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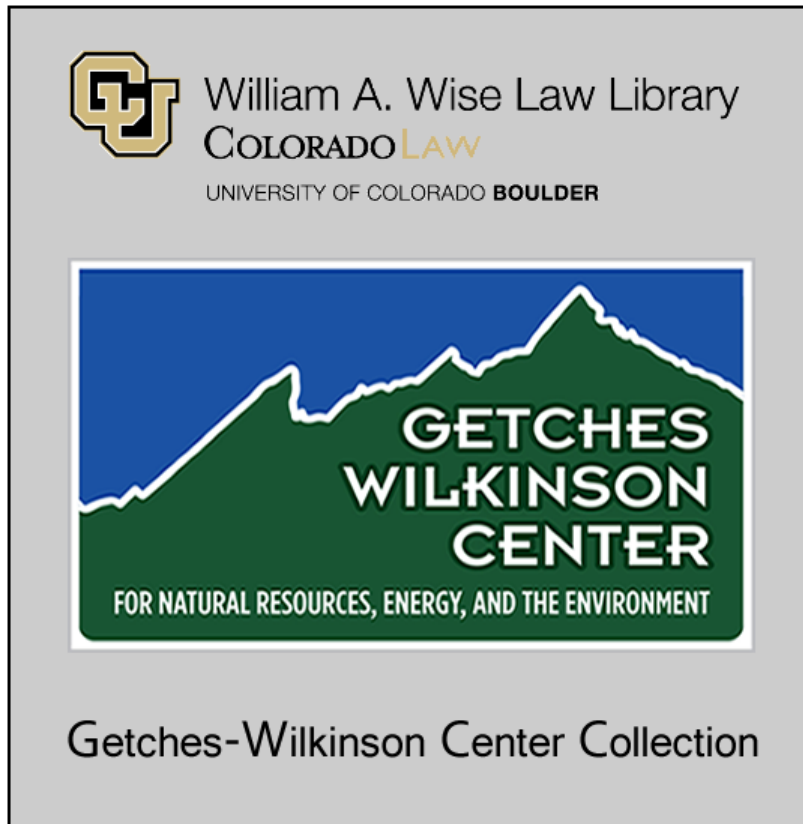
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# **ACQUIRING WATER FOR TRIBES**

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*Two Decades of Water Law and Policy Reform:  
A Retrospective and Agenda for the Future*

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NATURAL RESOURCES LAW CENTER  
University of Colorado  
School of Law  
Boulder, Colorado

## ACQUIRING WATER FOR TRIBES

### A. Water Sources – Selected Summary of Existing and Pending Settlements.

#### 1. On-Reservation Water Supplies.

##### a. Surface Water.

(1) Chippewa Cree Tribe of the Rocky Boy’s Reservation Indian Reserved Water Rights Settlement of 1999. The Compact quantifies the tribal water right and dictates methods of diversion and allowable uses for two basins, including six creeks that flow through the reservation.

(2) Warm Springs Settlement Agreement of 1997. The tribal reserved water right in specified amounts may be obtained from certain surface waters or any groundwater within the reservation. There is a presumption that groundwater is hydrologically connected to rivers and streams flowing through and bordering the reservation. The Tribe has authority to allocate its tribal reserved water right within the reservation, except for water designated for instream flows by the agreement and subject to the Secretary of the Interior’s authority under 25 U.S.C. § 381 (responsibility for allottee water). The Tribe has authority to administer state water rights and *Walton* rights established under federal law within the reservation. Administration and enforcement of state water rights used on the reservation are governed by state law. By separate Memorandum of Understanding, the parties will provide for the designation of a tribal water master to enforce state water rights used on the reservation.

(3) San Carlos Apache Tribe Water Rights Settlement. Under the 1992 settlement, the San Carlos Apache Tribe is entitled to approximately 77,435 acre-feet per year (“AFY”) of water. Of this amount, neighboring non-Indian communities relinquished claims to a total of approximately 58,735 AFY of surface water. A significant portion of the Tribe’s entitlement consists of reallocations of Central Arizona Project (“CAP”) water.

##### b. Groundwater.

(1) Yavapai-Prescott Indian Tribe Water Settlement. The 1994 settlement allows for the Tribe’s on-reservation existing use of groundwater for municipal, industrial, recreational, and agricultural purposes to continue pursuant to a groundwater

management plan to be developed by the Tribe in consultation with the Arizona Department of Water Resources.

(2) Las Vegas Paiute Tribe. To settle outstanding litigation concerning the Tribe's water rights and for purposes of determining and settling the Tribe's water rights claims in a general adjudication of water rights in the Las Vegas Artesian Basin, the parties agree that the Tribe has a permanent homeland right to groundwater from the Basin, with a priority senior to all other vested water right claimants to the waters of the Basin, based upon the Tribe's homeland needs, in the amount of 2,000 AFY to be held in trust by the United States on behalf of the Tribe. This homeland right is comprised of 1,500 AFY of groundwater recognized by the State of Nevada and 500 AFY of vested groundwater rights relinquished by the Las Vegas Valley Water District to the State of Nevada, the priority of which shall be prior to 1913. The settlement is contingent upon the Las Vegas Valley Water District being able to claim and support a vested right to at least 500 AFY of groundwater with a priority senior to others in the Basin.

(3) Northern Cheyenne Indian Reserved Water Rights Settlement. The 1992 settlement confirms that the Tribe may withdraw alluvial groundwater (*e.g.*, water interconnected with the surface flow); however, withdrawals from wells having a capacity of 100 gallons per minute or more will be deducted from the Tribe's total entitlement. The Tribe may claim non-alluvial groundwater as tribal property right, but not as a reserved water right. The settlement specifically reserves to the Tribe the right to assert a claim that it has a property right to the use of such groundwater underlying the reservation. Until a tribal property right is established, the Tribe can use non-alluvial groundwater as if it were alluvial groundwater or by obtaining a state permit.

The Northern Cheyenne Tribe and the Crow Tribe agreed separately to a 10-year moratorium on the marketing of water from the Big Horn River during the ongoing settlement negotiations between the Crow Tribe and the State of Montana. However, the 1992 settlement allows the Tribe to use and market its remaining tribal water right on or off the reservation. Any off-reservation use or transfer of the tribal water right is subject to state law; however, there are fewer state law requirements for inter-basin transfers. Further, such off-reservation use shall not

be deemed to convert the tribal water right to a state water right, with the exception of water stored in the Big Horn Reservoir. The non-use of the tribal water right shall in no event result in forfeiture or relinquishment of the water. The settlement recognizes the right of the Northern Cheyenne Tribe to use its rights on the reservation for any purpose and without regard to any provisions of state law. Tribal preference in water transfers is given to tribal members. Finally, the tribe is authorized to administer and enforce the tribal water right once the Secretary of the Interior approves and the Tribe adopts a tribal water code.

(4) Lummi Nation (Recent Settlement Concepts). The parties would find water from an off-reservation source or combination of sources totaling 5 million gallons per day (mgpd) for the purposes of (1) importing for use on reservation 2.5 mgpd, to be divided .5 mgpd for non-tribal use, and 2 mgpd for tribal use, and (2) enhancing instream fishery resources within the Nooksack Basin equivalent to 2.5 mgpd. The water source(s) must provide an assured, uninterrupted supply of water that is legally, politically, environmentally, and economically available. Until the entire 5 mgpd is secured, no portion of the 5 mgpd would be delivered or used for either tribal or non-tribal purposes.

On-reservation non-Indians using groundwater would obtain delivery of the off-reservation water that was determined, *inter alia*, to be cost effective. The non-Indians would substitute the off-reservation supply for the existing groundwater use, ceasing the use of groundwater. Except as otherwise provided for in the agreement, the non-Indians would claim no further rights to the use of the groundwater, and any state water rights would be appropriately revised and retired. The groundwater thereafter would be available for tribal use under the Tribe's reserved water rights.

(5) San Carlos Apache Tribe Water Rights Settlement. The Tribe is entitled to use all groundwater beneath the reservation, subject to federal approval of a "groundwater management plan."

c. Bureau of Reclamation Reservoirs.

(1) Nambe Dam. The Nambe Dam is located on Nambe Pueblo lands and is part of the San Juan Chama project. A contract delineates the operational requirements of the dam and allocates rights to storage of water among three pueblos and the Pojoaque Valley

Irrigation District. Although a settlement is still being negotiated, water stored in the Nambe Dam will be an important component of the settlement.

(2) San Carlos Apache Tribe Water Rights Settlement. The Tribe was reallocated 14,655 AFY of CAP water previously allocated to the Phelps Dodge Corporation, and 3,480 AFY of CAP water previously allocated to the City of Globe, Arizona. The Tribe's remaining entitlement comes from a combination of reallocating "surplus" CAP water conserved from the Ak-Chin Water Settlement Act, transferring 30,000 AFY of "surplus" water conserved from the San Carlos Reservoir, and the Tribe's original CAP allocation of 12,700 AFY of water.

d. Retired State Water Rights.

(1) Lummi Nation. An important component of recent settlement concepts is a tribal development fund that would be available for, *inter alia*, tribal acquisitions of non-Indian lands on the reservation as part of voluntary agreements. State water rights associated with such lands would then be retired.

2. Off-Reservation Water Supplies.

a. Bureau of Reclamation Reservoirs.

(1) Fort Hall Indian Water Rights Settlement. Under the 1990 settlement, the Tribes are entitled to 581,031 AFY of water from a combination of surface, ground, and stored water. The Tribes may use water from the surface flow of the Snake River and its tributaries, when and if available. In times of shortage, the Tribes will augment their flows with federal storage rights and pumped groundwater. The stored water is delivered through the Fort Hall Indian Irrigation Project ("FHIIP") and storage space made available in the Blackfoot Reservoir, Grays Lake, and other reservoirs on the Snake River system. The Tribes' rights in the FHIIP were converted to *Winters* rights and assigned a priority date of 1867. To mitigate impacts from the settlement, some unallocated federal storage space was also made available to local water users.

(2) Fallon Paiute-Shoshone Indian Tribe Water Rights Settlement. Under the 1990 settlement, the Tribes are entitled to 10,588 AFY of water from the Newlands Project, which serves irrigation water to approximately 60,000 acres in the Carson Basin, including most of the Fallon Reservation. The 1990 settlement also provided the Paiute-

Shoshone Tribe with enough capital to rehabilitate and improve the existing irrigation system on the Fallon Reservation.

(3) Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement. The Compact provides, and the settlement legislation allocates, 10,000 AFY from the Bureau of Reclamation water right stored at Lake Elwell, off-reservation. The settlement legislation also provides that, in considering alternatives for tribal municipal, rural, and industrial, the Bureau of Reclamation shall consider the feasibility of releasing the Tribe's Lake Elwell allocation into the Missouri River System for later diversion to a delivery and treatment system for the reservation.

(4) Northern Cheyenne Indian Reserved Water Rights Settlement. Under the 1992 settlement, the Tribe is entitled to a total of 81,330 AFY of water. This amount includes 30,000 AFY of stored water above the Yellowtail Dam in the Big Horn Reservoir, 12,500 AFY of direct surface flow from the Tongue River and its tributaries, 21,330 AFY of surface water from the Rosebud Creek, and 20,000 of stored and exchanged water from the Tongue River Dam Project ("TRDP"), which will become available once the Dam has been enlarged. Further, the TRDP would protect the existing tribal rights to 7,500 AFY of Tongue River water. The tribal water rights have been assigned a priority date of 1881. However, the Tribe's priority to the 30,000 AFY of water stored in the Big Horn Reservoir will be junior and subordinated to the Crow Indian Tribe.

Under the settlement, the non-use of the tribal water right does not result in forfeiture or relinquishment of the water. The settlement recognizes the right of the Tribe to use its rights on the reservation for any purpose and without regard to state law. Tribal preference in water transfers is to be given to tribal members. Finally, the Tribe is authorized to administer and enforce the tribal water right once the Secretary of the Interior approves and the Tribe adopts a tribal water code.



b. City or Regional Water System.

(1) Yavapai-Prescott Indian Tribe Water Settlement. The 1994 settlement provides that the Tribe's water service agreement with the City will continue in perpetuity. The Tribe will have priority access to 550 AFY in times of severe shortage. The City was to execute a trust agreement whereby it holds 3,169 AFY of grandfathered groundwater rights under Arizona law as security for its performance of the water service agreement.

c. Exchange Water.

(1) Fort McDowell Indian Community Water Rights Settlement. Under the 1990 settlement, the Indian Community is entitled to 36,350 AFY of water from a combination of sources. Much of the water will be exchanged by the Salt River Project ("SRP") to allow the Indian Community to divert water directly from the Verde River, an aboriginal source. The SRP has entered into a 25-year contract with the federal government to store the Indian Community's Kent Decree rights. To date, the Indian Community has used a portion of its Kent Decree water in certain years depending on the availability of water in the river and the condition of irrigation canals.

d. Purchased State Water Rights.

(1) Zuni Indian Tribe (Pending Settlement). In addition to other water made available under the settlement, the Zuni Tribe or the United States is entitled to purchase up to 3,600 AFY, from willing sellers upstream of the reservation, in the Norviel Decree Area. The settlement is not enforceable (through *inter alia* tribal waivers of water rights claims) until most of this water is actually purchased. The parties agree to cooperate in obtaining state rights, and the surface water rights will carry a priority date as set forth in the Norviel Decree. The parties agree not to object to the severance and transfer of the water rights to the Zuni Reservation. Once the rights are severed and transferred for the benefit of the Tribe, state law does not apply, the water is not subject to forfeiture and abandonment, and the Tribe may use the water any way it deems advisable.

e. State Water Rights.

(1) Las Vegas Paiute Tribe. Under the settlement, the tribe retains its rights under permits granted by the State of Nevada and held by the Tribe in the amount of 288.88 AFY, subject to the terms and conditions of the permits.

(2) Seminole Indian Claims Settlement. The Compact, as ratified by the 1987 settlement, allows the Tribe to use or affect waters without obtaining permits from a local water district and without being subject to the water district's process and procedures. The Tribe will regulate its own water use through a newly created tribal water office. In return, the Tribe has agreed to follow essential aspects of Florida surface and groundwater management and to seek advance approval from the water district of its water development plans and consumptive water use.

Under the Compact, the water district has guaranteed the Tribe 15 percent of the available surface water in the Indian Prairie Basin (Brighton Reservation) and a comparable percentage on the Big Cypress Reservation. There is no preference given for withdrawals greater than 15 percent.

The Compact also gives the Tribe absolute preference for the development of groundwater and assures the Tribe the highest priority afforded under Florida water law. For example, if there are conflicting uses or not enough water to satisfy new uses between the Tribe and a non-Indian, the Tribe's use is given preference. On the other hand, if the non-Indian's water use is pre-existing, the Tribe may have to share the water. However, one important distinction between the tribal water rights and the usual water rights afforded Florida citizens is that the tribal water right is "perpetual" in nature and is not subject to renewal by state authorities.

f. Effluent.

(1) Salt River Pima-Maricopa Indian Community. Under the 1988 settlement, the Indian Community's water entitlement includes 10,000 AFY (effluent exchange with local cities) contributed from the Roosevelt Irrigation District ("RID") via the SRP and 20,000 AFY (effluent exchanges with RID and SRP) contributed from local cities within the SRP area via the Salt and Verde Rivers. In exchange, the local cities receive 22,000 AFY of

Colorado River water via the CAP system. This 22,000 AFY of CAP water was purchased by the local cities from the Welton-Mohawk Irrigation District (a non-party) and can be used outside the SRP area.

(2) Southern Arizona Water Rights Settlement (“SAWRSA”). Under the 1982 SAWRSA, the Tohono O’odham Nation is entitled to a “firm delivery” of 66,000 AFY of water from several specific sources. These sources include CAP water, reclaimed water acquired from the City of Tucson, and a limited amount of groundwater pumping. Specifically, 28,200 AFY will be made available from reclaimed effluent water acquired by agreement with the City of Tucson. The City of Tucson will provide the reclaimed effluent water at cost. The cost to acquire and deliver this reclaimed effluent water would be reimbursable under P.L. 90-537, the underlying CAP authorization. The reclaimed effluent water will be apportioned by delivering 23,000 AFY of water to the San Xavier Reservation and 5,200 AFY to the Schuk Toak District. Further, as a condition precedent to receiving its entitlement, the Nation has agreed to limit groundwater pumping to no more than 10,000 AFY beneath the San Xavier Reservation and no more than was being pumped as of January 1, 1981 beneath the Schuk Toak District. The 1982 SAWRSA does provide for limited off-reservation marketing of groundwater, as long as such water is marketed within the Tucson Active Management Area.

In order to ensure the Nation a “firm” supply of water, the 1982 SAWRSA requires the Secretary of the Interior to acquire and deliver such supplemental amounts of water as are needed in times of shortages for CAP water deliveries. Purchase of supplemental CAP supplies may be obtained from several possible sources, including augmented CAP water, private lands, and additional reclaimed water. In the event the Secretary of the Interior is unable to acquire and deliver any of the Nation’s entitlement, the Secretary is liable for damages to the Nation in the amount of the actual replacement cost of such water. In this respect, the Nation is guaranteed that its entitlement will not be reduced in times of shortages.

g. Conserved Water.

(1) San Luis Rey Indian Water Rights Settlement. The 1988 settlement provides for the delivery of not more than 16,000 AFY of “supplemental” water, which will be conserved by lining the All American Canal (“AAC”). Thus, it is estimated that

the Bands have the right to “beneficially use” up to 24,000 AFY of surface water (*i.e.*, 9,000 AFY of San Luis Rey water and 16,000 AFY of AAC supplemental water). The cost of developing and delivering the 16,000 AFY of “supplemental” AAC water will be borne by the Bands and the local entities alone. All water will be delivered through existing federal, state, and local canal systems and aqueduct systems.

h. New Storage.

(1) Colorado Ute Settlement Act Amendments of 2000, S. 2508, 106<sup>th</sup> Cong., 2d Sess. (2000). This legislation modifies the Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585 (Nov. 3, 1988), 102 Stat. 2973, in order to provide a final settlement of the Southern Ute and Ute Mountain Ute Indian Tribes’ claims to water from the Animas and La Plata Rivers, S. 2508, 106<sup>th</sup> Cong. § 1(b)(1). To that end, the Act authorizes the Secretary of the Interior to construct, operate, and maintain “a reservoir, a pumping plant, a reservoir inlet conduit, and appurtenant facilities with sufficient capacity to divert and store water from the Animas River to provide for an average annual depletion of 57,100 acre-feet of water to be used for a municipal and industrial water supply.” *Id.*, § 2(a)(1)(A)(i). From that water, the Act allocates 16,525 acre-feet to the Southern Ute and Ute Mountain Ute Tribes for their present and future needs, 2,340 acre-feet to the Navajo Nation for its present and future needs, and the balance to various non-Indian entities. *Id.*, § 2(a)(1)(A)(ii)

**B. Water Sources – Legal Issues.**

1. Surface.

a. Nez Perce Instream Flow Decision. On November 10, 1999, the Snake River Basin Adjudication Court issued a decision rejecting the Nez Perce Tribe\*s claims for off-reservation water rights for instream flows that the Tribe claimed were implied in its reservation of off-reservation fishing rights. *In re Snake River Basin Adjudication*, Case No. 39576, Consolidated Subcase 03-10022 (Dist. Ct., 5th Judicial District, County of Twin Falls) (Nez Perce Instream Flow Claims). The Court\*s decision unpersuasively distinguishes between on- and off-reservation fishing rights, *United States v. Adair*, 723 F.2d 1394 (9<sup>th</sup> Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984), and other cases that the Adjudication Court acknowledged had

implied a reserved water right for the purpose of maintaining an Indian Tribe\*s reserved fishing rights.

2. Groundwater.

a. Gila River General Stream Adjudication. Also in 1999, the Arizona Supreme Court issued another key decision in the *Gila River General Stream Adjudication*. *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 195 Ariz. 411, 989 P.2d 739 (1999), *cert. denied*, 530 U.S. 1250 (2000) (“*Gila River*”). The Arizona Supreme Court held that (1) the federal reserved rights doctrine applies to groundwater, and (2) federal reserved water rights holders are entitled to greater protection from groundwater pumping than are water users who hold only state law water rights.

Although the Court clearly recognized that the reserved rights doctrine applies to groundwater, the Court also commented in dicta that “a reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation.” *Gila River*, 989 P.2d at 748. This language may imply that a tribe must first look to surface water to satisfy a reserved right, and only when these “other waters” are insufficient will a reserved right to groundwater be recognized. It is not clear what the Court meant or how it arrived at the statement; the Court provided no rationale for suggesting that a reserved right to groundwater must exist only when “other waters” would be insufficient.

The Court held “federal reserved rights holders enjoy greater protection from groundwater pumping than do holders of state law rights.” *Gila River* at 750. The Court did note, however, that “we do not read the case law to require a zero impact standard of protection for federal reserved rights,” and that injunctions should be “tailored to minimal need.” *Id.* (citing *Cappaert v. United States*, 426 U.S. 128, 141 (1976)). The Court then “declin[ed] in the abstract to define how imminent a threat to a reservation\*s essential water must be in order to warrant injunctive relief,” holding that this inquiry should be “grounded in the bedrock of the facts.” *Id.*

The *Gila River* decision is important for several reasons. First, it provides by far the most detailed, explicit court decision to date dealing with federal reserved rights to groundwater. For that reason, we can expect that the *Gila River* decision will be very influential in other jurisdictions across the West. Second, the decision affirms the position espoused by Indian tribes

for years that the *Winters* doctrine applies to groundwater, and any attempt to limit the reserved rights doctrine to surface water has no basis in law or principle. Further, the potential impact of the decision is considerable given that many state water users, including major municipalities, rely upon groundwater for a significant portion of their water needs. Some of these water uses may have to be restricted in the future if the facts demonstrate that such restrictions are necessary to protect a tribe's federal water rights. Finally, it is highly significant that this is a decision rendered by a state court. Historically, state courts have not been receptive to Indian water rights claims.

3. Scope of Use of Reserved Water Rights. See *State of New Mexico ex rel v. R. Lee Aamodt, et al.*, United States District Court for the District of New Mexico No. 6639-M (December 1, 1986) (Memorandum of Opinion and Order). In *Aamodt*, the court quantified the Pueblos' irrigation water rights but held that the Pueblos are not required to use this water for irrigation. In 1986, Judge Mechem ruled, in a controversy involving the Tesuque Trailer Park, that "federal law accords [the Pueblos] a certain quantity of water with an aboriginal priority. The Pueblo[s] must decide for [themselves] how to use the water." The Court rejected the argument of the State of New Mexico that the Pueblo could not use water for commercial purposes. Instead, the Court ruled that "in confirming the Pueblo's right to a quantity of water for domestic, stock water, and irrigation purposes for the lands remaining in Indian ownership, Congress did not abrogate the Pueblo[s'] right[s] to transfer water to unenumerated uses." Further, the Court held that the Pueblos "will only have to turn to state law and procedures to secure water rights when [their] water uses exceed [their] federal water rights." The effect of the Court's December 1, 1986 ruling is clear: the Pueblos have the right to use water on their lands in any manner they deem appropriate, free from any state law constraints; the *only* limitation on their use of water is the *amount* of water that they use. Thus, the Pueblos do not have to use all of the water recognized by the Court in its previous rulings (based on the Pueblos' historically irrigated acreage) for irrigation purposes only.

4. Jurisdiction – Off-Reservation Tribal Lands (and Water).

a. Trust Lands. Indian tribes have civil jurisdiction over lands that are “Indian country” as defined in 18 U.S.C. § 1151. *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 446 (1975). Indian country encompasses lands within a tribe’s reservation, trust allotments, and dependent Indian communities – lands that have been “validly set apart for the use of Indians as such, under the superintendence of the [United States] Government.” *Mustang Production Co. v. Harrison*, 94 F.3d 1382, 1385 (10<sup>th</sup> Cir. 1996), *cert. denied*, 520 U.S. 1139 (1997) (holding that tribes have civil jurisdiction over Indian trust allotments); *see also Pittsburg & Midway Coal Min. Co. v. Watchman*, 52 F.3d 1531 (10<sup>th</sup> Cir. 1995) (holding that § 1151 represents an express congressional delegation of civil authority over Indian country to the tribes). Accordingly, disestablishment of a reservation is not dispositive of the question of tribal jurisdiction. *Mustang* at 1385.

b. Fee Lands. Tribally owned lands that are not “Indian country” are subject to state jurisdiction. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) (holding that an Alaska Native village could not exercise jurisdiction over former reservation lands held in fee by a Native corporation established under the Alaska Native Claims Settlement Act).

5. Reclamation Laws.

a. Limited Uses Allowed in Existing Laws. “Congress can and generally does restrict the uses to which water . . . released from federal reclamation projects can be applied.” *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1138 (10<sup>th</sup> Cir. 1981). The San Juan-Chama Project in New Mexico, discussed at length in the *Jicarilla* case, provides a lucid example. Based on its reading of the San Juan-Chama authorizing legislation, Act of June 13, 1962, §§ 1, 8-10, 76 Stat. 96, 97, 99, the *Jicarilla* Court concluded that “the principal uses of the [Project] water are to be municipal, domestic, industrial and irrigation.” *Jicarilla Apache Tribe*, 657 F.2d at 1139. The Court thus prevented the City of Albuquerque’s attempt to use Project water to provide recreational benefits. Such a use, the Court said, was not intended by Congress to be a primary purpose of the legislation. *Id.*

b. Regulatory Issues – State Jurisdiction is Authorized. Under section 8 of the 1902 Reclamation Act, Act of June 17, 1902, ch. 1093, § 8, 32 Stat. 390, *codified at* 43 U.S.C. § 372 (1986), federal reclamation projects must be operated in accordance with state water law if not inconsistent with congressional directives. *See California v. United States*, 438 U.S. 645 (1978); *United States v. Alpine Land and Reservoir Co.*, 887 F.2d 207 (9<sup>th</sup> Cir. 1989), *cert. denied*, 498 U.S. 817 (1990); *Westlands Water Dist. v. United States, Dept. of Interior, Bureau of Reclamation*, 805 F. Supp. 1503 (E.D. Cal. 1992), *aff'd sub nom. Wetlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667 (9<sup>th</sup> Cir. 1993).

**C. Conclusions.**

1. Available natural flows (surface) typically are over-allocated because of political considerations; existing uses typically are preserved. Tribal share often is smaller due to the slower pace of tribal development.

a. *Aamodt (New Mexico)*.

b. *Zuni Indian Tribe (Arizona)*.

2. Endangered species issues heighten the importance of early tribal priority dates for their water, whatever the source. In some areas, the demand for water for ESA almost certainly will require, in dry years, that junior water users decrease their uses. Tribes should put their senior priority to use to preserve their seniority in ESA proceedings. *See Report of the Working Group on the Endangered Species Act and Indian Water Rights*, United States Department of the Interior.

3. Use of effluent requires long-term tribal planning to determine what water source of what quality can be obtained by tribes.

4. Tribal sovereignty issues vary depending on the water source. Tribal jurisdiction over reservation water use is extremely important to tribes. Financial considerations are also important in determining whether a particular water source is in the tribe's best interests as part of a water settlement.

5. As a matter of fairness, tribal rights under a settlement should be at least equivalent to the state rights, particularly with regard to leasing authorities.



6. Groundwater science and law are in their infancy. Many states minimally regulate groundwater. These circumstances make difficult quantifying and protecting tribal rights to groundwater. Federal law rights and protections should be carefully considered and addressed in any settlement.

a. Las Vegas Paiute Tribe. Tribe gets perpetual 2,000 AFY; the state issues only revocable (temporary) rights to groundwater that are revocable when a surface water is made available.

b. Zuni Indian Tribe/Little Colorado River. Pumping Protection Agreements create buffer zones surrounding the reservation with limited or no use of groundwater by non-Indians. The parties recognize a perpetual tribal right to withdraw 1,500 AFY of groundwater. State water law generally does not regulate groundwater except in Active Management Area.

7. Tribal rights to reservoir storage are subject to many existing legal restrictions that need to be carefully considered and addressed to ensure that enforcement of the settlement is not threatened.

8. Tribal uses, particularly cultural and religious, can mandate that particular sources be made available as part of a settlement.

a. Aamodt. Natural flow in stream, not groundwater or other imported sources, is needed for religious uses.

b. Zuni Indian Tribe. Under the pending Little Colorado River settlement and consistent with the congressional act establishing the reservation, water is for restoration of a wetland environment, including an area containing a sacred lake and spring for the Tribe's religious practices.

9. Tribal acquisition of water from regional and local state-chartered water entities creates new challenges, as tribes are governments and not typical customers of these entities. As governments, tribes should be able to negotiate agreements in a way that does not infringe on tribal sovereignty or fail to recognize tribes are similar to other governments that receive special governmental recognitions and benefits in water delivery contracts.

## **General References**

*Indian Water Rights: An Analysis of Current and Pending Indian Water Rights Settlements*, a report by Jon C. Hare prepared as a cooperative project between the Confederated Tribe of the Chehalis Reservation and the Office of Trust Responsibilities, Bureau of Indian Affairs, Washington, D.C. (1996).