty creating the reservation, they had to comply with Wyoming state law.²¹⁵ If state law did not recognize the proposed use, then the tribes like any private citizen would be denied a permit for that proposed use.²¹⁶ Since Wyoming did not recognize private appropriation for instream flows, any tribal request to use the water for that purpose was denied.²¹⁷ As such, the court held that the engineer's refusal to comply with the tribes' water call was legitimate and there was no need to replace him.²¹⁸

Protests to the contrary notwithstanding, *Big Horn II* was not based on valid state property law grounds.²¹⁹ Rather, the fragmented decision infringed on the tribes' sovereign *proprietary* authority to regulate the uses of their adjudicated water by permitting the engineer to apply state law instead of tribal law when deciding whether a water call was valid.²²⁰ In this author's opinion, the case will be appealed, providing the Supreme Court an opportunity to distinguish between Indian and

209. *Id.*

210. *Id.*

211. *Id.* at *4, *9.

212. *Id.* at *4. Such purpose was "purely agricultural." *Big Horn I*, 753 P.2d at 95.

213. *Big Horn II*, 1992 WL 119212 at *4.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at *6.

218. *Id.* at *9.

219. *Id.* at *4.

220. See *supra* notes 216-17 and accompanying text. The *Big Horn II* decision contained five separate opinions. See *Big Horn II*, 1992 WL 119212 at *1 (Macy, J.); *id.* at *10 (Thomas, J., concurring); *id.* at *12 (Cardine, J., concurring in part and dissenting in part); *id.* at *16 (Brown, J., concurring in part and dissenting in part); *id.* at *19 (Golden, J., dissenting).

federal reserved water rights. It should most likely determine whether the state's "backdoor" method of applying state water regulations through the engineer's mere authority to count water violates 25 U.S.C. § 1322(b). There, Congress stated that no state shall impose any regulations pertaining to tribal water rights that are "inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or . . . confer jurisdiction upon the State to adjudicate . . . the ownership or right to possession of such property or any interest therein."²²¹ Not only does the state law violate the tribes' interim water code enacted pursuant to the Indian Reorganization Act of 1934,²²² it also violates the very principles underlying the Indian reserved right doctrine as construed in *Walton*, decided after *New Mexico* and denied certiorari by the Supreme Court.²²³ There, the *Walton* court applied federal law and specifically permitted the tribes to use their *Winters* right for an instream flow even though the right was quantified under a strict agricultural purpose standard and did not include an amount for instream flows.²²⁴

The extent of an Indian reserved right is not a species of state or tribal regulatory law, but a federal question that is resolved in a state court. Enforcement of a water adjudication is not the *regulation* of a *use*, but the *protection* of a *right*. The tribal court may not have jurisdiction to hear a purely regulatory complaint against a non-Indian using excess water.²²⁵ A complaint brought in tribal court by an individual member or by a tribal private entity to protect a reserved right may properly avoid categorization as a regulatory complaint, and be jurisdictionally sound under Indian common or statutory law.²²⁶ To entertain such a suit a tribe must review its own laws to ensure that it has enacted the requisite personal and subject-matter components necessary to secure jurisdiction.²²⁷ The tribal court may expect a review of its jurisdictional findings in federal court.²²⁸ In sum, a tribe that

221. 25 U.S.C. § 1322(b) (1988).

222. *Id.*

223. 454 U.S. 1092 (1981).

224. *Confederated Colville Tribes v. Walton*, 647 F.2d 42, 48-49 (1981).

225. *See Holly v. Confederated Tribes & Bands of Yakima Indian Nation*, 655 F. Supp. 577 (E.D. Wash. 1985) (*Holly II*). *Compare* *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 428-30 (1989) (White, J., plurality opinion) (the tribe has no regulatory authority over the conduct of non-Indians on fee lands within the reservation) *with id.* at 438-44 (Stevens, J., plurality opinion) (balance of physical and demographic factors may preclude tribal regulatory jurisdiction over non-Indians on fee land).

226. *See National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985) (the tribal court has authority to determine whether it has jurisdiction to hear a civil complaint arising on fee land within the reservation).

227. *See generally* Pommersheim, *supra* note 113.

228. *See National Farmers*, 471 U.S. at 856-57.

has undergone a quantification of its water right should not be denied jurisdiction to enforce that right.

The above discussion applies where a tribe has quantified its water rights through adjudication. Below is a discussion of how settlements address the jurisdictional issues.

B. Regulatory Jurisdiction Where the Right Has Been Negotiated

The McCarran Amendment's failure to provide the states with a forum for limiting the extent of *Winters* claims is perhaps mitigated by the states' ability to resolve the competing jurisdictional claims accompanying a river-system adjudication.²²⁹ Where tribes and the states agree to settle *Winters* claims they are able to determine each other's jurisdictional limits through negotiation rather than face the uncertainties that accompany a judicial determination of each entity's jurisdictional interests.²³⁰ As such, each party is able to cede issues that it considers to be of lesser importance in order to reach a satisfactory agreement over other issues each party rates a higher priority. Jurisdictional issues are subject to such negotiation.²³¹ Following is a discussion of the negotiated outcomes of the jurisdictional issues in the Fort Peck and Colorado-Ute agreements.

The parties to the Fort Peck compact agreed that all three governments would play a role in administering the water. First, the compact provides for federal administration of water rights under the Fort Peck Irrigation Project;²³² second, state administration and regulation of (1) non-Indian rights and uses within the reservation and (2) uses of reserved water off the reservation;²³³ third, tribal administration and regulation of tribal members and Walton users on the reservation.²³⁴

Disputes between tribal, Indian, and Walton users of reserved water and users under state law are arbitrated by a three-member panel.²³⁵ The panel is composed of a tribal representative, a representative of the state, and a neutral member selected by the other two.²³⁶ Appeals from the board can be taken to any court of "competent jurisdic-

229. See *In re Rights to Use Water in Big Horn River*, 753 P.2d 76, 114-15 (Wyo. 1988) (*Big Horn I*), *aff'd by an equally divided Supreme Court per curiam*, 490 U.S. 406, *reh'g denied*, 492 U.S. 938 (1989). See *supra* notes 187-224 and accompanying text (discussing the jurisdictional issues accompanying *Big Horn I* and *Big Horn II*).

230. *Big Horn I*, 753 P.2d at 114-15.

231. See *SLY*, *supra* note 56, at 74 ("In the Fort Peck settlement, the Tribal Council was particularly interested in regulatory powers.").

232. *Id.* at 154.

233. *Id.* at 154-55.

234. *Id.* The state is specifically precluded from issuing water permits to Walton users. *Id.* at 155.

235. *Id.*

236. Rundle, *supra* note 111, at 14-15.

tion.”²³⁷ However, the tribal court is “competent” only if all parties agree.²³⁸

Under the Colorado-Ute agreement, the tribe regulates only tribal reserved rights.²³⁹ Secretary of the Interior administers the rights of Walton users, and the state enforces the rights of all non-Indian users on fee land.²⁴⁰ The state’s water court system has jurisdiction to resolve disputes between tribal, Walton, and non-Indian users.²⁴¹ The tribe has jurisdiction over disputes where only tribal members or users of reserved water under contract with the tribe are involved.²⁴²

The agreements reveal that the parties can successfully negotiate issues relating to the enforcement of rights. However, the pacts do not address the issue of which government has the authority to enforce water quality complaints or conflicts arising from competing priorities.²⁴³

C. Regulatory Jurisdiction Without Quantification

Quantification of the tribe’s reserved right is not necessary in order to enact and enforce a water code. Without quantification, however, the basis of jurisdiction is purely territorial.²⁴⁴ It must be noted that within a reservation which opened to settlement by way of the Dawes Act,²⁴⁵ statewide water regulations may apply to non-tribal member users on fee lands.²⁴⁶

However, state-based water codes do not apply to tribal members on trust lands.²⁴⁷ A tribal water code is enforceable against members

237. SLX, *supra* note 56, at 155.

238. Rundle, *supra* note 111, at 14-15.

239. SLX, *supra* note 56, at 155.

240. *Id.* at 155-56.

241. *Id.* Federal court is a potential forum for issues not normally resolved in the state’s water court. *Id.*

242. *Id.* at 156.

243. The Fort Peck agreement specified that the state must consider all tribal uses to be beneficial unless the use is wasteful. *See* Rundle, *supra* note 111, at 12. Whether pollution of water constitutes waste, and whether the state has jurisdiction to prevent a waste of water, were not determined by the agreement. The Colorado-Ute parties raised the issue that tribal application of its water to alkaline soils may cause the return flow to carry excessive amounts of sodium. However, this author is uncertain as to whether jurisdiction over the water quality of return flows was addressed by the parties.

244. *See* *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). *See generally* Clayton, *supra* note 3.

245. 25 U.S.C. §§ 351-358 (1988).

246. *See* *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989).

247. COHEN, *supra* note 6, at 349; SLX, *supra* note 56, at 165 (absent the express congressional grant of jurisdiction, state water laws are not enforceable on tribal land) (citing 25 U.S.C. § 1322(b) (1988)).

on trust land and allotment land held in trust, and Walton users, but perhaps not against non-tribal member users on fee lands. As such, the tribe's ability to protect its reserved right against encroaching non-tribal member users is not a settled matter.

Without quantification, the tribe must exercise its ability to regulate the *uses* within the reservation in order to protect one user's *right* against another's use.²⁴⁸ In order to properly protect each user's right to use water without infringement by other users, the tribe must enact both an effective water code and appropriate civil laws. Following is a discussion of the tribe's options where its *Winters* right has not been quantified. First, the section discusses the precedents limiting tribal regulatory jurisdiction over non-Indians on fee lands. Second, the section relates the experiences of the Colville and Umatilla Reservations, whose water departments enforce their water codes against nonmembers on fee lands along with the factors that provided for such jurisdiction. Finally, the section explores the alternatives facing the Sioux and other reservations when pursuing jurisdiction to enforce their own water codes.

1. *Precedents Regarding Regulatory Jurisdiction*

In *Montana v. United States*,²⁴⁹ the Supreme Court reversed the previous presumption that tribal sovereignty and the policy of self-government authorized regulatory jurisdiction over non-Indian conduct on fee lands.²⁵⁰ In preventing tribal jurisdiction over hunting and fishing on fee lands within the reservation, the Court limited tribal regulatory jurisdiction to two situations: (1) where the non-Indian enters into a consensual relationship with the tribe,²⁵¹ and (2) where non-Indian conduct on fee lands "threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe."²⁵²

The second *Montana* exception to the presumption against tribal regulatory jurisdiction over nonmembers was broad enough to encompass every major issue, and permit tribal jurisdiction, regardless of the presumption.²⁵³ However, the reliability of *Montana's* second exception

248. A user's right includes the right to use a certain quality as well as quantity of water.

249. 450 U.S. 544 (1981).

250. *Brendale*, 492 U.S. at 455-56 (Blackmun, J., dissenting); Pommersheim, *supra* note 113, at 345.

251. *Montana*, 450 U.S. at 565.

252. *Id.* at 566.

253. See *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (1981) (due to the hydrologically enclosed nature of the basin within the reservation, tribal self-government would be sufficiently threatened without jurisdiction over the "excess" water within it); see also *Confederated Tribes & Bands of Yakima Indian Nation v. Whiteside*, 828 F.2d 529 (9th Cir. 1987), *rev'd sub nom. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 409 (1989).

has been cast in doubt by a subsequent Supreme Court opinion, *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*.²⁵⁴

Brendale has undermined the tribe's legislative authority over the conduct of nonmembers on fee lands within the reservation even where the conduct threatens or has some direct effect on the political integrity, the economic security, health, or welfare of the tribe. Justice White's plurality opinion held that tribal regulatory jurisdiction over nonmembers on fee lands within the reservation is prohibited *per se*.²⁵⁵

Justice Stevens' plurality opinion in *Brendale* reached a different conclusion. His opinion held that the courts should examine the facts and circumstances as they exist at the time of the litigation in order to determine which governmental entity has jurisdiction.²⁵⁶ If the area of the dispute contains a primarily non-Indian population, with significant fee ownership and prevailing state services, the state should be awarded jurisdiction.²⁵⁷ Conversely, if the area is primarily populated by Indians, state services are minimal, and fee parcels are scarce, the court should find that the tribe is the proper regulatory authority.²⁵⁸

While tribal legislative/regulatory jurisdiction is not prohibited *per se*, the Supreme Court has placed a premium on existing, successful, evenhanded enforcement of tribal laws. The message to the tribes is to pursue effective administration of tribal codes before changing demographics and physical conditions indicate that nonmember conduct is too prevalent and ingrained to deny state regulatory jurisdiction. It is important for the tribes to enact and demonstrably enforce an effective water code. Successful enforcement of the water code is a valuable ingredient, and perhaps an essential element, of the code's legitimacy should there be litigation over its validity as it applies to non-tribal members.²⁵⁹

On many reservations, the distinction between "open" and "closed" areas is not as clear as the Supreme Court found on the Yakima Reservation in *Brendale*. As such, a *Brendale*-type analysis may not resolve the jurisdictional issue. Further, a tribe should enact its water code with the belief that it can be fairly enforced against members and nonmembers alike.²⁶⁰

254. 492 U.S. 408, 428-32 (1989).

255. *Id.* at 428-31. Instead, the tribe retained a "protected interest," which it could assert in federal district court after seeking relief under the proper state authority when non-Indian conduct imperiled a tribal interest. *Id.* at 431.

256. *Id.* at 441-48.

257. *Id.*

258. *Id.* at 437-44.

259. *Id.* at 445-66. See *infra* note 293 for a discussion of the Secretary of the Interior's moratorium on approving tribal codes and the subsequent "catch-22" position that the tribes are put in due to the *Brendale* decision.

260. See generally Pommersheim, *supra* note 113; *Brendale*, 492 U.S. at 443 (Stevens,

2. Territorial Jurisdiction Regardless of Montana and Brendale Decisions

Outside of the courtroom, tribal territorial jurisdiction over water uses on the reservation may depend on the state's attitude, level of active management, and budgetary constraints.²⁶¹ It may also depend on whether the number of nonmembers, and the amount of acreage they own, is substantial enough to persuade the state to regulate their uses.²⁶² Finally, hydrological circumstances may determine whether the state has a sufficient interest to pursue the regulation of nonmembers on fee lands.²⁶³ Following is a discussion of the reasons why the Colville and Umatilla tribes regulate the uses of non-Indians on fee lands within their reservations.

(a) The Colville Experience

Today, the Colville Reservation Water Code²⁶⁴ is enforceable against non-Indians on fee lands within the reservation.²⁶⁵ Both Indian and non-Indian users, including users on fee lands, must obtain their permits with the tribe.²⁶⁶ Tribal jurisdiction over non-Indians has evolved since the enactment of a water code in 1974. The state's own limitations, and the tribes' ability to enforce their code, has combined to confer regulatory jurisdiction on the tribes.

J., plurality opinion) (tribal regulations prohibiting hunting and fishing on nonmember fee lands while allowing such activities on tribal lands in *Montana* was a factor in denying tribal regulatory jurisdiction).

261. See *infra* notes 264-71 and accompanying text (discussing the Colville experience).

262. See *infra* notes 272-83 and accompanying text (discussing the Umatilla experience).

263. See *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (1981).

264. COLVILLE RESERVATION WATER CODE § II(C) (1974).

265. Telephone Interview with Gary Pasmore, Director, Water Resources Department, Colville Indian Reservation (July 2, 1991) [hereinafter Pasmore Interview, July 2].

266. The Colville Water Code is administered through a permit system. COLVILLE RESERVATION WATER CODE § II(C) (1974). Its permit is tantamount to a permanent license to use water. Telephone Interview with Gary Pasmore, Director, Water Resources Department, Colville Indian Reservation (Aug. 8, 1991) [hereinafter Pasmore Interview, Aug. 8]. Users are awarded permits so long as there is available water and the potential for conflict with existing uses is minimal. *Id.* Although most permits are for domestic-use wells, some larger permits have been granted to non-Indians for irrigation projects. *Id.* In fact, more permits for more amounts of water are issued to non-Indians than Indians. *Id.*

The permits are computerized and cross-filed. Some of the methods include filing by name, location, type of use, type of diversion method, and amount diverted. The code allocates water during times of shortage according to the type of use. *Id.* However, the director is considering adopting a "first in time, first in right" system among similarly situated users of tribal water in order to avoid a waste of water. *Id.*

The Colville Reservation's water director stated that in the past, the state of Washington most likely issued permits beyond the amount of water available for appropriation under state law within the reservation.²⁶⁷ Because of this, overappropriation of some of the water systems exists.²⁶⁸

Water problems in other parts of the state have commanded the state's budget and personnel.²⁶⁹ The existence of a viable water administration system on the Colville Reservation has relieved the state of the need to expend resources in that area.²⁷⁰ The attorney general in that state indicated to the Colville tribes' water resources director that his office was not interested in supporting a challenge against tribal jurisdiction.²⁷¹ As such, Washington's budgetary constraints plus the existence of a viable tribal water code caused the state to acquiesce to, if not endorse, tribal regulatory authority over non-Indian water users on the reservation.

(b) The Umatilla Experience

The Umatilla Indian Reservation, located within the borders of the state of Oregon, also exerts territorial jurisdiction over waters within the reservation. The tribe's ability to exercise jurisdiction over non-Indians on fee land without a jurisdictional dispute is due to the tribe's historical cooperation with the county, fair administration of their zoning code throughout the reservation, and proof that their water code was not only superior to the state's code but it could be enforced by the tribe better than the state could enforce its own code.²⁷²

In 1981, the Umatilla tribe took a hard look at its water situation.²⁷³ It discovered that off-reservation users were pumping groundwater at

267. *Id.*

268. There is very little surface water within the reservation but sufficient quantities of groundwater. *Id.* The Columbia River serves as the reservation's eastern border and part of its southern border. Although the reservation contains over 1 million acres, one source has estimated that only 15,000 acres are practicably irrigable. See U.S. BUREAU OF INDIAN AFFAIRS, INDIAN IRRIGATION PROJECTS PRESENTLY INCLUDED IN THE BIA IRRIGATION CONSTRUCTION PROGRAM (1975), reprinted in INDIAN WATER RIGHTS IN THE WEST 86, 89 (Western States Water Council ed., 1984).

269. Pasmore Interview, Aug. 8, *supra* note 266.

270. *Id.*

271. *Id.*

272. Telephone Interview with Mike Farrow, Director, Department of Land and Natural Resources, Umatilla Indian Reservation (Aug. 5, 1991) [hereinafter Farrow Interview, Aug. 5].

273. Address by Douglas Nash, Symposium on Indian Water Policy (Nov. 9, 1981), in INDIAN WATER POLICY IN A CHANGING ENVIRONMENT 81, 82 (Am. Indian L. Training Program 1982) [hereinafter Nash address]. Demographically, the Umatilla Reservation is comprised of half fee land and half tribal land. Farrow Interview, Aug 5, *supra* note 272. The respective populations are also evenly divided: there are 1700 Indians and 1600 non-Indians within the borders of the reservation. *Id.* Two thousand acres are currently being irrigated by non-Indians; tribal members irrigate 200 acres. *Id.*

a rate faster than it was recharging, which was affecting on-reservation wells.²⁷⁴ Further, the state's inadequate regulation of well drilling resulted in the construction of wells that leaked and created pollution among the different aquifers.²⁷⁵ Moreover, the state did not have the resources, water management capability, or desire to stop the ground-water mining that was taking place.²⁷⁶

The tribe determined that its best interests lay in preserving the quantity and quality of water on the reservation themselves; they could not rely on the federal government or state to do it for them.²⁷⁷ To achieve this purpose they decided to enact and enforce a water code.²⁷⁸

The director of the Umatilla Reservation Department of Land and Resources stated that the tribes' ability to enforce their water code since 1981 can be traced to their historical track record of fairly enforcing a comprehensive zoning code over members and nonmembers since 1974.²⁷⁹ When non-tribal members saw that the zoning department was not afraid to enforce its code evenhandedly, credibility in the program was instilled and compliance followed.²⁸⁰ There is no argument over whether the water belongs to the tribes or the state.²⁸¹

Through communication, the tribes convinced the state that its code was more complete and that they could manage the water within the

274. Farrow Interview, Aug. 5, *supra* note 272.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* The tribes basically reshaped the state's water code to reflect their own interests. They replaced the state's consumption-oriented policies with policies that emphasized conservation, tightened up the state's well drilling standards, and eliminated the first-in-time priority system with a "balancing the uses" method. *Id.* The tribes enforce the code through a permit system. UMATILLA INTERIM WATER CODE § V (1981). The permits do not confer a permanent license to the user. *Id.* § V(6)(H)(1). Rather, the permit is renewable every five years. *Id.*

In 1986, the tribes drafted a new water code that integrates four essential aspects of a successful, comprehensive plan. Telephone Interview with Mike Farrow, Director, Department of Land and Resources, and Aaron Skervin, Water Manager, Umatilla Indian Reservation (Aug. 6, 1991) [hereinafter Farrow & Skervin Interview]. First, it contains an allocation scheme where eighteen beneficial uses are listed. They emphasize conservation and water quality over consumption. Second, the drafted code authorizes the tribes to embark on a quantification of their water rights through negotiation with the state. Third, it specifies how the tribes' municipal water system should operate. Finally, it creates eight water management zones and dictates how water is to be used for developing the different zones, in conjunction with the tribes' comprehensive land zoning ordinance. Implementing the new code is currently on hold because of a lack of funds. Farrow Interview, Aug. 5, *supra* note 272.

279. Farrow Interview, Aug. 5, *supra* note 272.

280. *Id.* The zoning program is also operated by the Department of Land and Resources. *Id.*

281. *Id.*

reservation better than the state.²⁸² Moreover, tribal administration eliminated the state's need to expend its own resources to essentially duplicate the tribes' efforts.²⁸³ As a result, the state has not interfered with the tribes' jurisdiction over non-Indians. In essence, the state's acceptance of tribal jurisdiction could be reduced to two reasons: good business and trust, based on historical experience.

In sum, tribal territorial jurisdiction to regulate the water use of nonmembers depends on the state's agreement or acquiescence. Such acceptance may accrue from the state's interest in saving the resources necessary to administer its water law within the reservation, and its belief that the tribe will administer the code in a fair, evenhanded manner. Where the tribe has no record of regulatory enforcement to be judged by, or where the state has no budgetary concerns or water management problems that consume its resources elsewhere, the tribe's ability to exercise territorial jurisdiction over the water within its state will depend on other factors. Those factors include the demographics of the reservation, tribal-state relationships, and common issues relating to money and power.

III. Policy Issues Tribes Face When Enacting a Water Code

The above sections identify issues that tribes may encounter when deciding whether to quantify their *Winters* rights or enforce their water codes throughout their reservations. The section below discusses issues that tribes may encounter in deciding whether to enact their water codes.

A. Impediments to Enacting a Water Code

Tribal governments organized under the IRA²⁸⁴ invariably operate under "boilerplate" constitutions, written by the Bureau of Indian Affairs (BIA) and patterned after the United States Constitution.²⁸⁵ The original constitutions contain a provision that the laws enacted by the tribal council require approval by the Secretary of the Interior before they become effective.²⁸⁶

282. *Id.* While the tribes were attempting to assert regulatory jurisdiction over the reservation, the state was receiving widespread criticism concerning its ability to preserve its own water resources. *Id.*

283. *Id.*

284. 25 U.S.C. §§ 461-479 (1988).

285. COHEN, *supra* note 6, at 149.

286. 25 U.S.C. § 476 (1988); *cf.* ROSEBUD SIOUX TRIBE CONST. art. 4, § 2 (repealed 1985) ("Any resolution or ordinance which, by the terms of this Constitution, is subject to review by the Secretary of the Interior, shall be presented to the Superintendent of the Reservation, who shall, within ten (10) days hereafter, approve or disapprove the same.").

In the mid-1970s, the western states pressured the Department of the Interior to refuse approval of tribal water codes.²⁸⁷ In response, the Secretary placed a moratorium on the approval of all water codes pending the adoption of regulations providing guidelines for approval.²⁸⁸

Regulations were proposed in 1977 and revised in 1981, but never adopted.²⁸⁹ Whether the moratorium has been lifted or not is a matter of debate. However, tribes organized under the IRA continue to operate with uncertainty²⁹⁰ and suspicion that the withholding of approval is politically guided.

The Water Resources Director of the BIA stated that tribal water codes are approved on an "*ad hoc*" basis.²⁹¹ However, the criteria for approval arise from the very forces that caused the moratorium in the first place. In order to obtain approval, there must be a showing that the water code will not cause strained relations between the state and the tribe.²⁹² Under this "political purity" standard, the tribe invariably must send its water code to the state attorney general's office. The office then responds with any objections that it may have. The Secretary then reviews the objections to determine whether they are substantial enough to cause political turbulence. If the objections are substantial, the water code is not approved.

In order to overcome nonapproval, the tribe must make presentations to the BIA superintendent on the reservation, the regional superintendent, and others in the BIA hierarchy leading to the Secretary of the Interior. The presentations must convince the BIA authorities that the water code should be approved regardless of a state's objections.²⁹³

287. Getches, *From Conflict to Pragmatism*, *supra* note 117, at 527.

288. *Id.* (citing Memorandum from Rogers C.B. Morton, Secretary of the Interior, to the Commissioner of Indian Affairs (Jan. 15, 1975)).

289. *Id.* at 527-28.

290. In 1977, the Rosebud Tribal Council enacted a comprehensive water code. Resolution No. 77-32, Rosebud Sioux Tribe (1977). The superintendent did not approve or disapprove the code, but "noted and transmitted" it. Memorandum from Wallace G. Dunker, BIA Field Solicitor, to the BIA Area Director (July 18, 1977). Absent approval, the tribe has not attempted to enforce its code, even though it has the technological expertise and personnel to do so and has subsequently removed the provision from its constitution requiring the Secretary's approval of such laws. See Telephone Interview with Syed Huq, Director, Office of Water Resources, Rosebud Sioux Reservation (Aug. 5, 1991). See *supra* note 286.

291. Telephone Interview with Fain Gildea, Director, Water Resources, BIA (June 21, 1991) [hereinafter Gildea Interview].

292. *Id.* Ms. Gildea referred to this procedure as requiring "political purity" between the tribe and the state. *Id.*

293. *Id.* This procedure is referred to as a "strategy to influence" the Department of the Interior. *Id.* Besides providing the states with virtual veto power over the tribe's water code, the procedure conflicts with Stevens' plurality opinion in *Brendale*: if the state can obstruct the tribe's ability to regulate the development of resources within the

The Fort Peck Water Code was approved by the Secretary; its code was enacted pursuant to the water compact between the Fort Peck Reservation and the state of Montana. As such, it easily passed the "political purity" standard. To date, it is the only water code approved under this "ad hoc" method.

Further, the tribe may amend its constitution to remove the obstacles to enacting a valid water code.²⁹⁴ By repealing the provision requiring the Secretary's approval of ordinances, the moratorium on approval is no longer applicable.²⁹⁵ Absent a tribal constitutional amendment, the tribe may also consider enacting a code enforceable against tribal members only. Such a code will meet the "political purity" standard for approval. More importantly, it will enable the tribe to organize its agencies and regulate the use of water for the benefit of the tribe.

B. Why Enact a Water Code

Water codes reflect a society's outlook as to the purposes that water should serve in its members' lives and culture. If water embodies a tribe's notion of community, then the code should be enacted to preserve water for the use and benefit of all residing within that tribal community.²⁹⁶ A tribe may enact a water code to ensure that it has the means to protect water for the maintenance of its reservation as a permanent homeland.²⁹⁷ Wishing to preserve the quantity and quality of the waters within a reservation,²⁹⁸ a code may enable a tribe to regulate water for the development of economic resources.²⁹⁹ Legal

reservation, the tribe cannot maintain the essential character of the reservation. *See* *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 440 (1989). As such, the tribe cannot prevent the change that causes it to lose jurisdictional authority. *Id.* This situation highlights the "catch-22" position that the tribes are put in: federal authority over the tribes prevents them from asserting the very jurisdiction over the reservation that is essential for them to maintain sovereign jurisdiction.

294. Gildea Interview, *supra* note 291. In 1985, the Rosebud Sioux Tribe passed such an amendment. ROSEBUD SIOUX TRIBE CONST. amend. XVIII. Tribal ordinances no longer require the Secretary's approval. Thus, there are no longer any external barriers to the tribe's enactment of a water code.

295. The tribe is also able to withstand legal challenges to its water code on the basis that it is unconstitutional.

296. NAVAJO TRIB. CODE tit. 22, § 1101 (Supp. 1984-85); ROSEBUD SIOUX WATER CODE § 1.1 (1977); UMATILLA INTERIM WATER CODE § I (1981).

297. Treaty with the Sioux Indians, (Fort Laramie Treaty), Apr. 29, 1868, art. 15, 15 Stat. 635, 640; ROSEBUD SIOUX WATER CODE § 1.1 (1977); NAVAJO TRIB. CODE tit. 22, § 1101 (Supp. 1984-85). Signatories to the Fort Laramie Treaty included the Brule, Oglala, Miniconjou, Yankton, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, Santee, and Arapaho tribes.

298. ROSEBUD SIOUX TRIBAL CONST. preamble. *See supra* notes 273-78 and accompanying text (discussing the purposes for enacting the Umatilla Interim Water Code).

299. ROSEBUD SIOUX TRIBAL CONST. preamble; ROSEBUD SIOUX WATER CODE § 1.1 (1977); NAVAJO TRIB. CODE tit. 22, § 1101 (Supp. 1984-85); UMATILLA INTERIM WATER CODE § I(L)(2) (1981).

control of a tribal resource may aid the tribe in the just, equitable, and orderly distribution of water,³⁰⁰ and also represent an assertion of sovereignty.³⁰¹ Finally, tribal regulation of water serves the general health and welfare interests of a tribe as a whole.³⁰²

A tribe may wish to incorporate language from relevant case law to support its claim for regulatory authority. For instance, it may enact a coherent water code to protect or promote the "political integrity, economic security, and health and welfare" of the tribe³⁰³ or to "preserve the essential character" of the reservation.³⁰⁴ The stated purposes for enacting a water code should accurately reflect the tribe's reasons for enacting it.³⁰⁵ Public meetings to discuss enactment of the code will help define the tribe's purposes, and will instill popular support for the code.³⁰⁶

C. Taking Inventory of the Water, Budget, Office Space and Personnel

1. Water Inventory

In order to effectively administer a water code, a tribe must know how much water exists on and under the reservation, and where it is located.³⁰⁷ It is suggested that a tribe take inventory of its water in

300. NAVAJO TRIB. CODE tit. 22, § 1101 (Supp. 1984-85) (just and equitable); UMATILLA INTERIM WATER CODE § II(A) (1981) (orderly).

301. NAVAJO TRIB. CODE tit. 22, § 1101 (Supp. 1984-85); ROSEBUD SIOUX WATER CODE § 1.1 (1977); UMATILLA INTERIM WATER CODE § I(J) (1981).

302. ROSEBUD SIOUX TRIBAL CONST. preamble; ROSEBUD SIOUX WATER CODE § 1.1 (1977); UMATILLA INTERIM WATER CODE § I(B) (1981) (benefits the reservation as a whole).

303. See, e.g., *Montana v. United States*, 450 U.S. 544, 566 (1981).

304. See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 439 (1989).

305. At least two tribes have asserted territorial jurisdiction as a stated purpose for enacting a water code. See NAVAJO TRIB. CODE tit. 22, § 1101 (Supp. 1984-85); *Holly v. Totus*, 655 F. Supp. 548, 551 (E.D. Wash. 1983) (*Holly I*). The assertion, by itself, was not sufficient to provide tribal territorial jurisdiction over all waters within the reservation. See *Holly v. Confederated Tribes & Bands of Yakima Indian Nation*, 655 F. Supp. 557, 559 (E.D. Wash. 1985) (*Holly II*). The Umatilla Reservation states that the water code applies to the whole reservation. UMATILLA INTERIM WATER CODE § III (1981).

306. Orville St. Claire & Wes Martel, Wind River Associates, Address to the Mni Sose Tribal Water Rights Coalition, in Rapid City, S.D. (July 9, 1991). The Shoshone and Arapahoe tribes of the Wind River Indian Reservation conducted twelve open meetings in three weeks at various locations within the reservation to exchange information concerning the enactment of their water code. A specific topic was discussed at each meeting. The topics included (1) the hydrologic cycle of water within the reservation, (2) jurisdictional issues, and (3) the code itself, including the policies supporting its enactment. The meetings were never closed, and included non-Indians.

307. A search should also be conducted to discover water sources on trust and allotment lands located on diminished portions of a reservation, if applicable.

two steps.³⁰⁸ First, a member or committee may uncover all existing information dealing with the whereabouts of water within the reservation.³⁰⁹ Such information could be found in sources such as a state's water department, the United States Geological Survey,³¹⁰ the National Weather Bureau, state colleges and universities, and municipal water deliverers.³¹¹

Next, the tribe can verify its initial findings by hiring a professional hydrogeologist or firm.³¹² The tribe should be prepared to pay for the drilling of test wells and building of precipitation gauging and stream gauging stations.³¹³ From these tests, the tribe will learn where the water comes from, where it goes, and what happens to it in between.³¹⁴

2. Office and Staff Inventory

To effectively manage its water resource, tribes have formed water departments. Such departments monitor water users within the reservation along with the quantity and quality of surface and groundwater.

Before enacting a water code, a tribe should weigh its need for one against the cost of effective enforcement. Existence of a tribal water code may not be worthwhile for reservations in the following situations: (1) where water is not being extensively used by members or nonmembers, (2) the tribe does not foresee development of its water resource in the near future by members or non-tribal members, and (3) the tribe's sovereignty will not be eroded if it does not enact and enforce a water code.³¹⁵

D. Tribal Beneficial Uses of Water

Once a tribe determines that its goals weigh heavily in favor of enacting a water code, it may designate water uses that further those goals. "Beneficial uses" of water are those uses which promote the policies identified in a code.³¹⁶ Tribal codes generally list the uses in

308. Douglas Nash, *Tribal Water Code Development*, ROCKY MTN. MIN. L. INST. 117, 118-19 (1985) [hereinafter Nash, *Code Development*].

309. *Id.*

310. The United States Geological Survey may provide matching funds to survey and approximate the amount of water within a reservation. Pasmore Interview, July 2, *supra* note 265.

311. Nash, *Code Development*, *supra* note 308, at 118.

312. *Id.* at 119.

313. *Id.*

314. *Id.* Nash also recommends that the tribe estimates its future water needs. This entails a prediction or estimate of the tribe's future water uses. *Id.*

315. See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 444-49 (1989) (without the enactment and enforcement of regulatory codes, tribes risk losing their ability to determine the essential character of their reservation).

316. *Id.* at 464.

the order of their preference, and define priority of right by priority of use.³¹⁷ The greatest difference between the beneficial uses identified by states as opposed to those identified by tribes is that state uses emphasize consumptive uses and ignore conservation-type uses.³¹⁸ Generally, use lists are not exclusive; this gives a tribe flexibility in recognizing future beneficial uses. A code may emphasize or prohibit uses that (1) waste water, (2) are not in the interest of a tribe, or (3) are contrary to the health or welfare of a tribe.³¹⁹

E. Determining Priorities Among Competing Users

While the priority-based list of beneficial uses resolves disputes between different types of users, it does not address disputes that arise between users for the same purposes. Tribes must choose their method of allocating this scarce resource. The choices range from (1) "first in time, first in right," (2) "reasonable use," and (3) "balancing the uses."

1. First in Time, First in Right

The "first in time, first in right" method of adjudicating disputes is the heart of the law in water-scarce western states.³²⁰ Under this philosophy of allocation, the use of water by the first person may harm another (the second person), who does not receive enough to satisfy her/his needs. By its terms, the second user's harm is both expected and sanctioned if the second user began using water at a later date than the first user. The risk inheres to the second user, who

317. See e.g., NAVAJO TRIB. CODE tit. 22, § 1501(4) (Supp. 1984-85); ROSEBUD SIOUX WATER CODE § 5.1(4) (1977); UMATILLA INTERIM WATER CODE § I (1981). The list of beneficial uses, in their order of preference, include domestic uses, community or municipal uses, stock watering, agriculture, fish and wildlife, recreation, aesthetics, industry, mining, power, flood control, fire protection, water quality, and any other uses that promote the policies of the code.

Priorities according to use are enforced during periods of scarcity. During shortages, the more beneficial uses will continue to receive water at the expense of less beneficial uses. The less beneficial uses may simply be cut off. As such, it is important for the list to accurately reflect the tribe's preferences. Priorities relating to water quality may be enforced any time there is a violation.

318. Farrow Interview, Aug. 5, *supra* note 272.

319. NAVAJO TRIB. CODE tit. 22, § 2301 (Supp. 1984-85); UMATILLA INTERIM WATER CODE § I(L)(5) (1981).

320. See *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882). Almost every water law regime employs a priority system based on priority of time. See generally Frank J. Trelease, *New Water Legislation: Drafting for Development, Efficient Allocation and Environmental Protection*, 12 LAND & WATER L. REV. 385 (1977); Telephone Interview with Mike Farrow, Director, Department of Land and Resources, Umatilla Reservation (Aug. 6, 1991) [hereinafter Farrow Interview, Aug. 6] (rights of existing users are considered prior to approving new permits).

invests accordingly. The emphasis is on efficiency and growth, not harmony among users.³²¹

This method of allocation is relatively easy to enforce since all disputes are governed by a determination of who used the water first. Enforcement entails the singular act of turning off a headgate or capping a well, with periodic reviews to ensure that the water remains turned off.

Determining priorities based on the date of appropriation is perhaps arbitrary, since social policy issues are eliminated from consideration. While a priority system based on the type of use mitigates the harshness of this method, a priority based on the date of appropriation may provide non-tribal members with an unshakable hold on the water. The latter method could be detrimental to a tribe's policy of promoting the interests of its people, when the tribe wishes to use the water in the same manner as non-tribal members. However, the method avoids charges of discrimination that can result from a subjective balancing test, especially where non-tribal members are involved. Quantification will resolve these conflicts.

2. *Proportional Sharing*

A system of proportional sharing promotes harmony over efficiency and growth. It embraces the policy that all users are treated equally. Where water is scarce, however, harmony may be impossible to achieve and can result in waste.³²² Moreover, it is an inefficient system to manage. The regulating agency must oversee ratable cutbacks among all of the users on a continuing basis instead of performing the singular act of shutting off one or several headgates or wells.

3. *Balancing the Uses*

When the enforcing body is required to take an action that may harm an existing user, including the resolution of a complaint against a user, it may employ a "balancing the uses" test.³²³ A water committee balances the user's hardship against the best interests of the tribe and its members, and considers any less harmful alternatives to the proposed action.³²⁴

321. Underscoring this rule is society's policy of ensuring that some survive during times of scarcity rather than permitting all to fail under a ratable apportionment of the water.

322. For instance, a ratable cutback among agricultural users may cause every user to suffer a crop failure, whereas a priority-based system may ensure that some crops are harvested.

323. See e.g., ROSEBUD SIOUX WATER CODE § 5.1(2) (1977); NAVAJO TRIB. CODE tit. 22, § 1501(2) (Supp. 1984-85); UMATILLA INTERIM WATER CODE § V(D)(6) (1981).

324. ROSEBUD SIOUX WATER CODE § 5.1(2) (1977); NAVAJO TRIB. CODE tit. 22, § 1501(2) (Supp. 1984-85); UMATILLA INTERIM WATER CODE § V(D)(6) (1981).

Although this system is time consuming and complicated, its implication could better promote harmony among tribal users.³²⁵ This harmonious goal may be difficult to achieve, where competing uses and scarcity cause displacement among entrenched historical users.³²⁶

The Umatilla tribe applies a "balancing the uses" method of allocation that adopts a *de facto* "first in time" priority system.³²⁷ Any well must be test-pumped before it is approved. If it causes harm to existing users, its use is restricted to accommodate prior users. If the restrictions cannot prevent the harm that the well causes, a permit is not granted. The tribe relies on its water monitoring technology to ensure that a water system or basin will not become overappropriated.

The Navajo and Sioux water codes are able to employ each method, depending on the circumstances.³²⁸ Both tribes have a water committee

325. The Navajo Nation is contemplating adoption of the "first in time" priority system for its sheer simplicity. Telephone Interview with Robert Becker, Navajo Water Resources Management Department (June 26, 1991) [hereinafter Becker Interview].

South Dakota and other western states apply the "first in time" priority system to resolve water quantity disputes. However, if a user with a higher priority of use but lower priority of time demanded water ahead of a prior appropriator with a lower-priority beneficial use, a court would be compelled to award the water to the user with the higher priority of use. A court may also award the prior appropriator damages. For example, if a municipality required water from an aquifer to such an extent that it would displace prior agricultural appropriators, it might be allowed to pump the water but it would also be required to pay damages to the agricultural appropriators for their losses. Telephone Interview with Jim Goodman, Water Engineer, Department of Environment and Natural Resources, State of South Dakota (June 26, 1991) [hereinafter Goodman Interview].

326. The "balancing the uses" test was crafted to promote tribal interests. At the same time, it may cause potentially discriminatory treatment of non-Indians. See *infra* notes 371-80 and accompanying text (discussing water code enforcement and equal protection of nonmembers). Although the test may not violate the tribe's bill of rights or the Indian Civil Rights Act of 1968, see *infra* notes 349-70, it may inhibit the Secretary of the Interior's approval necessary for the code's applicability to everyone within the reservation if the tribe's government was revitalized under the Indian Reorganization Act of 1934, or may cause a federal district court to deny that the code is enforceable against non-Indians on fee lands within the reservation. See *Montana v. United States*, 450 U.S. 544, 546 (1981). The discriminatory nature of this test disappears where there has been quantification, because the relative priorities of time between reserved right users and state water users is determined in the adjudication or settlement. See *supra* notes 25-27 and accompanying text.

327. UMATILLA INTERIM WATER CODE § VI(D)(6) (1981); Farrow Interview, Aug. 6, *supra* note 320.

328. See NAVAJO TRIB. CODE tit. 22, §§ 1801-1813 (Supp. 1984-85) (subchapter 8, "Determination of Availability and Need"); ROSEBUD SIOUX WATER CODE §§ 8.1-8.13 (1977) (chapter 8, "Determination of Availability and Need"). The procedure is invoked when it becomes apparent, either through complaints or investigation by the Water Administrator, that a particular basin is or will be overappropriated. NAVAJO TRIB. CODE tit. 22, § 1801; ROSEBUD SIOUX WATER CODE § 8.1. Then, after a "proceeding" where everyone who may be affected is given notice and opportunity to participate, the

and administrator.³²⁹ Users may appropriate water from a basin until overappropriation occurs or a new proposed use causes dislocation of water among the prior users.³³⁰ When either event occurs, all affected appropriators may have their uses altered. After an investigation by the water administrator and a formal hearing, the water committee is authorized to prescribe methods for coping with the overappropriation or new user's application.³³¹

One method establishes a priority list among the users in the basin.³³² When compiling this list, the code directs the water committee to balance the uses to determine the order of priority among the users.³³³ A committee's method of water reallocation is not limited.

F. Sources of Water

When a tribe identifies its sources of water, it should employ a system that best regulates water use from the particular source.³³⁴ For example, groundwater does not perfectly lend itself to the "first in time, first in right" method of allocation as well as streams do. Where

Administrator prepares a report for review by the Water Committee. NAVAJO TRIB. CODE tit. 22, §§ 1803, 1805; ROSEBUD SIOUX WATER CODE §§ 8.3, 8.5. The Water Committee then proposes a Determination of Availability and Need. NAVAJO TRIB. CODE tit. 22, § 1807; ROSEBUD SIOUX WATER CODE § 8.7. One of its recommendations may include "a list of priorities to be observed within the affected area." NAVAJO TRIB. CODE tit. 22, § 1808(4); ROSEBUD SIOUX WATER CODE § 8.8(4). A formal hearing is then conducted in the affected basin, and the respective water committees are then authorized to adopt a Final Determination of Availability and Need. NAVAJO TRIB. CODE tit. 22, §§ 1809-1811; ROSEBUD SIOUX WATER CODE §§ 8.9-.11. The list of priorities does not have to adhere to a priority based on the date of appropriation, but can be based on other reasonable criteria, such as the balancing of significant factors including need, efficiency, amount of investment, and best interests of the tribe.

This chapter is essentially an ad hoc mechanism for dealing with overappropriation and zoning problems. Through proper planning and technical support, overappropriation can be avoided. A comprehensive zoning scheme will prevent water shortages due to competing types of uses. Farrow Interview, Aug. 6, *supra* note 320. Limiting the life of a permit to five years also gives the tribe time to enact a zoning scheme. *Id.*

329. *Id.*

330. NAVAJO TRIB. CODE tit. 22, § 1801 (Supp. 1984-85); ROSEBUD SIOUX WATER CODE § 8.1 (1977).

331. NAVAJO TRIB. CODE tit. 22, § 1808 (Supp. 1984-85); ROSEBUD SIOUX WATER CODE § 8.8 (1977).

332. Apparently, the Water Committee cannot alter the preference among uses specified in its code. *See* NAVAJO TRIB. CODE tit. 22, § 1501(4) (Supp. 1984-85); ROSEBUD SIOUX WATER CODE § 5.1(4) (1977). It would be left with determining the priorities among same-type users. *See* NAVAJO TRIB. CODE tit. 22, § 1808(4); ROSEBUD SIOUX WATER CODE § 8.8(4).

333. *See* NAVAJO TRIB. CODE tit. 22, § 1501(2)-(3) (Supp. 1984-85); ROSEBUD SIOUX WATER CODE § 5.1(2)-(3) (1977).

334. *See* Nash, *Code Development*, *supra* note 308, at 118.

streams rely on predictable seasonal precipitation for their source of water, groundwater exists as the result of surface seepage or entrapment by glacial or geological forces.³³⁵ Some aquifers³³⁶ can be recharged and some cannot.³³⁷ Where groundwater cannot be recharged, or too many users prevent an aquifer from recharging, the federal government may need to regulate the depletion of the aquifer or enjoin certain users to promote recharge.³³⁸

The right of prior appropriation may not be the issue where groundwater is being pumped, because there may be plenty of water in the aquifer. Instead, the dispute between users may revolve around the rate of removal; one user may pump the water faster than it can be recharged in the immediate future, harming nearby pumpers.³³⁹

Regulating well drilling is highly technical. Within an industry there are standard requirements for drilling wells fashioned by the Environmental Protection Agency (EPA). The Umatilla Interim Water Code

335. CHARLES J. MEYERS ET AL., WATER RESOURCES MANAGEMENT 584-93 (1988).

336. "Aquifer" and "groundwater" are used interchangeably; they both refer to subsurface bodies of water contained by relatively porous or permeable material. *Id.* at 585-83.

337. MEYERS, *supra* note 335, at 629.

338. *Id.* at 614-57. Some states recognize that groundwater is connected to the hydrological cycle, and acknowledge that some groundwater depends on the hydrological cycle for its existence. They have modified the "first in right" principle when groundwater is the source of the appropriation. See, e.g., S.D. CODIFIED LAWS ANN. § 46-6-3 (1987). As such, groundwater appropriations that cause water to be removed from aquifers faster than they can annually be recharged are prohibited. *Id.* § 46-6-3.1. These laws create a zone of comfort and limitation for existing well users. New permits are disallowed once the underground source is appropriated to the limit of its ability to annually recharge. *Id.* There is an exception for public water distribution systems. See, e.g., *In re South Lincoln Rural Water Sys.*, 295 N.W.2d 743, 745-46 (S.D. 1980).

339. The *Restatement (Second) of Torts* states:

(1) A proprietor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another unless

(a) the withdrawal of ground water unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure,

(b) the withdrawal of ground water exceeds the proprietor's reasonable share of the annual supply or total store of ground water, or

(c) the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to use the water.

RESTATEMENT (SECOND) OF TORTS § 858 (1977). This particular law, referred to as a "reasonable use" law, only addresses "quantity" disputes and does not include the damaging effects created by improperly sealed wells, which cause pollution of connected aquifers.

See MEYERS, *supra* note 335, at 580-703 for further discussion concerning the respective rights of groundwater users.

and most regulatory agencies require a special well drilling permit, where only licensed and bonded drillers are permitted to drill the wells.³⁴⁰ Tribal adoption of technical standards for drilling wells, and the hiring of personnel who understand the standards and can spot discrepancies between the drilling method and the standards, allows a tribe to protect both the water quality of its aquifers and nearby users. Sources for regulations of well drilling include the EPA and state laws.³⁴¹

G. Procedural Due Process, Equal Protection and the ICRA

All water codes should address the rights and protections provided by a tribe's bill of rights,³⁴² if its constitution includes them, or the 1968 Indian Civil Rights Act (ICRA).³⁴³ ICRA brings many types of constitutional rights enjoyed by non-Indians to the reservation.³⁴⁴ In pertinent part the act states: "No tribe in exercising powers of self-government shall . . . (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."³⁴⁵

An equal protection issue may arise where a tribal water agency denies approval of a non-tribal member's water permit, or where it enforces violations of the code against non-tribal members but not tribal members. A due process complaint may arise where a water code does not provide for sufficient notice and an opportunity to be heard, before an impartial tribunal, where an individual is denied a permit or is found to be in violation of a water code.

It is important to note that, as held in *Santa Clara Pueblo v. Martinez*,³⁴⁶ tribal judicial authority alone is charged with determining whether a tribe's government has violated an individual's right(s) under ICRA.³⁴⁷ In *Martinez*, the Supreme Court held that ICRA did not

340. UMATILLA INTERIM WATER CODE § X (1981).

341. Huq Interview, *supra* note 290; Farrow Interview, Aug. 5, *supra* note 272. The Umatilla Interim Water Code requires the completion of a supplemental form describing the well. UMATILLA INTERIM WATER CODE § X(C)(1) (1981).

342. See, e.g., ROSEBUD SIOUX TRIBE CONST. art. X, § 3 ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor be denied equal protection of law.").

343. 25 U.S.C. § 1302(8) (1988).

344. The United States Constitution has never applied to Indian reservations. See *Talton v. Mayes*, 163 U.S. 986 (1896). However, Congress has "plenary power" over tribal governments. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Congress reasoned that certain constitutional rights enjoyed by its citizens should also be extended to those on reservations. See generally Alvin J. Ziontz, *After Martinez: Civil Rights Under Tribal Government*, 12 U.C. DAVIS L. REV. 1 (1979).

345. 25 U.S.C. § 1302(8) (1988).

346. 436 U.S. 49 (1978).

347. *Id.* at 70-72.

imply a federal cause of action reviewable by federal courts.³⁴⁸ ICRA does not distinguish between Indians and non-Indians; both claimants' rights are defined by the tribal court.³⁴⁹

1. *Procedural Due Process*

Procedural due process refers to a government agency's practice of providing (1) notice and (2) an opportunity to be heard for a person who is or may be affected by the governmental action, (3) before an impartial hearer or tribunal who has the authority to act in favor of the individual. A discussion of the water code's relationship to each of the due process elements follows.

(a) *Notice*

If a tribe decides to enforce its water code through a permit system, it should provide for proper procedural due process in two situations. First, notice should be given to those who may be adversely affected by a proposed use during the application process or proposed modification of an existing use.³⁵⁰ Prior to granting or denying a permit, the agency gives notice and an opportunity to be heard to all who

343. The Court made an exception for a writ of habeas corpus where the applicant was physically detained. *Id.* at 67.

349. See *R.J. Williams Co. v. Fort Belknap Housing Auth.*, 719 F.2d 979 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985). However, where a non-Indian is denied a tribal forum to pursue his claim (and denied a forum de facto, since sovereign immunity precludes state court jurisdiction over a tribal governmental entity), federal court is available to provide the claimant a remedy under ICRA. *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682, 685 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981). Presumably, an Indian claimant could also pursue his remedy in federal court under ICRA if the claimant were denied a tribal forum. Beyond this exception, one's ability to obtain federal court review of official tribal action depends on the categorization of her/his legal theory in terms other than ICRA. Gregory Schultz, *The Federal Due Process and Equal Protection Rights of Non-Indian Civil Litigants in Tribal Courts After Santa Clara Pueblo v. Martinez*, 62 DENV. U. L. REV. 761 (1985).

350. NAVAJO TRIB. CODE tit. 22, §§ 1607-1608 (Supp. 1984-85); ROSEBUD SIOUX WATER CODE § 6.5 (1977). Contents of the notice include a map of the area where the proposed permit will divert the water, the name and address of the applicant, a description of the source of water, the quantity of water requested, the exact location of diversion, the method of diversion, and a description of the use that the water will be put to. It also includes a description of the objection, notice, and hearing provisions, and a statement that anyone who may be adversely affected will be given an opportunity to comment in conformance with those provisions. Under the Rosebud Sioux Water Code, the water committee, comprised of three members of the tribal council, are responsible for providing notice. ROSEBUD SIOUX WATER CODE § 6.5. In an effort to free its Resources Committee from bureaucratic tasks, the Navajo Code assigns the notice duties to the Water Director. NAVAJO TRIB. CODE tit. 22, § 1607.

may be affected by the applicant's requested use.³⁵¹ Further, where a user requests that her/his permit be amended or modified, the same notice procedure for granting the permit should be followed.³⁵² Second, notice should also be given to a user who may be in violation of the code or specifications in her/his permit.³⁵³ Contents of the notice should include the nature of the violation, the section of the code or permit violated, and the time, date, and place of the hearing to determine whether there is a violation.³⁵⁴

Where a suspected violation is causing an immediate, ongoing harm, the tribe may wish to give the enforcing agency the authority to take

351. The Rosebud Sioux Water Code provides that notice to affected persons includes publication in the local newspapers, posting in the affected area, and mailing to persons who may be adversely affected. ROSEBUD SIOUX WATER CODE §§ 6.5(6), 6.6(4) (1977). The Navajo Water Code has identical provisions. NAVAJO TRIB. CODE tit. 22, § 1608 (Supp. 1984-85).

If a party responds to the notice by objecting to the application within thirty days, the applicant is given an opportunity to reply within thirty days and a hearing is held. ROSEBUD SIOUX WATER CODE §§ 6.8-10. Objections and replies can be oral or in writing. *Id.* §§ 6.8-9. The code requires that objections and replies be inscribed on a form, by the objector/applicant, or by the Water Administrator or capable personnel, from the oral objections and replies. *Id.* The Navajo Code contains identical provisions. NAVAJO TRIB. CODE tit. 22, §§ 1609-1611.

The Umatilla tribes require that notice be given to every user within a one mile radius from the proposed point of diversion. It then provides a reasonable time between the time of the notice and hearing, if one is needed, for those persons to prepare to comment for or against the application. It gives notice through direct mail and through publication in a newspaper. Farrow & Skervin Interview, *supra* note 278.

352. See NAVAJO TRIB. CODE tit. 22, § 1603 (Supp. 1984-85). The Code states:

Upon the effective date of this Code, all persons desiring to initiate new uses of, or take other actions within the jurisdiction of the Navajo Nation affecting the waters herein shall file an Application for Permit as required by this chapter. After such date, it shall be unlawful for any person to make any new use or take any other action within the jurisdiction of the Navajo Nation affecting the waters therein except as authorized by this Code.

Id. The Rosebud Sioux Water Code allows modifications in accordance with the procedures provided in the code. ROSEBUD SIOUX WATER CODE § 7.7 (1977).

353. NAVAJO TRIB. CODE tit. 22, § 2002 (Supp. 1984-85); ROSEBUD SIOUX WATER CODE § 10.2 (1977); UMATILLA INTERIM WATER CODE § XIV (1981).

354. ROSEBUD SIOUX WATER CODE §§ 10.1-10.9 (1977) (chapter 10, "General Hearing Provisions"). This chapter describes the procedural process for the prosecution of code and permit violations. It requires that a user suspected of violating the code be given notice through registered mail. *Id.* § 10.2. Notice of the hearing is also published in a newspaper in the area of the violation. *Id.*

This chapter describes the procedures for any hearing not otherwise provided for in the code. By its organization, it requires and provides procedures above and beyond those required for permit approvals. The Navajo Water Code is organized the same way. See NAVAJO TRIB. CODE tit. 22, §§ 2001-2009 (Supp. 1984-85) (subchapter 10, "General Hearing Provisions").

The Umatilla Interim Water Code contains a separate, all-inclusive procedure for prosecuting code violations. UMATILLA INTERIM WATER CODE § XIV (1981).

immediate corrective action to alleviate or ameliorate the harm. Such action will include entry onto land to shut off or reduce the flow of the suspected violator's diversion system.³⁵⁵ Perhaps notice to the user prior to entry is required, unless in the enforcing agent's reasoned judgment the immediate need to enter and take corrective action outweighs the user's right to notice and opportunity to be heard before the corrective action is taken.³⁵⁶

Whether the individual is entitled to notice prior to tribal action is an issue to be resolved by the tribal court following an ICRA complaint.³⁵⁷ However, the tribe's ability to enforce its water code against all users within the reservation will depend, in part, on non-Indians' or non-tribal members' perception that the enforcement procedures are fair.³⁵⁸ A notice requirement prior to entry in order to take corrective action, or at least a requirement that the tribal agent proceed under a reasoned judgment that the harm caused by the use outweighs the user's right to notice and hearing, plus an exploration of alternatives to the outright shutdown of the delivery system and immediate post-action hearing, will go far in alleviating users' fears.³⁵⁹ Corrective action prior to notice should be the exception to the rule that the user

355. The Rosebud Sioux Water Code provides for the enforcement agency's entry onto land of anyone using water on the reservation. ROSEBUD SIOUX WATER CODE § 7.4 (1977). Further, every permit is required to contain the condition that the applicant consents to "reasonable entry" upon his land. *Id.* What constitutes "reasonable entry" is for the tribal court to determine. "Reasonable entry" may require notice beforehand, or perhaps the reason for the entry must be reasonable. Entry for the purpose of inspection is perhaps reasonable entry, but entry without notice to turn off a delivery system may not be reasonable without notice in the absence of imminent harm. The code should include an inclusive list of examples for what constitutes reasonable entry, and what actions the enforcing agent may take once he gains entry.

356. Some western states have not yet encountered such a situation. See, e.g., Goodman Interview, *supra* note 325. South Dakota's water engineers have been able to resolve complaints by talking to the suspected violator. The violator has then voluntarily taken actions to correct any harm.

357. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *R.J. Williams Co. v. Fort Belknap Housing Auth.*, 719 F.2d 979 (9th Cir. 1983) (whether prejudgment writ of attachment to non-Indians' property following dispute with tribal agency violates ICRA is for the tribal court to determine).

358. See *Fuentes v. Shevin*, 407 U.S. 67 (1972) (seizure of property prior to notice and hearing violates the due process clause of the United States Constitution).

359. State water engineers are allowed by law to enter property in order to shut off headgates during times of scarcity. In doing so, they allocate the state's water among users according to the state's priority system. Without quantification, tribal water engineers would allocate a resource owned by both the state and tribe between members and non-tribal members according to the tribe's priority system. Conflicts arise during times of scarcity when tribal engineers enter non-Indian property to shut off non-Indian users whose uses do not enjoy seniority under the tribe's priority system. Conflicts will also arise when tribal water engineers enter non-Indian property to shut off water due to perceived violations of the tribe's water quality provisions.

is entitled to notice of his potential violation before any action is taken.

(b) Hearings

Hearings satisfy the "opportunity to be heard" element of procedural due process. Hearings are held to determine whether a permit or modification of a permit should be granted or denied.³⁶⁰ A hearing to determine whether there has been a violation of the code or permit should also be held. The hearing should be open and a record preserved in case an appeal is made.³⁶¹

Hearings are essential for a fair determination of an individual's rights and the tribe's welfare. They are also expensive and consume a great deal of time.³⁶² Exactly who may have standing to request a hearing should be carefully considered by the tribe.

The permit applicant is afforded the opportunity for a hearing.³⁶³ Any person who may be directly affected by the granting of a permit or modification of an existing permit should also be afforded a hearing.³⁶⁴ However, some codes provide restrictions for opportunities to object to a proposed permit.³⁶⁵

(c) Impartial Tribunal

Most tribal constitutions concentrate governmental power within the tribal council.³⁶⁶ This is especially true in regard to tribal governments organized under the IRA.³⁶⁷ Water codes generally follow this tendency.

360. The Umatilla Tribes' water director may approve or deny a domestic well permit without a hearing. UMATILLA INTERIM WATER CODE § VI(E)(1) (1981). Hearings are required where there are appeals from his decision. *Id.*

361. NAVAJO TRIB. CODE tit. 22, § 2008 (Supp. 1984-85) (hearings are recorded, and any person may bring a stenographer to the hearing). The Umatilla Water Code calls for stenographic recording of any hearing. UMATILLA INTERIM WATER CODE § VI(E)(5) (1981). The Rosebud Sioux Water Code does not require that recordation take place, only that hearing should be recorded "[w]henever possible." ROSEBUD SIOUX WATER CODE § 10.8 (1977).

362. Farrow & Skervin Interview, *supra* note 278.

363. NAVAJO TRIB. CODE tit. 22, § 1612 (Supp. 1984-85); ROSEBUD SIOUX WATER CODE § 6.10 (1977); UMATILLA INTERIM WATER CODE § VI(E)(2) (1981).

364. NAVAJO TRIB. CODE tit. 22, § 1609 (Supp. 1984-85); ROSEBUD SIOUX WATER CODE § 6.7 (1977); UMATILLA INTERIM WATER CODE § VI(E)(3)(b) (1981).

365. *Cf.* NAVAJO TRIB. CODE tit. 22, § 1612 (Supp. 1984-85); ROSEBUD SIOUX WATER CODE § 6.11 (1977) ("Any applicant directly affected or any party objecting in accordance with this (sub)chapter may request and obtain as a matter of right a hearing . . .").

366. *See, e.g.*, ROSEBUD SIOUX TRIBE CONST. arts. III, IV.

367. 25 U.S.C. §§ 461-470 (1988). The Rosebud Sioux Tribe Constitution originates from this law. *See* ROSEBUD SIOUX TRIBE CONST. preamble; *see also* Ziontz, *supra* note 344; Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972).

The regulatory entities that grant or deny permits and modifications, or determine whether a code violation has occurred, are generally composed of tribal council members.³⁶⁸ Their ability to operate independently of the tribal council is a recurring issue that tribes may wish to address.

The Umatilla tribes are considering the inclusion of a non-Indian as a voting member of their water committee.³⁶⁹ They are also exploring the possibility of hiring a "hearing officer," who is specially experienced or trained in resolving water disputes, and could competently take over hearings involving permit approvals and code violations from the water committee.³⁷⁰ The water committee could then focus on its role in formulating water policy.

2. Equal Protection

A tribe can write its code in a manner that provides for equal, fair treatment of tribal and non-tribal members alike. The best way to do this is to omit any language that prescribes preferential treatment for tribal members or discriminatory, arbitrary treatment of non-tribal members.³⁷¹

368. NAVAJO TRIB. CODE tit. 22, § 1308 (Supp. 1984-85) (Resources Committee, composed of tribal councilmen selected by the chairman, is a standing committee of the Navajo Tribal Council); ROSEBUD SIOUX WATER CODE § 3.1 (1977) (Water Committee is composed of five members from the tribal council); UMATILLA INTERIM WATER CODE § XII (1981) (Water Committee is composed of members from the Board of Trustees). The Navajo and Umatilla codes provide for a technical advisory committee to advise the water committee. NAVAJO TRIB. CODE tit. 22, §§ 1001-1006 (chapter 9, "Water Development Technical Review Board"); UMATILLA INTERIM WATER CODE § XI (1981) ("Technical Advisory Committee").

369. Farrow & Skervin Interview, *supra* note 278.

370. *Id.*

371. The Rosebud Sioux Water Code expressly mandated preferential treatment for tribal members over non-tribal members. The applicable section states in full:

Whenever practicable, actions taken should benefit the Rosebud Sioux Tribe and their (sic) members and further the objective for which the Rosebud Sioux Reservation was created, namely, to provide a permanent home and abiding place for the Rosebud Sioux Tribe and their (sic) members, both now and in the future. *Alternatives to existing and proposes (sic) uses are to be considered whenever practicable in order to achieve this goal.* Included in those alternatives shall be the option to restrict or prohibit entirely any further use of water *for any reason*. If there is presented to the Water Committee a conflict between the Rosebud Sioux Tribe or any of its members with non-Tribal projects or uses, *the Water Committee will grant appropriate preference to the Tribe or its members over non-Tribal projects or uses.*

ROSEBUD SIOUX WATER CODE § 5.1(1) (1977) (emphasis added).

This section not only discriminates against non-tribal members, it also condones the discriminatory action for any reason, not only in cases where the presence of a compelling

The Umatilla tribes administer permits to members and nonmembers alike.³⁷² The only requirements for receiving a permit are (1) available water that can be extracted without causing harm to an existing user, and (2) compliance with the code's diversion and policy requirements.³⁷³ The code does not contain language providing for different treatment of non-tribal members. Further, if an Indian applicant's proposed diversion would harm a non-Indian, the permit is either granted with restrictions that protect the non-Indian or it is denied.³⁷⁴

Furthermore, the Umatilla Reservation's Water Committee itself recognizes the potential for racial bias.³⁷⁵ Like committees mandated by other codes, the Umatilla Water Committee is composed of the Umatilla Board of Trustees, the tribe's governing body.³⁷⁶ As such, the committee is affected by political conflicts. Conflicts that generate preferential treatment for tribal members are more likely than political pressure to engage in discriminatory treatment of non-tribal members. It is difficult to deny a constituent's permit application; it is also difficult for the committee to avoid *ex parte* contact and subsequent preferential treatment of members when it rules on code violations.³⁷⁷

tribal interest exists.

The tribe's own tribunal will decide whether any provision in the code violates the equal protection of ICRA. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 52 (1978). However, the tribe may be forced to choose whether it wishes to exercise jurisdiction over its territory within the reservation or promote its traditional views. *See Montana v. United States*, 450 U.S. 544 (1981) (tribal regulation prohibiting hunting and fishing on fee lands within the reservation but permitting such activity on trust lands was not enforceable over fee lands). Not only have such laws been struck down by the Supreme Court; they contribute to the fashioning of "bad law" which is detrimental to long-term tribal interests. *See id.*

372. The tribes' newly drafted code further attempts to eliminate the possibility of racially oriented decisions. First, the new Water Committee will include a non-Indian. Second, its role will be limited to policy-oriented matters only. Third, the number of hearings will be reduced. Domestic wells will be approved or denied on the basis of conformance to specific, comprehensive regulations, eliminating the need for a hearing. The code provides for the obtaining of a variance and review of the regulations' applicability. Fourth, hearings for nondomestic well permits, variances for domestic wells, and code violations will be conducted by a "Hearing Officer", an individual experienced or educated in hydrogeology who can fairly expedite such proceedings. Water Resource officials recognize that it may not be possible to find such an individual. Farrow & Skervin Interview, *supra* note 278. Due to budgetary constraints, the code has not been enacted. *Id.*

373. Farrow Interview, Aug. 5, *supra* note 272. Most of the available water within the Umatilla Reservation is groundwater. Compliance with diversion requirements requires adherence to the tribes' well-drilling regulations. To date, 160 wells have been drilled according to the tribe's code. *Id.*

374. *Id.*

375. Farrow Interview, Aug. 6, *supra* note 320.

376. UMATILLA INTERIM WATER CODE § XII(C) (1981).

377. Farrow Interview, Aug. 6, *supra* note 320.

Basic due process protections discourage discriminatory treatment. Mandatory recordation and open hearings create an atmosphere of fairness, and aid the tribal court when it hears appeals from a water committee's actions.³⁷⁸

The strict notice and hearing provisions also serve the tribes' needs by alleviating non-tribal members' fears that their rights would not be respected by the tribes' judicial process.³⁷⁹ The provisions help reduce tension and instill trust that the code will be administered fairly and evenhandedly.³⁸⁰

H. Appeals

A tribe should consider whether, to what extent, and to which body it should allow appeals from the Water Committee's decisions. It should consider who may appeal, what can be reviewed, and the standards for review that apply to each permissible cause of action.

In order to comply with the ICRA and, in some cases, a tribe's own bill of rights, a board should be instituted to hear appeals from the water committee's decisions. The Rosebud Sioux Water Code requires that all appeals be taken to the Tribal Council.³⁸¹ The Umatilla code directs appeals to the tribal court.³⁸² Appeals under the Navajo code are heard by the Navajo Court of Appeals.³⁸³

Tribal codes generally include the standards of review for an appellate court to apply. The standards of review fall into two categories. First, the tribunal may review whether the water committee's decision has a basis in fact; that is, whether its final determination was "arbitrary and capricious."³⁸⁴ A code may require that the agency's record

378. *Id.*

379. *Id.*

380. *Id.* Tribal officials feel that non-tribal members are confident enough in their administration to consider less expensive due process procedures while maintaining the same protections. *Id.*

381. ROSEBUD SIOUX WATER CODE § 11.1 (1977). The code provides safeguards to prevent a biased councilman, or one with an interest in the outcome, from sitting on the appellate board. *Id.* § 11.2(2). It is acknowledged that a tribal council has the authority to judge whether its acts violate the ICRA. See *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976). However, such concentration of power raises well-known separation-of-power issues. Tribal court review may increase faith in the system for both Indians and non-Indians.

382. UMATILLA INTERIM WATER CODE §§ XIV(E), XVII (1981).

383. NAVAJO TRIB. CODE tit. 22, § 2101 (Supp. 1984-85).

384. *Id.* § 2107 (arbitrary, capricious, or unsupported by substantial evidence); ROSEBUD SIOUX WATER CODE § 11.8 (1977) (arbitrary and capricious); UMATILLA INTERIM WATER CODE § XIV(E)(2) (1981) ("in accordance with tribal law"); cf. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1988). Federal courts give great deference to agency decisions under the "arbitrary and capricious" standard, and inevitably heighten their scrutiny where the agency must provide "substantial evidence" to support its decision. The tribe's appellate body, however, has the sovereign authority to define these terms for itself.

be supported by "substantial evidence."³⁸⁵ Second, it may review the agency's interpretation of the law as it applies to the facts.³⁸⁶

Finally, the ICRA mandates that a person cannot be deprived of equal protection under a tribe's laws, nor can a person be deprived of property without due process of law.³⁸⁷ As such, an appellate body has jurisdiction to hear equal protection and due process complaints based on tribe's water agency's implementation or enforcement of its code. A tribe may want to specify that its code is to be enforced under the guidance of its bill of rights and the ICRA.³⁸⁸

There is also a coercive reason for providing civil rights protections to members and nonmembers. While federal court review is not available, the Department of the Interior has the capacity to review a tribe's record regarding ICRA protections.³⁸⁹ Its review will not overturn tribal court opinions, but may result in decreased funding for water-related projects if the Department determines that individual civil rights are not sufficiently protected.³⁹⁰

I. Penalties for Noncompliance

A tribe should take inventory of all methods to encourage compliance with the code. The enforcement agency should concentrate on education and communication to resolve complaints.³⁹¹

Where more coercive methods are necessary, tribal codes include civil penalties. Criminal penalties may not be necessary when enforcing a water code. Further, their inclusion might cause a state to resist tribal regulatory jurisdiction over non-Indians.³⁹²

A water code is most easily enforced through restitution, remedial action, fines, and injunctions against further violations or harm. In-

385. NAVAJO TRIB. CODE tit. 22, § 2107 (Supp. 1984-85).

386. Federal courts accord no deference when reviewing questions of law. They apply a "de novo" standard of review. See Martha Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 470, 475-76 (1988).

387. 25 U.S.C. § 1302(8) (1988).

388. See NAVAJO TRIB. CODE tit. 22, § 1904 (Supp. 1984-85). There may be an unavoidable future collision with the tribe's legitimate interest in deriving the benefit of its waters through tribal or member use, and a non-tribal member's civil rights to equal protection under tribal allocation laws, when reservation water reaches full appropriation. Telephone Interview with Aaron Skervin, Water Manager, Umatilla Reservation (Aug. 6, 1991) [hereinafter Skervin Interview].

389. See Zientz, *supra* note 344, at 28.

390. *Id.*

391. Farrow Interview, Aug. 5, *supra* note 272 (education is one of the Umatilla Reservation Land and Resource Department's top priorities); Goodman Interview, *supra* note 325 (practically every dispute is resolved by talking to the users).

392. See *Holly v. Totus*, 655 F. Supp. 548, 552-53 (E.D. Wash. 1983) (*Holly I*) (the penalties for noncompliance with the tribe's water code included six months in jail); cf. ROSEBUD SIOUX WATER CODE §§ 13.2-.4 (1977) (violation of the tribe's water code may result in incarceration for up to six months).

junctions against unlawful use should match the harm caused. If one person's lawful use is infringing on another's lawful use, a partial injunction calling for a cutback of use should be explored. Perhaps uses at different times or at different water pressures, or a requirement that the use involve less waste, can resolve the dispute. The emphasis should be on solving problems, rather than enforcing the letter of the code.

If a person is using too much water, an injunction against use over and above what he is entitled to under his permit may resolve the dispute. Other penalties can include requiring (1) payment for water improperly used or polluted through improper use;³⁹³ (2) corrective or remedial work;³⁹⁴ (3) restitution to all adversely affected parties; (4) payment for all necessary remedial actions taken by an agency;³⁹⁵ (5) payment of associated costs to enforce the violation;³⁹⁶ (6) modifying terms of the permit;³⁹⁷ and (7) fines for each violation.³⁹⁸

Serious or repeated violations may require suspension or revocation of a permit.³⁹⁹ A combination of payment for unlawful use of water and the administrative costs of taking remedial action and enforcement, restitution to harmed parties, and fines may be combined with a suspension. Failure to pay adjudicated costs and fines may invoke suspension of a permit.

A tribe may want its penalty provision to include a reference to its bill of rights and the ICRA.⁴⁰⁰ As with granting or denying a permit, the requirements of procedural due process and equal protection must be applied in order to validly suspend or revoke a permit.

J. Charging for Water: Permit Fees and Water Marketing

Every water code requires a permit application fee. Fees are levied under two different principles. First, the fee should correspond to the amount of time and expense that it takes to process the permit.⁴⁰¹

393. NAVAJO TRIB. CODE tit. 22, § 2305 (Supp. 1984-85).

394. UMATILLA INTERIM WATER CODE § XV(C)(1) (1981).

395. NAVAJO TRIB. CODE tit. 22, § 2305 (Supp. 1984-85).

396. *Id.*

397. UMATILLA INTERIM WATER CODE § XV(C)(3) (1981).

398. ICRA allows the tribe to impose a fine of \$5000 for conviction of a criminal offense. 25 U.S.C. § 1302(7) (1988). An appropriate fine for a regulatory offense is unclear. The Umatilla code provides for a minimum of \$50 per "minor" violation to a maximum of \$1000, and \$500 per "major" violation to a maximum of \$5000. UMATILLA INTERIM WATER CODE § XV(C)(4) (1981). The highest fine ever levied was \$500. Skervin Interview, *supra* note 388.

399. NAVAJO TRIB. CODE tit. 22, § 2305 (Supp. 1984-85) (forfeiture or suspension of rights to use water); ROSEBUD SIOUX WATER CODE §§ 13.4-.5 (1977) (forfeiture of all rights to use water).

400. NAVAJO TRIB. CODE tit. 22, § 2305 (Supp. 1984-85).

401. The Umatilla fee schedule provides that the application fee for a domestic well costs \$30, based on the cost to inspect the well before final approval. Final approval costs another \$10. Farrow Interview, Aug. 6, *supra* note 320.

Second, the fee should reflect the amount of water to be diverted. Some codes require fees on a sliding scale for water to be used for agriculture purposes.⁴⁰² Other codes charge one fee, and do not distinguish between permits for domestic, agricultural, or other water uses.⁴⁰³ Some codes provide for a waiver of the filing fee upon proof of financial hardship by the applicant.⁴⁰⁴ The fee should be applied evenly to tribal and non-tribal members alike; failure to do so will raise the issue of whether a tribe is violating the "equal protection" clause in the ICRA.

A tribe should not expect that its enforcement agency can be funded by the fees or fines that it collects. However, charging for the water or levying a use tax have been considered by various tribes. The issue of water marketing generates much hostility from non-Indian users, especially when the issue is off-reservation marketing of water.⁴⁰⁵ This issue is more important when the reserved right is quantified. The

402. The Umatilla fee schedule requires a \$50 fee for the first 30 acres to be irrigated; thereafter it charges \$.30 per acre. *Id.*

403. NAVAJO TRIB. CODE tit. 22, § 1606 (Supp. 1984-85) (\$25 filing fee); ROSEBUD SIOUX WATER CODE § 6.4 (1977) (\$5 filing fee).

404. NAVAJO TRIB. CODE tit. 22, § 1606 (Supp. 1984-85); ROSEBUD SIOUX WATER CODE § 6.4 (1977).

405. State advocates are generally hostile to the sale of such rights. See Jack D. Palma II, *Considerations and Conclusions Concerning the Transferability of Indian Water Rights*, 20 NAT. RESOURCES J. 91, 95 (1980); see also Rusinek, *supra* note 1, at 398 (Supreme Court questioned the right of tribes to sell water it cannot consumptively use); *In re Rights to Use Water in Big Horn River*, 753 P.2d 76, 79 (Wyo. 1988) (*Big Horn I*) (tribes can sell water on the reservation; sale of water off-reservation was not at issue), *aff'd by an equally divided Supreme Court per curiam*, 492 U.S. 406, *reh'g denied*, 492 U.S. 938 (1989). But see Sly, *supra* note 56, at 30 (Fort Peck Agreement provides for off-reservation marketing of reserved water with notice and state participation in benefits). See generally Getches, *From Conflict to Pragmatism*, *supra* note 117.

The Reagan administration supported water settlements that provided for the marketing of Indian water rights as a way to pay for quantification proceedings. Sly, *supra* note 56, at 132. The federal government has encouraged and participated in the free water policy. See generally DONALD WORSTER, *RIVERS OF EMPIRE: WATER, ARIDITY, AND THE GROWTH OF THE AMERICAN WEST* (1985). Federal water projects heavily subsidized western states' growth by providing cheap electricity and water. *Id.* These projects have proceeded with little or no regard for tribal needs or participation. See generally McCool, *supra* note 1. In sum, states oppose the sale of tribal water because they would rather use it for free.

States have proceeded under the policy that water is free for those who will expend the resources to develop it. Social policy dictates that the sale of a scarce resource that is vital to survival should not be allocated according to market resources. See MEYERS, *supra* note 335, at 45-46. Another purpose of this approach is to remove the cost of water as an obstacle to economic development. *Id.* at 49-50. The assumption is that increased revenue from property taxes, personal and business income taxes, and sales taxes more than compensate for any money that could be raised by selling water to prospective users. *Id.*

code can be enacted without a provision regarding the sale of reserved water.

If a tribe wants to tax the use of reserved water, it should review its ability to collect the tax.⁴⁰⁶ Quantification may be necessary to prove tribal ownership of the water use it wishes to tax. Like charging for water, this issue can be left out of the code and enacted in a later ordinance.

K. *Method of Enforcement: The Permit System*

When a tribe decides to enact a water code, it should decide how it wants to enforce it. The prevalent method requires users to apply for a permit in order to use the tribe's water.⁴⁰⁷ The permit applicant discloses extensive information about the proposed use. Applications request that the applicant reveal the following: the applicant's name, address, source of water the applicant will divert from, a map of the diversion and land surrounding it, a legal description accompanying the map, the exact location of the point of diversion, the method of the diversion, the purpose for diversion, how much water the applicant will use, an estimate of return flow, if any, the anticipated change in water quality or temperature, and the estimated date that the applicant will actually divert the water.⁴⁰⁸ If the proposed use is for irrigation, the user should describe the land it will be applied to and the owner's name of that land.⁴⁰⁹

The regulatory agency may want to test the water that is to be diverted for its compatibility with the proposed use. Particularly, it may wish to have soil analysis performed to determine the land's ability to process the water and assess the quality of the return flow.⁴¹⁰

Most water codes issue permanent licenses that are appurtenant to the land upon which the water is applied.⁴¹¹ However, the Umatilla

406. *Cf.* *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (the tribe has authority to levy a severance tax against nonmembers for oil and gas removed from tribal lands). It will be much easier to collect the tax from non-tribal members who use water within the reservation.

407. NAVAJO TRIB. CODE tit. 22, § 1603 (Supp. 1984-85); ROSEBUD SIOUX WATER CODE § 6.1 (1977); UMATILLA INTERIM WATER CODE § V (1981). The Colville Reservation also employs the permit method. The permit system is the prevailing method for regulating the use of water on reservations. It is also the most prevalent method among the western states. GETCHES, NUTSHELL, *supra* note 24, at 94.

408. NAVAJO TRIB. CODE tit. 22, § 1604 (Supp. 1984-85); ROSEBUD SIOUX WATER CODE § 6.1 (1977); UMATILLA INTERIM WATER CODE § VI(G)(c) (1981).

409. UMATILLA INTERIM WATER CODE § VI(G)(c)(v) (1981).

410. *Cf.* S.D. CODIFIED LAWS ANN. §§ 46-5-6.2 to -6.10 (1987) (requiring that a soil/water compatibility permit application be submitted to the state's Division of Conservation for approval).

411. The Rosebud Sioux, Navajo, and Colville water codes provide for permanent water permits.

code provides for the expiration of each permit five years after its approval.⁴¹² The permit is renewable. The purpose for the Umatilla's five year limitation is to give the tribe the flexibility in balancing its future demands against the utility of the permittee's use of the water.⁴¹³ The tribe also has the flexibility to more effectively refine and adapt its zoning laws without having to plan around permanent water uses.⁴¹⁴ Some uses are licensed for twenty years to provide the user with the amount of time necessary to receive a reasonable return on the user's water diversion and application investments.⁴¹⁵ When a tribe devises a comprehensive zoning plan that requires no major future changes, the need to issue renewable permits will disappear.

L. Existing Users

After enacting a water code, the most important activity that a regulatory agency performs is compiling a list of every existing user on the reservation. The list should be comprehensive. A tribe should decide whether to conduct hearings to approve or deny the continuance of each existing use or whether to "grandfather" (waive such requirement) the uses.

The Navajo Nation's experience emphasizes the importance of this first step of cataloging existing users. The Navajo Nation's water code required *de novo* scrutiny of all existing uses at the time its code was enacted.⁴¹⁶ As a result, the tribe was not able to enforce compliance among non-tribal members. The result of this situation is that the code has not been regularly enforced since its enactment in 1984;⁴¹⁷ subsequent water use has not conformed to any sort of plan.⁴¹⁸

The Umatilla tribe, on the other hand, made a policy decision in 1981 to accept the status quo of existing uses on the reservation.⁴¹⁹ In

412. UMATILLA INTERIM WATER CODE § VI(H)(1) (1981).

413. Farrow Interview, Aug. 6, *supra* note 320.

414. *Id.* Temporary permits and variances are also available to prevent dislocation. *Id.* Further, a permittee may seek renewal term longer than five years. UMATILLA INTERIM WATER CODE § VI(H)(5) (1981).

415. *Id.*

416. NAVAJO TRIB. CODE tit. 22, §§ 1601-1605 (Supp. 1984-85). Under the code, an existing user was required to file a "description of use" relating to the user's current appropriation within one year of the code's enactment. *Id.* § 1602. The user received an "interim permit" for a "reasonable quantity" of water pending approval of the user's application for a permit under the Navajo Water Code. *Id.* §§ 1603, 1605. The user's application was then processed in the same manner as an application for a new use. *Id.* § 1603. The Rosebud Sioux Water Code follows an identical procedure. ROSEBUD SIOUX WATER CODE §§ 6.1-6.5 (1977) (chapter 6, "Applications for Permits").

417. Becker Interview, *supra* note 325.

418. *Id.*

419. Nash Address, *supra* note 273, at 82-83. The Umatilla Interim Water Code asserted tribal control but accepted the existing uses as they were. UMATILLA INTERIM WATER CODE § IV(C) (1981). Any new uses required tribal permits. *Id.* § V.

doing so, it determined that jurisdiction over its reservation would not accrue immediately, but would result from a series of steps taken with the acknowledgment of existing users' rights.⁴²⁰ The existing uses were "grandfathered" for the life of the interim code.⁴²¹ The tribe contemplated that a permanent code would be enacted within a number of years; however, the reservation has operated under the interim code for ten years.⁴²²

The Colville water code also "grandfathered" all existing uses.⁴²³ Users under state permits were allowed to submit their permits as proof of the quantity and priority of their claims. Those claims were then incorporated into the tribes' permit system.⁴²⁴

In sum, a tribe should concentrate its resources on compiling existing use information to be filed in its offices. It will then be in a better position to manage its water and resolve disputes between users. New permit applications, or proposed changes in existing uses by non-tribal members, are determined by the tribe, not the state.⁴²⁵ Providing

420. Nash Address, *supra* note 273, at 83.

421. UMATILLA INTERIM WATER CODE § IV(C) (1981).

422. See *supra* note 372 (discussing the tribes' comprehensive code, drafted in 1986 but not enacted due to insufficient funds).

423. Pasmore Interview, July 2, *supra* note 265. The BIA hired an independent contractor to catalogue all the existing users. *Id.*

424. Under an agreement with the state of Washington, state permit applications from nonmembers on fee lands are on "hold." Telephone Interview with Jim Lyerla, Department of Water Resources, State of Washington (Aug. 6, 1991).

425. See Nash Address, *supra* note 273, at 82. Keeping track of proposed changes in existing use by non-tribal members will be a bureaucratic challenge. A method to keep abreast of filings with the state should be developed since non-tribal members may not attempt to comply with the tribal code, or may not know that they should comply with it.

If the non-tribal member applies to the state for a new permit or to change an existing use, the tribe should lodge a complaint that the state does not have the jurisdiction to make such a determination. The complaint should be filed (in conformance with the state's administrative proceeding which would approve or deny the permit) in federal or district court, or both. Such a complaint may begin a jurisdictional dispute, as was the case in *Brendale*. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 414 (1989). A tribe's ability to show that it effectively administers its code will be a strong factor in any final outcome.

If a tribe has quantified its entitlement it may want to require users of unused water to file a permit with the tribe. In order to do this, the tribe would have to closely monitor state permits in order to determine whether the state's share of "excess" water was fully appropriated. Next, the tribe would probably have to obtain a favorable ruling in federal court that junior appropriators cannot divert unused tribal reserved water in the same manner that they divert unappropriated state water; that is, junior appropriators must file for a tribal permit to use reserved water, not the state's water code. Compare *United States v. Anderson*, 736 F.2d 1358, 1365 (9th Cir. 1984) ("Any permits issued by the state would be limited to excess water. If those permits represent rights that may be empty, so be it.") with *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46 (9th Cir. 1981) (unused reserved water is available for appropriation by non-Indians).

continuity of use to non-tribal members may not be palatable, but it avoids immediate, protracted litigation involving jurisdictional, due process, equal protection, and laches issues.⁴²⁶ Given the backdrop of *Brendale*, a theoretical fight over jurisdiction at the inception of a tribal code is less likely to result in tribal regulatory authority over a code that has already been fairly enforced over a substantial period of time.

Where state law sanctions a use that collides with a tribal use and results in harm, the issue of which law applies, and which forum may hear the complaint, is an issue that is constantly disputed. Tribal courts are competent to hear and resolve such issues.⁴²⁷ Federal court is available as a last resort to determine whether the tribal court has overstepped its jurisdiction.⁴²⁸

The *Walton* court did not state whether appropriators of unused reserved water should apply with the tribes or the state. *Id.* The hydrological circumstances of the basin in *Walton* required that non-Indian users of excess water file with the tribe. *Id.* at 51.

426. As a practical matter, courts will not want to shut off junior appropriators' beneficial use of water without a showing by the tribe that it needs the water. Under *Brendale*, the Supreme Court has asserted that it does not favor the curtailment of non-tribal members' economic development within the reservation. *Brendale*, 492 U.S. at 429-31. Since a tribe has no need to demand water at this time, there is no need to litigate an issue that results in depriving non-Indian users of water. Asserting that non-Indians are illegally using the water without a permit invites litigation.

Information regarding non-tribal members' existing use within the reservation can be obtained from the state's regulatory authority. The information on the state permits can be transferred to tribal forms. The state permits should be kept for verification in case there are any errors in the transcribing process.

The non-tribal member user should be given the opportunity to ratify the information contained on the state permit, with the intended effect that the user attests that it accurately describes the user's use and fulfills the user's duty to comply with the tribe's permit requirement. A consent form should be created, which gives the non-tribal member the opportunity to allow the information on the state permit to constitute compliance with the tribe's permit requirement. This makes compliance extremely easy for the non-tribal member, and may constitute a "waiver" of the non-tribal member's right to assert that the tribe does not have jurisdiction over non-tribal member's use of water.

427. The tribal court may be able to apply, or at least interpret, state law in tribal court to augment its claim or enjoin the harm where the priorities of use are the same. Who wins an appeal in federal court is sometimes determined by who has the most equitable claim. The probability of prevailing is greatest when a tribe can demonstrate a history of cooperation and fairness. Rather than forcing the confrontation, a tribe should proceed by fairly and equitably enforcing its code. If the federal court system denies jurisdiction, it can explore its quantification alternative to help eliminate disputes relating to shortages or overuse of water.

428. See, e.g., *National Farmers Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). See generally Pommersheim, *supra* note 113; Clayton, *supra* note 3.

M. Water Quality: The Need for Specific Regulations

Most tribal codes address water quality issues in a practical fashion. For example, the Umatilla Interim Water Code creates a statutory cause of action for "nuisance" activities relating to pollution of the reservation's waters.⁴²⁹ Apparently, both the regulatory agency and an individual may bring suit against a polluter under the interim code.⁴³⁰

Technicians from the Rosebud Sioux Office of Water Resources routinely test the reservation's waters for pollutants such as nitrates, sodium, and bacteria with an eye toward protecting the tribes' drinking water.⁴³¹ Tribal codes give the water committees discretion to minimize pollution, thermal degradation, and "interaquifer communication."⁴³² Since most code sections are so vague, regulations are necessary to define the unacceptable levels of pollution; this provides a scientific and defensive basis for prosecuting violations.⁴³³

Jurisdiction to enforce the Clean Water Act (CWA)⁴³⁴ and Resource Conservation and Recovery Act (RCRA)⁴³⁵ over Indians in Indian country⁴³⁶ belongs to the EPA or tribes, if they demonstrate that they possess enforcement capabilities.⁴³⁷ The states are not authorized to enforce either act against Indians on tribal lands.⁴³⁸ The water directors from the Colville, Umatilla, and Rosebud Sioux reservations agree that the cost of tribal enforcement of the CWA or RCRA is too high.⁴³⁹ If a user violates the acts, the tribes rely on the EPA to enforce its regulations and clean up any spills.

429. UMATILLA INTERIM WATER CODE § IX (1981).

430. *Id.*

431. Telephone Interview with Syed Huq, Director, Office of Water Resources, Rosebud Sioux Reservation (Aug. 6, 1991) [hereinafter Huq Interview, Aug. 6].

432. NAVAJO TRIB. CODE tit. 22, § 1502(11)-(13) (Supp. 1984-85); ROSEBUD SIOUX WATER CODE § 5.2(12)-(13) (1977).

433. Regulations regarding well drilling effectively address interaquifer pollution caused by improperly sealed wells. Farrow Interview, Aug. 5, *supra* note 272. The Umatilla Reservation Department of Natural Resources will shut down wells that cause such interaquifer contamination. *Id.*

434. 33 U.S.C.S. §§ 1251-1387 (Law. Co-op 1987 & Supp. 1992).

435. 42 U.S.C.S. §§ 6901-6992 (Law. Co-op 1982 & Supp. 1992).

436. "Indian country" is defined by Congress to include "all land within the limits of any Indian reservation under jurisdiction of the United States' government, notwithstanding the issuance of any patent . . ." 18 U.S.C. § 1151 (1988).

437. See U.S. Envtl. Protection Agency, Indian Policy Implementation Guidance (Nov. 8, 1984); U.S. Envtl. Protection Agency, EPA Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984). Both of these documents are cited in DAVID H. GETCHES & CHARLES F. WILKINSON, *FEDERAL INDIAN LAW* 535 (1986).

438. See *Washington Dep't of Ecology v. United States Envtl. Protection Agency*, 752 F.2d 1465 (9th Cir. 1985).

439. Pasmore Interview, July 2, *supra* note 265; Farrow Interview, Aug. 5, *supra* note 272; Huq Interview, Aug. 6, *supra* note 431.

N. Civil Law Alternative

Water regulations are intended to promote efficient growth while curtailing the need for individuals to resort to their common-law remedies when two uses are in conflict. The tribe may wish to enact specific civil laws that provide jurisdiction for nuisance and strict-liability claims against any user who causes harm to another at the same time that it enacts a water code.⁴⁴⁰

Such laws would remove the jurisdictional issue from the criminal/prohibitory sphere and place it into the civil/regulatory sphere, where support for tribal jurisdiction remains strong.⁴⁴¹ The laws can be written to complement the water code in a way that maintains tribal court jurisdiction over water disputes in the event that tribal territorial jurisdiction is struck down. The tribe may need to organize its irrigation operations as distinct legal entities, or tribal "corporations," which operate independently from tribal government in order to sue as private parties.⁴⁴²

Perhaps the tribe can subrogate private complainants and sue in their name. A tribe's water department may serve as a source of evidence to support a tribal member's or entity's civil claim. The agency's role would be more akin to that of a court-appointed expert.⁴⁴³ The agency's information should be available to the non-tribal member defendant if it is requested. In sum, so long as the tribal party can distance itself from tribal government, it should be able to maintain a civil suit.

IV. Summary

This comment is intended to provide a practical overview of the issues regarding tribal water rights in the West. There are no easy answers; water issues in the West are cast in a reality of water shortage. All water disputes past and future, between tribes and states or tribes and users within the reservation, are necessarily over the allocation and use of a scarce resource.

It is important that tribes enact enforceable laws which give them control over the use of water within their reservation boundaries. The essence of sovereignty is the ability to control a people's destiny. Lack of control over the most precious resource in the West — and known to mankind — means lack of power to control tribal destiny.

440. UMATILLA INTERIM WATER CODE § IX (1981) ("Contamination or Pollution").

441. See *Williams v. Lee*, 358 U.S. 217 (1959); see also *National Farmers Ins. Co. v. Crow Tribes*, 471 U.S. 845 (1985); *Iowa Mutual Ins. Co. v. La Plante*, 480 U.S. 9 (1987).

442. Enactment of civil laws relating to water use will only strengthen tribal sovereignty. See Pommersheim, *supra* note 113.

443. Cf. FED. R. EVID. 706.

This first part of this comment dealt with jurisdiction issues relating to water rights and use within the reservation. Tribes must be able to meet jurisdictional challenges in order to control their water resource and their own destiny. Such challenges may be met by quantifying the right, through either litigation or negotiation, and enacting a water code which serves as a legitimate enforcement mechanism. Such comprehensive codes solidify tribal sovereignty and preserve a vital tribal resource.

The second part of this comment addressed specific language that tribes may wish to consider when enacting water codes. Since each tribe has different circumstances and needs, each water code should reflect these differences. It addressed a variety of options a tribe may pursue when tailoring a code to match its distinct reality. It also included a discussion of the realities that all tribes hold in common, such as sovereignty and the need for adequate legal mechanisms of enforcement. Exertion of control over tribal water in the West has been met with stiff resistance. States have battled to prevent both ownership and jurisdiction in order to preserve their own dominion over this same resource for economic expansion. As such, control over water is an economic as much as legal issue, and the Supreme Court has continually acknowledged that state economic development can unhinge the tribes' legal right to their entitlement. Hopefully, both parts of this comment will aid in the enactment of effective, enforceable water codes to meet the states' unceasing challenge and to strengthen sovereignty over tribal resources and territory.