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Articles

Settler Colonialism and Reclamation: Where American Indian Law and Natural Resources Law Meet

Sarah Krakoff*

Table of Contents

I. INTRODUCTION	262
II. THE COLORADO RIVER INDIAN TRIBES: FROM ELIMINATION TO SELF-DETERMINATION.....	264
A. Failed Attempts at Elimination: CRIT Survival from 1865–1958	265
1. 1865–Early 1900s: Federal Dreams of 10,000 Indians ...	266
2. Early 1900s–1958: Surviving Allotment and Relocation	270
B. CRIT Self-Determination and <i>Arizona v. California</i> : 1963–Present.....	276
1. <i>Arizona v. California I</i> : Establishing Reserved Water Rights	276
2. The Aftermath of <i>Arizona v. California</i> : What is the Purpose of an Indian Reservation?.....	279
III. NATURAL RESOURCES LAW LESSONS FROM CRIT	284
IV. CONCLUSION	286

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I. INTRODUCTION

Three hours east of Phoenix, Arizona, the Colorado River Indian Tribes ("CRIT"), a federally recognized tribe that includes over 3,700 enrolled members of Mohave, Chemehuevi, Navajo, and Hopi descent, occupies a reservation nearly 300,000 acres in size.¹ The CRIT was one of five tribes to have its water rights confirmed in the landmark case of *Arizona v. California*,² and therefore has senior rights to 719,248 acre-feet of Colorado River water, nearly one-third of Arizona's allocation.³ How the CRIT came to be a single federally recognized tribe composed of members from four indigenous peoples located on lands that were a fraction of their aboriginal territory, is, on one hand, a federal Indian law story.⁴ Federal Indian law, the body of law addressing relationships between the federal government and American Indian nations, includes doctrines of treaty, constitutional, and statutory interpretation that determine the framework in which the CRIT's rights to land, water, and resources have played out.⁵ But the CRIT's story is not just an Indian law story. It is also a natural resources law story. The stories are two sides of a single coin, which is the currency of settler colonialism in the United States ("U.S."). The object of settler colonial societies, like the U.S. and Australia, was to clear the land of their indigenous populations to allow for non-indigenous settlement.⁶ In the U.S., American Indian law has often done the work of clearing the land, while natural resources law assures the successful occupation of that land by non-Indians.

This Article explores the natural resources law side of CRIT's story in order to make a larger point about natural resources and environmental law. CRIT's history serves as a reminder that public land and water law do not start from a blank slate. The distribution of land and water to non-Indians required first that those resources be wrested from Indian

1. See *Enrollment*, COLO. RIVER INDIAN TRIBES, <http://www.critnsn.gov/critenrollment/> (last visited March 15, 2013).

2. 373 U.S. 546 (1963).

3. See NORRIS HUNDLEY, JR., *WATER AND THE WEST: THE COLORADO RIVER COMPACT AND THE POLITICS OF WATER IN THE AMERICAN WEST* 335-36 n.65 (2nd ed. 2009).

4. See Sarah Krakoff, *Inextricable Political: Race, Membership and Tribal Sovereignty*, 87 WASH. L. REV. 1041 (2012) (examining the CRIT's and the Great Dakota Nation's history and discussing how they inform our understandings of federal Indian law and constitutional law doctrines of equal protection).

5. See generally *id.*

6. See PATRICK WOLFE, *SETTLER COLONIALISM AND THE TRANSFORMATION OF ANTHROPOLOGY* 1-2 (1999).

control.⁷ With that as the starting point, current debates about Indian water settlements, access to land for religious and cultural purposes, and even economic and social legislation can be seen in their proper context, as measures of corrective justice that recognize indigenous peoples' preexisting political, moral, and legal claims, rather than as special rights doled out to select minorities.

Part II of this Article relates the early history of the CRIT Reservation, including the federal government's repeated efforts either to increase the Indian population of CRIT in order to consolidate tribal presence in the region, or to open up the CRIT Reservation to non-Indian settlement. Both of these strategies relied on irrigation to convert the desert to agricultural land. The government alternated between promising irrigation as a means to incentivize Indian settlement, and threatening that if the CRIT did not take steps to increase their Indian population, the promised irrigation would never be completed and/or the land would be opened for white settlement. Part III considers the implications of the CRIT story for contemporary natural resources law. If early public land and water laws were grounded in assumptions about the elimination of Native people and we are concerned about reversing the unjust effects of those laws, we should assess contemporary decisions about resource allocation in that light. In the water context, arguments about appropriate standards for quantifying tribal water rights and the uses to which tribes can put their water should be viewed against two backdrops. The first is the historical one, in which tribes ceded vast quantities of territory and water in response to the federal government's alternating good cop/bad cop strategy of promises and coercion. The second is the present one, which includes updated understandings of ecological needs, economic activities, resource scarcity, and most pressingly, the effects of climate change on all of the above. Together, these contexts point to solutions that allow tribes to have maximum flexibility with respect to their water rights in order to meet pressing and varied demands on our natural resources today, while simultaneously reversing the unjust effects of our eliminationist past.

7. See Sarah Krakoff & Jon-Daniel Lavalley, *Natural Resources Development and Indigenous Peoples*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES 199 (Abate & Kronk, eds., 2012) (summarizing U.S. history of depriving indigenous peoples of land, governance, and control of natural resources).

II. THE COLORADO RIVER INDIAN TRIBES: FROM ELIMINATION TO SELF-DETERMINATION

Today, the Colorado River Indian Tribes has approximately 3,700 enrolled members, roughly 2,400 of whom reside on the CRIT Reservation.⁸ The total population of the CRIT Reservation is slightly more than 7,000, with the balance consisting of whites, Hispanics, and others of mixed-race.⁹ CRIT's nearly 300,000 acres of Colorado River bottomlands and surrounding desert are more densely populated on a year-round basis than they were when the CRIT Reservation was first established in 1865, but there are fewer residents and far fewer Indians than the Indian agents and western boosters imagined there would be. When Congress created the CRIT Reservation, the hope was that 10,000 Indians, including virtually all of the tribes that used the lower Colorado, would settle on the 75,000 acres set aside for the "Indians of the said river and its tributaries."¹⁰ For the first several decades, however, scarcely more than 800 year-round residents, most of them Mohaves and a smaller number of Chemehuevis, could be induced to reside there.¹¹ The CRIT's history, from 1865 until the 1950s, consisted of repeated efforts by the federal government to settle greater numbers of Indians there, irrespective of tribal affiliation, or in the alternative, to open up the reservation to non-Indians. There are two themes that pervade this history of federal involvement. One is that desert lands had no greater use than to be irrigated and farmed. The other, a companion to the first, is that the solution to the West's "Indian problem" lay in concentrating as many Indians as possible on small patches of their former aboriginal territories, and converting them to a sedentary and agricultural existence. These two themes intertwine at the CRIT Reservation in ways that

8. See *Enrollment*, *supra* note 1 (citing enrollment figures); *Colorado River Indian Tribes Primary Care Area Statistical Profile 2011*, ARIZ. DEP'T HEALTH SERVS. (Apr. 1, 2013) (on file with author), available at <http://www.azdhs.gov/hsd/profiles/> (search for Colorado River Indian Tribes) (providing percentage of American Indians residing on the CRIT Reservation).

9. See *Colorado River Indian Tribes Primary Care Area Statistical Profile 2011*, *supra* note 8.

10. 13 Stat. 559 (1865); see UNIV. OF ARIZ. BUREAU OF ETHNIC RESEARCH, DEP'T OF ANTHROPOLOGY, SOCIAL AND ECONOMIC STUDIES, COLORADO RIVER RESERVATION; REPORT NO. TWO: HISTORY OF THE COLORADO RIVER RESERVATION 5-7 (1958) [hereinafter HISTORY OF THE COLORADO RIVER RESERVATION].

11. See HISTORY OF THE COLORADO RIVER RESERVATION, *supra* note 10, at 11-22 (describing attempts between 1865-1900 to settle Indians on the CRIT Reservation and noting repeated failures to induce tribes other than the Mohave and some Chemehuevi to stay on a year-round basis).

highlight the overriding importance of water. Without impounding and diverting the Colorado River's precious acre-feet, the Lockean visions for the arid Southwest were mere mirage.¹²

*A. Failed Attempts at Elimination:
CRIT Survival from 1865–1958*

Settler-colonialism, the term for the type of colonization that occurred in North and South America, Australia, and New Zealand, is characterized by a population of settlers who came to stay and who, in relatively short order, outnumbered the aboriginal inhabitants of the land.¹³ Australian anthropologist Patrick Wolfe has documented the ways that racial regimes were deployed to achieve distinctive ends in settler-colonial societies.¹⁴ According to Wolfe, because the object of settler colonialism is to separate indigenous peoples from their land, rather than to extract labor from them,¹⁵ the racial formation of American Indians was (and remains) very different from that of African-Americans.¹⁶ To facilitate access to land, the racial logic for American Indians followed the path of elimination. African-Americans, however, constituted first a free labor source and then, after the Civil War and the

12. See WALLACE STEGNER, *BEYOND THE HUNDREDTH MERIDIAN* 217–23 (PENGUIN BOOKS, 1992) (1954) (describing this vision of settlement and its failure in the arid region); see also Sally Fairfax, Helen Ingraham & Leigh Raymond, *Historical Evolution and Future of Natural Resource Law and Policy in THE EVOLUTION OF NATURAL RESOURCES LAW AND POLICY* 6 (Lawrence Macdonnell & Sarah F. Bates eds., 2010) (describing the disposition of public lands to private entities as implementing the vision of “a wonderful Lockean diorama, [of settlers] putting the land to beneficial use by mixing their sweat with it.”).

13. See generally WOLFE, *supra* note 6; see also AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 12–13 (2010) (defining settler empire and describing key features and consequences of that status).

14. See Patrick Wolfe, *Land, Labor, and Difference: Elementary Structures of Race*, 106 AM. HIST. REV. 866, 867 (2001) [hereinafter Wolfe, *Land, Labor, and Difference*] (“[R]ace is but one among various regimes of difference that have served to distinguish dominant groups from groups whom they initially encountered in colonial contexts. . . . American Indians and Aboriginal people in Australia share much more than the quality of attracting assimilation policies. Above all, they are both sets of peoples whose territorial expropriation was foundational to the colonial formations into which Europeans incorporated them.”)

15. See *id.* at 868 (“As opposed to franchise-colonial relationships (such as the British Raj, the Netherlands East Indies), settler colonialism seeks to replace the natives on their land rather than extract surplus value by mixing their labor with a colony’s natural resources.”).

16. See *id.* at 866–67, 881.

failure of reconstruction, a very cheap one. The racial formation of African-Americans therefore had the opposite structure: The more people labeled juridically black, the better.¹⁷ For American Indians, the racial logic of elimination led to laws and policies that encouraged assimilation and defined tribal affiliation in increasingly stringent ways so as to eliminate indigenous presence on the land by slowly eliminating indigenous peoples as a distinct legal category.¹⁸ By contrast, the desire to proliferate slaves led to the opposite approach to legally sanctioned racialization: "One drop" of African-American blood could be sufficient to make one legally black.¹⁹

The logic of settler colonialism is on display throughout the history of the federal government's efforts to settle the many distinct tribes of the lower Colorado River basin onto a single reservation. In this context, the eliminationist project was characterized by the federal government's obliviousness to distinctions between tribes in order to consolidate the greatest number of Native people possible onto one location.

1. 1865-Early 1900s: Federal Dreams of 10,000 Indians

The gap between how the tribes used the area and the federal government's goals for consolidation was apparent from the outset. Early reports indicated that the tribes that accessed the lower Colorado River had distinct, yet sometimes overlapping, territories, and that for some, their use of the river bottomlands was seasonal.²⁰ In addition, it was quite clear that some of the tribes, including the Mohave and Chemehuevi, did not have peaceful relationships with one another.²¹ Nonetheless, Charles D. Poston, the first Superintendent of Indian Affairs for the territory of Arizona, recommended that a single reservation be created that would " 'colonize some ten thousands Indians within its boundaries.' "²² Poston's proposed figure of 10,000 appears to arise from his assessment of the sum of the populations of five tribes that farmed along the River, and otherwise accessed vast stretches of territory throughout the region for hunting and other seasonal occupation.²³ Poston met with the leaders

17. *See id.* at 867–68.

18. *See id.*; *see also* Krakoff, *supra* note 4, at 1118–22.

19. *See* WOLFE, *supra* note 6, at 2.

20. *See* HISTORY OF THE COLORADO RIVER RESERVATION, *supra* note 10, at 5.

21. *See id.* at 9–10 (noting hostilities between the Chemehuevis and the Mohaves, among other tribes).

22. *Id.* at 5–7 (quoting Charles D. Poston, *Annual Report of the Commissioner of Indian Affairs for 1864*, at 300–01 (Government Printing Office, Washington, D.C., 1865)).

23. *See id.* at 6.

of these tribes at La Paz, a city he described as “ ‘a considerable commercial city [that] had sprung up in the midst of the powerful Mojave Indians.’ ”²⁴ Poston reported:

The council was headed by the principal chiefs and headmen of the Yumas, Mojaves, Yupapais [sic; today would be Yavapais], Hualopais [sic; today would be Hualapais], and Chemihuevis [sic]. These tribes have an aggregate of ten thousand souls living near the banks of the Colorado, from Fort Yuma to Fort Mojave. They cultivate the bottom lands of the Colorado [R]iver, where an overflow affords sufficient moisture; the failing of an overflow, which sometimes happens, is considered a great calamity and breeds a famine. Their resources from game, fish, and wild fruits have been very much curtailed by the influx of Americans, and it would be dangerous for them to visit their former hunting-grounds. The fruit of the mesquite tree, an acacia flourishing in this latitude, has been the staff of life to the Indians of the Colorado. . . . This resource for the Indians has been very much curtailed since the irruption of the Americans and Mexicans . . . The improvidence of the Indians leads them to sell all the beans in the autumn, saving none for the winter consumption. During the past winter they were in such a famished condition that they killed a great many horses and cattle on the river, mostly belonging to American settlers, for which claims are now made. After a careful investigation of the condition of the Indians, it was determined to select a reservation for them on the bank of the Colorado [R]iver, and ask the government to aid them in opening an irrigating canal, so that they may become industrious and self-sustaining . . . This reservation would include about seventy-five thousand acres of land—all public domain and uncultivated. It is proposed to colonize some ten thousand Indians within its boundaries. The estimated expense of opening an irrigating canal here is fifty thousand dollars in gold, or one hundred thousand in currency.²⁵

Poston's report and recommendations were adopted virtually wholesale into the legislation that created the CRIT Reservation. There was no consultation or negotiation with the tribes themselves (as Poston noted, “a reservation *was selected for them*”) nor was there any deliberation in Congress. Rather, the provision concerning the CRIT Reservation was inserted as an amendment to a larger bill concerning various appropriations for “ ‘the current and contingent expenses of the

24. *Id.*

25. *Id.*

Indian department,' ”²⁶ and “[t]he amendment was agreed upon without discussion, debate or explanation.”²⁷

The only aspect of Poston’s recommendations that did not become part of the legislative package was his proposal concerning \$100,000 in funding for the irrigation canal. The statute creating the CRIT Reservation provided only that

[a]ll that part of the public domain in the Territory of Arizona lying west of a direct line from Half-way Bend to Corner Rock on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart as an Indian reservation for the Indians of said river and its tributaries.²⁸

Elsewhere in the same statute, a smaller appropriation of \$20,000 was provided

[f]or the general incidental expenses of the Indian service in the Territory of Arizona, presents of goods, agricultural implements and other useful articles, and to assist them to locate in permanent adobes, and sustain themselves by the pursuits of civilized life. . . .²⁹

Without funding for the canal and irrigation system, progress faltered on turning the CRIT Reservation into an agricultural homeland for the many Indian tribes of the area. An 1865 report by the Commissioner of Indian Affairs described the inertia at the outset:

Nothing has been done in regard to the proposed reservation lying between Corner Rock and Halfway Bend, on the Colorado, which was authorized by act of Congress last winter. The reservation, it is understood, can only be made available for the Indians by an extensive irrigating canal, estimated to cost some \$100,000 in currency, for which Congress has made *no appropriation*.³⁰

In 1867, Congress appropriated \$50,000 for the project and construction began that year, only to cease due to lack of funding after just five miles of canal had been completed.³¹ In 1868, another \$50,000 was appropriated, and in 1872, another \$20,000.³² Nonetheless, progress

26. *Id.* at 8 (internal citation omitted).

27. *Id.* at 8.

28. Act of March 3, 1865, 13 Stat. 559.

29. *Id.*

30. HISTORY OF THE COLORADO RIVER RESERVATION, *supra* note 10, at 11 (quoting D.N. Cooley, *Report to the Commissioner of Indian Affairs*, in ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 14 (Government Printing Office, 1865) (emphasis added)).

31. *See id.* at 15, 27, 29.

32. *See id.* at 29 (listing appropriations for the CRIT canal and irrigation project).

on the project was slow, and while the canal “proved very successful so far as completed . . . a flood gate, with a canal to let off the surplus water was still necessary.”³³ Seven years after the creation of the reservation, only 500 acres were cultivated by irrigation, less than half of what the Mohave were able to plant on the bottomlands when the Colorado River overflowed that same year.³⁴

Throughout this early period, not only did the canal remain unfinished, but other services typically provided to Indian reservations were absent. There was no hospital, despite an outbreak of syphilis, and there were no school buildings.³⁵ Rather than re-think their plans to induce numerous Indians to stay, the Indian agents resorted to military force and coercion.³⁶ Even those measures were not enough, and as a government-commissioned report concluded,

it is obvious that the first 10 years of the Colorado River Indian Reservation were not very successful. No Indians except about 800 Mohaves . . . consistently lived on the reservation during these years, and those who did live there subsisted almost entirely on government rations while, apparently, hoping for the promised canal to be put into operations.³⁷

The following twenty-five years were scarcely more of a success. Some Chemehuevi chose to live seasonally on the CRIT Reservation, but only after the boundaries were enlarged in 1876 to include lands on the California side of the River.³⁸ Otherwise, the numbers remained the same. Only 800 Mohaves and some smaller and itinerant number of Chemehuevis called the CRIT Reservation home.³⁹ Nonetheless, the Indian agents, unhindered by the facts, retained a rosy outlook. In 1890, Agent George Allen reported

that there is no reason in this world why the present state of affairs should continue on this reservation. With the expenditure of a few thousand dollars in a 6-horse-power boiler and two vacuum irrigation

33. *Id.* at 18.

34. *See id.* (“The Colorado had overflowed that year and the Indians had been induced to plant about 1,100 acres by the threat of cutting off their rations.”).

35. *See id.* at 18.

36. *See id.* at 14, 18 (noting that the Indian agent repeatedly requested troops to be stationed “nearby to keep the Indians intimidated” and describing how the Mohave had been induced to plant “by the threat of cutting off their rations”).

37. *Id.* at 20.

38. *See id.* at 22 (describing series of Executive Orders that expanded the Reservation); *see id.* at 20 (describing Chemehuevi presence on the west side of the River).

39. *See id.* at 20–21.

pumps, a perpetual supply of water can be had . . . and all the Mohaves, Hualapais, and the Chimehuevi [sic] made self-sustaining. Besides there is land enough to support the Yumas, the Apache-Mohaves, and the Apache-Yumas.⁴⁰

Despite Agent Allen's can-do attitude, the pumping plant was not installed until 1898-1899.⁴¹ In addition, throughout the period of 1865-1917, most of the tribes mentioned as destined for the CRIT Reservation succeeded in negotiating permanent homelands of their own.⁴² By 1900, only 500 acres of the CRIT Reservation were under irrigation, and hopes had dimmed of 10,000 Indians from all tribes throughout the Southwest settling there.

2. Early 1900s-1958: Surviving Allotment and Relocation

Starting in the early 1900s, the federal government shifted its approach from attempting to maximize the Indian population at CRIT to opening up part of the CRIT Reservation to non-Indians. As noted above, the CRIT Reservation had been expanded by Executive Orders in the 1870s, so that by the early 1900s the Reservation, originally only 75,000 acres, comprised 265,858 acres of land.⁴³ The enlarged land base, in combination with the "complete failure"⁴⁴ of the irrigation schemes before 1900, led to different approaches to making the desert profitable. First, the Indian policy period known as the Allotment and Assimilation era was already in force elsewhere, and took root at CRIT during this time. The overriding goals of Allotment and Assimilation policies were to destroy tribal self-governance and identity, and assimilate Indians into the general population.⁴⁵ The means included breaking up the tribal land base and outlawing tribal laws, customs, and religious practices.⁴⁶ Under Allotment policies, the tribally held lands were carved into rectangular homestead plots, which were doled out to individual Indians or Indian heads of households. The idea, which involved no small amount of

40. *Id.* at 21 (quoting George Allen, *Report to the Commissioner of Indian Affairs*, in ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 4 (Government Printing Office, 1890)).

41. *See id.* at 27.

42. *See id.* at 21-22.

43. *See id.* at 22-23 (describing series of Executive Orders enlarging the Reservation in the 1870's and, in one case, correcting a surveying error, as well as legislation allowing a railway company to purchase 40 acres of land on the reservation).

44. *See id.* at 30.

45. *See generally* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995) (describing Allotment and Assimilation policies and their effects in detail).

46. *See id.*

magical thinking, was that tending to a private piece of land would transform the Indians into productive yeoman farmers who no longer felt allegiance to their tribes.⁴⁷ As more than a side benefit to a land-hungry white populace, the remaining unallotted reservation acreage was declared “surplus” and opened to homesteading by non-Indians.⁴⁸ Second, Congress passed the Reclamation Act of 1902, which funded large-scale irrigation projects throughout the West and opened up the newly irrigable lands to homesteading under the Act’s conditions.⁴⁹ Allotment and Reclamation came together at CRIT under the Act of April 21, 1904, which applied the Reclamation Act’s provisions to the CRIT and Yuma Reservations.⁵⁰ Initially, the plan was to allot five acres of land to each Indian residing on these reservations.⁵¹ By 1911, the allotment size was increased to ten acres, still far less than the traditional 160-acre homestead plot.⁵²

Despite the federal government’s promises to irrigate the CRIT Reservation since its establishment,⁵³ the legislation required that the CRIT pay for the reclamation projects with the sale of the Reservation’s surplus lands.⁵⁴ In other words, the CRIT would be required to pay, with funds acquired from selling off the lands that they never agreed to be confined to in the first place (and which constituted only a fraction of their aboriginal territory), for irrigation projects that the government had been promising them would be constructed from the very outset of establishing the CRIT Reservation in 1865.⁵⁵

One source of pressure to allot the CRIT Reservation was Indian policy itself. Infused with the Lockean ideal that the best use of land was to cultivate it, and the companion notion that individual responsibility for private property would magically convert Indians into productive and assimilated yeoman farmers, “Bureau of Indian Affairs philosophy, over

47. See *id.*; see also AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY “FRIENDS OF THE INDIANS”: 1880–1900 (Francis Paul Prucha, ed., 1973) (collected writings and speeches of allotment supporters).

48. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.04, at 75–84 (Nell Jessup Newton et al., eds., 2005 & Supp. 2009).

49. Act of June 17, 1902, 32 Stat. 388; see CHARLES WILKINSON, CROSSING THE NEXT MERIDIAN 246–47 (1992) (describing history behind the Act, its provisions, and its implementation).

50. See Act of April 22, 1904, 33. Stat. 224; HISTORY OF THE COLORADO RIVER RESERVATION, *supra* note 10, at 23.

51. See HISTORY OF THE COLORADO RIVER RESERVATION, *supra* note 10, at 23.

52. See *id.* at 23 (citing Act of March 3, 1911, 36 Stat. 1063).

53. See *infra* Part II.A.

54. See HISTORY OF THE COLORADO RIVER RESERVATION, *supra* note 10, at 23.

55. See *id.* at 23.

the years, thought of Indian land ownership in terms of how much land an Indian could actually use himself."⁵⁶ Another source of pressure was public lands policy, which was in the grip of disposition to states, individuals, and railroads. While the stated goals of disposition were similarly Lockean, with paeans to the individual homesteader who could go west and stake a claim, turning the desert into profitable farmland in the process, the realities were quite different. Land speculation formed the basis of many western cities, and federal subsidies, in the form of reclamation projects and land grants to railroads, made some areas subject to rampant forms of it.⁵⁷ The town of Parker, Arizona, located within the CRIT Reservation boundaries, was one such area.

The Secretary of the Interior set aside the town site of Parker in 1908, pursuant to the Act of April 30, 1908.⁵⁸ The Act authorized the Secretary to sell tracts of land within the town site and deposit the net proceeds in a fund for the CRIT.⁵⁹ Western boosters viewed long-promised irrigation projects for the CRIT as implicit agreements to open up the irrigable lands for non-Indian settlement. An auction in Parker, held in 1910, resulted in the sale of \$56,698 worth of lots.⁶⁰ A memorial of the Second Legislature of the State of Arizona, drafted to plead Arizona's case before Congress concerning the injustice of not opening the CRIT Reservation to non-Indians, urged that the purchasers were induced to buy the Parker lots by the allure of irrigated CRIT lands being made available.⁶¹ Not mincing words, the memorial stated:

That the lots put up for sale at said auction had a prospective value only upon the assumption that said surplus lands would be opened to settlement at an early date. That the enormous increase in the valuation of lots in the Parker town site . . . was only justified by the carrying out of the implied promise contained in the above act that the surplus lands of the Colorado River Indian Reservation would be open to settlement.⁶²

56. *Id.* at 38.

57. See PATRICIA LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* (1987).

58. 35 Stat. 77 (1908); see also *HISTORY OF THE COLORADO RIVER RESERVATION*, *supra* note 10, at 31.

59. See *HISTORY OF THE COLORADO RIVER RESERVATION*, *supra* note 10, at 31.

60. See *id.* at 32.

61. See *id.*

62. *Id.* at 32-33 (quoting *Memorial of the Second Legislature of the State of Arizona, Hearings Before the Comm. on Indian Affairs*, U.S. Senate, 64th Cong., 1st Sess. (1916)).

Following in the footsteps of many western boosters, Senator Ashurst of Arizona dramatically stated the case for the speculators:

Settlers came from all over the West and bought town lots there and built houses. They paid their money, they got their patents. Are we going to leave them between Scylla and Charybdis forever, or are we going to have an investigation and say what shall be or ought to be done?⁶³

For reasons that are not entirely clear, Senator Ashurst's plea was unavailing. The CRIT Reservation was never opened to non-Indian settlement, despite the twin pressures of allotment philosophy and manifest destiny evident in the discussions of the time.⁶⁴

The CRIT and its members, now decidedly only Mohave and Chemehuevi, survived the allotment and speculation pressures, only to have the federal government swing back again to a strategy of increasing the Indian presence on the Reservation. In 1931, Reservation Superintendent C.H. Gensler expressed the federal government's perpetual frustration with the stubborn excess of land occupied by the CRIT:

There is a large tract of potential agricultural land on the Colorado River Reservation . . . that these Indians can never use. There will never be enough of them to use it. With the coming of irrigation for this land some plan must be devised for its development. *There seems to be no justification for the Indians to attempt to retain all of this land.*⁶⁵

Superintendent Gensler again suggested opening the Reservation and selling off the surplus lands,⁶⁶ but quickly pivoted to a different plan. He approached the Superintendent of the Papago (today Tohono O'odham), and proposed that " 'a few Papagos colonize there for the experiment.' "⁶⁷

63. *Id.* at 33 (quoting *Hearings Before the Comm. on Indian Affairs*, U.S. Senate, 64th Cong., 1st Sess. (1916)).

64. *See id.* at 33 ("In short, the town site of Parker on the Colorado River Indian Reservation was founded by speculators, men whose speculations went to no avail since the reservation was never thrown open to entry.").

65. C.H. Gensler, *Narrative of Conditions on the Colorado River Agency as of April 1, 1931: Hearings Before the Subcomm. on Indian Affairs*, U.S. Senate, 71st Cong., 3d Sess., 8885–97 (1931) (emphasis added), quoted in Bernard L. Fontana, *The Hopi-Navajo Colony on the Lower Colorado River: A Problem of Ethnohistorical Interpretation*, 10 *ETHNOHISTORY* 162, 169–70 (1963).

66. *See id.*

67. Fontana, *supra* note 65, at 170.

The Papago could not be convinced, but soon thereafter several factors converged that resulted in a plan to relocate Navajo and Hopi people to the CRIT Reservation. First, the Bureau of Indian Affairs had, for years, been justifying its annual funding requests for the CRIT irrigation project on the basis of the ever-elusive goal of a larger CRIT population.⁶⁸ Second, pressure on the Bureau became even greater when the federal government, as part of its public works effort during the depression, began building big dam projects throughout the West.⁶⁹ With greater storage capacity, the logic of western water law drove potential users to make and use their claims as quickly as possible.⁷⁰ The Bureau likely felt compelled, in these circumstances, to defend its requests for CRIT funding only if the Bureau also redoubled its efforts to expand the number of project beneficiaries on the Reservation.⁷¹ Third, prolonged drought, a dire national economic situation, and the Bureau's heavy-handed response to overgrazing had taken their toll on Navajo and Hopi people, many of whom were suffering from extreme poverty and were therefore eager for better opportunities.⁷² Finally, the CRIT members themselves felt strong pressure to accept the Navajo and Hopi people onto their lands. As historian Bernard Fontana notes, pan-Indian identity was on the rise in the 1930s and some CRIT members were likely moved by the plight of their northern neighbors.⁷³ Other CRIT members may have simply grown weary of the federal government's endless efforts, some more threatening and coercive than others, to expand their population. In particular, the recurring refrain of "if you don't accept other Indians, we will open your lands to white people," was louder than ever.⁷⁴

68. *See id.* at 174.

69. *See id.* at 177.

70. *See id.* As Fontana correctly describes, "The matter of water rights, who would get the irrigation from these systems, became of paramount importance. The only way to retain water rights for land is to use water." *Id.*

71. *See id.*

72. *See generally* L. Schuyler Fonaroff, *Conservation and Stock Reduction on the Navajo Tribal Range*, 53 GEOGRAPHICAL REV. 200 (1963) (describing the effects of the drought, depression, and stock reduction on the Navajo); LAURA THOMPSON, *CULTURE IN CRISIS: A STUDY OF THE HOPI INDIANS* 33 (1950) (attributing Hopi interest in relocating to Navajo encroachment on their land base); *see also* Fontana, *supra* note 65, at 176 (attributing Navajo and Hopi interest in relocation to financial hardship and range deterioration).

73. *See* Fontana, *supra* note 65, at 174–75.

74. *See id.* at 172 (quoting a 1940 Bureau of Indian Affairs Report stating that if 75–80% of the lands that will be irrigable after project completion are not occupied by Indians, "there will be an irresistible demand to have Congress open the unused

The CRIT Tribal Council, giving in to the forces from without and within, passed Ordinance Number 5 (“Ordinance Five”) on March 26, 1945, which authorized the division of the Reservation into a Northern and Southern Reserve. The Northern Reserve, which included 25,000 irrigable acres, would be given to the existing CRIT members. The Southern Reserve, with roughly 75,000 irrigable acres, would be set aside for other Indians in the Colorado River drainage, including the Navajo and Hopi.⁷⁵ Ordinance Five also provided that the relocated Indians would be joined as members of the CRIT.⁷⁶

That same year, thirteen Navajo and Hopi families moved to the Reservation, described, without irony, as “colonists” by Bureau officials and subsequent historians.⁷⁷ By 1951, a total of 148 Navajo and Hopi families had relocated. Shortly thereafter, the relocation program came to an abrupt halt. The CRIT Tribal Council, having serious doubts about the wisdom of the program and recognizing the extent to which it had been coerced by the federal government into accepting it, held a referendum vote in which the CRIT members rescinded Ordinance Five.⁷⁸ The Navajo and Hopi families who relocated during the brief window that Ordinance Five was in effect were therefore the only official “colonists,” resulting in the four-tribe lineage at the CRIT Reservation today.

Today, the CRIT proudly embrace their multi-tribal heritage.⁷⁹ In 1966, a seal was created to honor the four tribes from which their members descend.⁸⁰ But the forced consolidation of distinct peoples made the process of becoming a coherent tribe, with a functioning government and economy, more challenging than it had to be, and to some extent, cultural and political hurdles remain.⁸¹ Fortunately, the relocation of Navajo and Hopi people was the last chapter in the federal government’s nearly ninety-year effort to force a larger population at the

lands”); see also Krakoff, *supra* note 4, at 1099 (describing Director of Indian Affairs John Collier’s threatening stance toward CRIT in this regard).

75. See Fontana, *supra* note 65, at 164; HISTORY OF THE COLORADO RIVER RESERVATION, *supra* note 10, at 36;

76. See Fontana, *supra* note 65, at 164; HISTORY OF THE COLORADO RIVER RESERVATION, *supra* note 10, at 36–37.

77. See, e.g., Fontana, *supra* note 65, at 164; HISTORY OF THE COLORADO RIVER RESERVATION, *supra* note 10, at 49–50.

78. See Fontana, *supra* note 65, at 166; HISTORY OF THE COLORADO RIVER RESERVATION, *supra* note 10, at 50–51.

79. See TRUDY GRIFFIN PIERCE, NATIVE PEOPLES OF THE SOUTHWEST 250 (2000).

80. See *id.*

81. See Michael Tsosie, Preservation of Mohave History and Culture 1–2 (Dec. 1993) (unpublished manuscript, Americans for Indian Opportunities Ambassador Program), available at <http://www.eric.ed.gov/PDFS/ED379115.pdf>.

CRIT Reservation. By the late 1950s and early 1960s, different pressures and ideas began to pervade the country. These included reckoning with natural resource limitations, including the costs to the environment of dewatering our rivers, and recognizing that American Indian nations should exercise their own powers of self-governance, consistent with strong legal and moral obligations to the continent's original peoples.

*B. CRIT Self-Determination and Arizona v. California:
1963–Present*

1. Arizona v. California I: Establishing Reserved Water Rights

*Arizona v. California*⁸² was decided in 1963, at the beginning of the policy period in American Indian law known as the era of Self-Determination.⁸³ Arizona filed the case in 1952 to settle long-simmering disputes with California about each state's proportionate share of the 7.5 million acre-feet of water apportioned to the lower basin states, which include Arizona, California, and Nevada, under the Colorado River Compact.⁸⁴ The Compact, entered into in 1922, divided the waters of the Colorado River between the upper basin states (Colorado, Utah, Wyoming, New Mexico, and, for a small percentage of their share, Arizona), and the three lower basin states.⁸⁵ The notion was that the states would work out, under the Compact's framework, their proportionate share of water within the upper and lower basins. That notion proved overly optimistic. The Compact, which was intended to avert lengthy litigation, became the object of it.⁸⁶ Arizona's primary concerns were that California should not, by virtue of diverting and using the Colorado River's waters first, be legally entitled to more than 4.4 million acre-feet, and that Arizona should have the exclusive beneficial use of its tributaries, meaning that these waters would not be counted against Arizona's Colorado River apportionment.⁸⁷

The U.S. intervened in the case in order to assert water rights on behalf of twenty-five American Indian tribes in the lower basin and to

82. 373 U.S. 546 (1963).

83. See ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 152–58 (2d ed. 2010) (describing the self-determination era laws and policies).

84. See 373 U.S. at 558–59 (describing the basis for Arizona's concerns).

85. See *id.* at 557–59; see also Colo. River Compact, 70 Cong. Rec. 324 (1922), available at <http://www.usbr.gov/lc/region/g1000/lawofrvr.html>.

86. See 373 U.S. at 557.

87. See *id.* at 562–64.

press for reserved rights for other federal lands.⁸⁸ After the initial pleadings, the Court referred the case to a Special Master, who conducted a trial that endured for more than two years, “during which 340 witnesses were heard orally or by deposition, thousands of exhibits were received, and 25 thousand pages of transcript were filed.”⁸⁹ The Supreme Court largely accepted the Special Master’s findings and recommendations, and Arizona was the big winner.⁹⁰ The Court agreed that California’s share was limited to 4.4 million acre-feet, and that each state was entitled to the water from its tributaries.⁹¹

With respect to the federal government’s claims, the Special Master set aside the federal lands issues as well as any tribal claims that derived from tributaries of the Colorado River. For the five tribes in the lower basin on the main stem of the River, including the CRIT, the Special Master ruled in favor of recognizing their senior rights to water, and the Supreme Court affirmed that decision. The Court held that the CRIT, Cocopah, Yuma, Chemehuevi, and Fort Mohave Tribes had senior rights to water, with priority dates the same as those for the designation of their reservations.⁹² In coming to that conclusion, the Court embraced the outcome and much of the reasoning of *Winters v. United States*, a 1908 case that held that a tribe’s right to water dates from the creation of its reservation, and furthermore, that the right exists regardless of whether diversion or irrigation had yet taken place.⁹³

One of Arizona’s arguments against recognizing the tribes’ water rights was that there was “a lack of evidence showing that the [U.S.] in establishing the reservation intended to reserve water for them.”⁹⁴ The Court rejected this position, relying in part on *Winters*’ generalized reasoning that the federal government intended to deal fairly with Indians, and therefore would not have recognized their claims to land while denying them the water necessary to support their reservations.⁹⁵ The Court also specifically mentioned CRIT’s situation, including references in the congressional record to the debate before the first

88. *Id.* at 595; see also HUNDLEY, *supra* note 3 (describing the U.S. claims in the litigation).

89. 373 U.S. at 551.

90. See *id.* at 565; see also HUNDLEY, *supra* note 3, at 303–04.

91. See 373 U.S. at 565, 567–75.

92. See *id.* at 600.

93. See *id.* at 599–600 (quoting and discussing *Winters v. United States*, 207 U.S. 564 (1908)).

94. *Id.* at 598.

95. See *id.* at 600.

appropriation for CRIT's irrigation canal.⁹⁶ As is clear from the history recounted above, the Court could have included much more evidence of the unrelenting series of actions attesting to the federal government's intentions to settle Indians at the CRIT Reservation by turning them into farmers.⁹⁷ Key to this, of course, was the provision of water, or at least that was the recurring (if unfulfilled) promise.⁹⁸ While the Court did not delve into that troubled history as deeply as this Article has, it did observe that

[i]t is impossible to believe that when Congress created the great Colorado Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted for and the crops they raised.⁹⁹

The Court's affirmation of *Winters* was a significant victory for the CRIT and the other four tribes whose rights were decreed, but also for tribes in general. Today, tribal reserved water rights are well established in law (if not warmly embraced in fact). But in 1963, many of the bedrock legal principles of Indian law had yet to be acknowledged by federal courts in the modern era. *Williams v. Lee*,¹⁰⁰ which ousted state court jurisdiction over a claim arising on the Navajo Nation, is often described as the case that heralded the modern era of American Indian law in the federal judiciary.¹⁰¹ Yet *Arizona v. California* could give *Williams* a run for that title, and reviving *Winters* would be reason enough.

There is even more to the *Arizona v. California* opinion, however. In addition to recognizing very senior priority dates for the tribes, the Court affirmed the Special Master's decision concerning the quantity of water reserved.¹⁰² The Special Master concluded that "the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations."¹⁰³ The Court embraced the "practically irrigable acreage" ("PIA") standard, which allowed for

96. See *id.* at 599.

97. See *infra* Part II.

98. See *id.*

99. 373 U.S. at 598–99.

100. 358 U.S. 217 (1959).

101. See ANDERSON ET AL., *supra* note 83, at 394.

102. See 373 U.S. at 600.

103. *Id.*

much greater quantities of water than the approach Arizona urged. Arizona pressed for the tribes' quantities to be determined by their actual population and their " 'reasonably foreseeable needs.' " ¹⁰⁴ The Court rejected this argument out of hand, and simply stated, "We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." ¹⁰⁵

Since 1963, the PIA standard has been both lauded and criticized. ¹⁰⁶ One thing is certain, however, and that is that the standard gives tribes much more leverage than they would have had if Arizona's rule had been adopted. ¹⁰⁷ In addition, seen in light of the CRIT's history, there is some justice in the Supreme Court's ready adoption of a standard that the federal government relied on in principle, yet resisted in reality for decades. In other words, while the notion of turning those "hot scorching sands" ¹⁰⁸ into rolling green fields of alfalfa may seem bizarre today, it was the official policy, including Indian policy, of the federal government throughout the late nineteenth and much of the twentieth centuries. To quantify a tribe's right to water according to that notion at least has the benefit of making the federal government reap what it sowed.

2. *The Aftermath of Arizona v. California:* *What is the Purpose of an Indian Reservation?*

For CRIT and the other four tribes whose reserved rights were recognized in *Arizona v. California*, the aftermath was largely, but not solely, procedural. In *Arizona II*, those five tribes, whose interests had been represented by the U.S. in *Arizona I*, moved to intervene in the case. The tribes sought water for lands within reservation boundaries that the U.S. had omitted from the 1963 claims, and for lands that had been added to the tribes' reservations as a result of boundary disputes that had been settled since the litigation began. ¹⁰⁹ The Court granted the tribes'

104. *See id.*

105. *Id.* at 601.

106. *See* Barbara Cosens, *The Legacy of Winters v. United States and the Winters Doctrine, One Hundred Years Later*, in *THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS: THE WINTERS CENTENNIAL* 9–11 (Barbara Cousins & Judith V. Royster eds., 2012).

107. *See* Robert T. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 CALIF. L. REV. 1133, 1143 (2010).

108. 373 U.S. at 599.

109. *See Arizona v. California (Arizona II)*, 460 U.S. 605 (1983).

motions to intervene over the states' objections.¹¹⁰ This seemingly uneventful procedural ruling was crucial for subsequent tribal water rights cases. As Professor Robert Anderson has noted, "[t]his ruling cleared the way for direct tribal participation in the many general stream adjudications commenced throughout the West."¹¹¹ After allowing the tribes to intervene, however, the Court refused to reconsider the tribes' claims for water for their omitted lands, citing the need for finality and certainty regarding quantification of water in the region, and also noting that the tribes faced as much risk that a recalculation would harm them as it would be likely to help.¹¹² With respect to the boundary disputes, the CRIT and other tribes did eventually realize more irrigable acreage as a result of the Court's ruling that the 1963 opinion (and accompanying 1964 decree) contemplated subsequent judicial resolution of those questions.¹¹³ More than a half century after the case was first filed, the Court issued its final consolidated decree, summarizing the decades of litigation in eighteen pithy pages, plus an appendix.¹¹⁴ For CRIT, the upshot was the following: That its water rights consisted of "annual quantities not to exceed (i) 719,248 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 107,903 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less," with priority dates consistent with the dates of the establishment of the Reservation in 1865 and the subsequent Executive Orders (1873, 1874, 1876 and 1915, respectively).¹¹⁵ Having survived decades of threats and coercion, and then decades more of litigation with the biggest players in the region, the CRIT finally had legal rights to water that had been dangled as an incentive to settle on the Reservation since 1865.

For the many tribes on the Colorado River and throughout the country whose water rights were not yet adjudicated, actions by Congress and the Court subsequent to the *Arizona v. California* litigation instigated a dramatic shift in strategy. First, in 1953, shortly after *Arizona v. California* was filed, Congress passed the McCarran Amendments, which waived U.S. sovereign immunity to suit in state court for water

110. *See id.*

111. Anderson, *supra* note 107, at 1147.

112. *See* 460 U.S. at 618–26.

113. *See id.* at 630–38. The CRIT's claims were ultimately recognized in the 2000 supplemental decree. *See Arizona v. California*, 531 U.S. 1 (2000); *see also Arizona v. California*, 547 U.S. 150 (2006) (final consolidated decree listing all claims and quantifications).

114. *See Arizona v. California*, 547 U.S. 150.

115. *Id.* at 158.

adjudications, and also waived any objections to the application of state substantive laws.¹¹⁶ The Supreme Court has interpreted the McCarran Amendments broadly to provide state courts with the authority to adjudicate federal and Indian reserved water rights.¹¹⁷ Tribes are not obligated to waive their sovereign immunity to participate in these state court proceedings, but another Supreme Court case all but mandates that they do so if they want to protect their rights. In *Nevada v. United States*, the Court held that tribes were barred from reopening a case that had been litigated on their behalf by the U.S., even though the U.S. failed to raise all of the tribal claims and also had a clear conflict of interest.¹¹⁸ A state general stream adjudication in which the U.S. represents tribal interests therefore binds tribes, and they sit on the sidelines at their peril. For all practical purposes, litigation concerning tribal water rights now must take place in state courts.¹¹⁹

In terms of substantive law, the Supreme Court has not expanded on the PIA standard nor elaborated on the Indian reserved rights doctrine. The Court has, however, decided two non-Indian reserved rights cases, one of which seemed to embrace a more stringent approach to assessing federal water rights. In *Cappaert v. United States*, the Court recognized federal reserved rights to water necessary to protect the desert pupfish in Devil's Hole National Monument.¹²⁰ The Court affirmed the lower court's approach, which recognized an implied reservation vesting on the date necessary to protect the underground pool that was being depleted and therefore endangering the pupfish.¹²¹ In *United States v. New Mexico*, the Court arguably mischaracterized language in the lower court opinion in *Cappaert* in order to conclude that federal reserved rights for national forests should only be implied to fulfill the primary purposes of the reservation, and further that rights should be recognized only if that purpose would be "entirely defeated" without an implied reservation of water.¹²²

116. See Department of Justice Appropriation Act of 1953, Pub. L. No. 82-495, § 208(a), 66 Stat. 549, 560 (codified at 43 U.S.C. § 666(a)).

117. See *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (state courts have authority to adjudicated federal reserved rights); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983) (state courts have authority to adjudicate Indian reserved rights).

118. See 463 U.S. 110 (1983).

119. See Anderson, *supra* note 107, at 1148; Cosens, *supra* note 106, at 12.

120. 426 U.S. 128 (1976).

121. See *id.* at 141.

122. See 438 U.S. 696, 700 (1978).

Neither *Cappaert* nor *New Mexico* addressed Indian reserved rights directly, but tribal litigants, who must now press their claims in state courts, rightly worry that lower courts will pick up on the miserly tone.¹²³ For states and other non-Indian parties, the risks are the opposite. The Court has embraced the PIA standard, and if they urge state courts to adopt anything more stringent, they risk Supreme Court review.¹²⁴ Cases that have been litigated in state courts have yielded mixed results. The Arizona Supreme Court adopted a seemingly more flexible standard for assessing the quantity of tribal water rights, adopting a "homeland" approach as opposed to PIA as the *sine qua non*.¹²⁵ The "homeland" standard would seem to allow tribes to press for their reserved rights without being boxed into the dated notion that their water should be used for the sole purpose of converting their reservations to an all-agricultural economy.¹²⁶ The homeland standard could, in theory, provide a measure for quantification that "is specific to the needs, wants, plans, cultural background, and geographic setting of the particular reservation"¹²⁷ Further, a homeland standard could be particularly constructive for assessing the *scope* of present water uses, regardless of whether it supplanted the PIA standard for quantification. On the other hand, given that any such standard would be articulated by state courts and not the tribes themselves, there are no guarantees that tribes would not be worse off in terms of water quantification than under the somewhat wooden but at least fairly fixed PIA approach.¹²⁸ Moreover, other state court decisions have confirmed tribal skepticism, construing treaty terms narrowly and seizing on bizarre arguments to reject, for example, in-stream flows as being necessary for fish to survive.¹²⁹

123. See Cosens, *supra* note 106, at 10–11. While tribes' concerns are warranted, it should be noted that the better reading of *Cappaert* and *New Mexico* is that they are confined to the non-*Winters* reserved rights context. Tribal reserved water rights are grounded in treaties, which have a different legal status than ordinary statutes, and American Indian law canons of construction further reinforce a more generous reading of treaty terms.

124. See *id.* at 12. ("To avoid potential Supreme Court reversal by embarking on an untested path, most states and tribes proceed within the guidelines provided by PIA. . . .").

125. See *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys.*, 35 P.3d 68, 74, 77–79 (Ariz. 2001) (en banc).

126. See *id.*; see also Cosens, *supra* note 106, at 12.

127. Cosens, *supra* note 106, at 12.

128. See Anderson, *supra* note 107, at 1151–52.

129. See *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 835 P.2d 273, 278, 282–83, (Wyo. 1992) (rejecting in-stream flow claim by tribe); *In re SRBA*, No. 39576, at 13 (D. Idaho Nov. 10, 1999), available at <http://www.srba.state.id.us/FORMS/sum-judg.PDF>; see also Michael Blumm et al.,

The risks on all sides, and in particular for the tribal parties, have created an environment where settlement is the preferred alternative to litigating claims to a final decree.¹³⁰ Scholars have noted that settlement negotiations allow tribes to have strong voices in the discussions, and to craft solutions that are more flexible and responsive to tribal needs.¹³¹ CRIT and the other tribes that have final judicial decrees are, in contemporary times, exceptional. But the issues that tribes tussle over in settlement discussions are some of the same ones that tribes with “wet water” face, particularly as that water becomes increasingly precious. For example, can tribes use their water, quantified under a PIA standard, for other consumptive uses? Can they convert a consumptive use to an in-stream flow or other ecological use? Most contentiously, can tribes market their water to the highest bidder? Are they or should they be any more or less constrained than other players with respect to these questions?¹³²

In some sense, all of these issues relate to the foundational ones addressed in *Winters* and *Arizona v. California*: what is the scope of a tribe’s rights and how should contemporary courts construe congressional purposes? What is a tribal homeland, and who gets to decide? Is it a place reserved for perpetuating an Indian nation, on its own terms, notwithstanding the assimilative and eliminationist aims of the federal government at the time of establishment? In federal Indian law, judicial approaches, originating in the nineteenth century, have preserved tribal prerogatives (albeit inconsistently and imperfectly) notwithstanding a history of contradictory federal policies.¹³³ *Winters* and *Arizona v. California* reflect these Indian law principles, and mediate what could have otherwise been harsh outcomes for tribes under conventional water law. Today, Indian law and water law are therefore enmeshed in ways that force confrontations not only between the

Judicial Termination of Treaty Water Rights: The Snake River Case, 36 IDAHO L. REV. 449 (2000) (criticizing approach and reasoning in *In re SRBA*).

130. See Cosens, *supra* note 106, at 12–13; Anderson, *supra* note 107, at 1153–55.

131. See Cosens, *supra* note 106, at 13; Anderson, *supra* note 107, at 1156–58.

132. See Cosens, *supra* note 106, at 13–14 (discussing issues that arise in settlement discussions and describing some creative negotiated solutions); Jeanne Whiteing, *Indian Water Rights: The Era of Settlement*, in *THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS: THE WINTERS CENTENNIAL* 136, 141–44 (Barbara Cosens & Judith V. Royster eds., 2012) (describing settlement provisions, including water marketing provisions).

133. This approach, evident in *Winters* and *Arizona*, requires courts to construe treaties and legislative documents for the benefit of tribes. See ANDERSON ET AL, *supra* note 83, at 172; COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 119–20 (LexisNexus ed., 2005).

demands of many users to an increasingly scarce resource, but also between our settler-colonial past and our self-determination era present. The following Part will suggest that while Supreme Court case law has framed the questions in a way that *permits* just responses to these confrontations, more is needed to unravel the eliminationist origins of Indian law and natural resources law.

III. NATURAL RESOURCES LAW LESSONS FROM CRIT

Today, conflicts over land policies, endangered species, and water characterize the West. There is every reason to believe that these conflicts will become sharper in the coming years. Climate change predictions for the Southwest in particular include higher temperatures, more prolonged periods of drought, and changing patterns of precipitation. In these increasingly uncertain times, it will be tempting to ignore our history. History is not convenient. It includes the unseemly beginnings of non-Indian acquisition of water, land, and other natural resources. If taken seriously, however, this history might help us think about contemporary and imminent conflicts in new ways. Below is a brief sketch of how taking our settler-colonial past into account might allow us to reframe some of these issues.

In the water context, resource managers, state engineers, and water lawyers throughout the region could be forgiven if they walked around in a constant state of anxiety. The forecasts for the West's water supplies are not promising, and at the same time the region's population continues to grow.¹³⁴ Worse still, as water experts and all Colorado River Compact stakeholders have known for some time, the Compact's estimates of the Colorado River's average flow were based on several unusually high water years.¹³⁵ To make matters even more nettlesome, many tribes have yet to quantify their reserved water rights. For example, the Navajo Nation, which has the largest land base of any tribe in the country, is still litigating and negotiating its rights to water in several different cases.¹³⁶ As we head into water-challenged times, there are many reasons to be nervous.

134. See CLIMATE ASSESSMENT FOR THE SW., <http://www.climas.arizona.edu/sw-climate/climate-change> (last visited Mar. 3, 2013).

135. See HUNDLEY, *supra* note 3, at 307–09 (describing the Compact's overestimation of the River's average flow).

136. See THE NAVAJO NATION WATER RTS. COMMISSION, <http://nnwrc.org/public-awareness/> (last visited Mar. 4, 2013).

One response to tribes' contemporary efforts to assert their *Winters* rights is to see them as untimely efforts to unsettle what are already precarious and overburdened schemes of allocation. Another way, if we take the CRIT story seriously, is to see that the history of non-Indian settlement of the West is hopelessly intertwined with tribal histories, and in particular the federal government's bi-polar approach of, on one hand, attempting to coerce tribes to use the land in ways that would settle their claims and make them fit into the mythical (and quixotic) "yeoman farmer of the desert" mold, and on the other, threatening them with divestment of those same lands (and accompanying rights to water), if they did not occupy them densely enough.¹³⁷ In short, instead of punishing tribes for being "Johnny-come-lately" to our water allocation schemes, stakeholders could see tribes as equals, coming to the table as governments finally able to assert their interests after decades of attempts to marginalize them.

In particular, in response to the thorny questions mentioned above about how tribes should be able both to quantify and use their water today,¹³⁸ answers should be consistent with the goal of unraveling our settler-colonial past. Such answers would allow tribes maximum flexibility to define their homelands as living places with ancient yet evolving cultures, and contemporary economies. The purposes of their reservations should be construed generously, to allow for survival based on treaty and statutory promises, but also based on understandings of tribes as modern governments, rather than relics created with the hope that they would fade away. Interestingly, it may well be that a PIA standard, irrespective of its musty agriculture-in-the-desert origin, is a perfectly fine measure for just quantification along these lines. A more contemporary homeland standard could be up to the task as well, so long as decision makers refrain from using it to conclude that tribes warrant less water than the cities, irrigation districts, industrial farms, and others who managed to grab the wet water first. Then, after decisions about the appropriate standard for quantifications, questions will remain about how tribes can actually use their quantified water. Given the heightened demands for water to preserve species, to meet the needs of urban areas, and to provide for at least some agricultural products, flexibility is warranted here as well. If tribes were permitted, for example, to use traditional agricultural methods that are less water intensive than industrial-scale irrigation, they should not be penalized for it. If they want to keep the rest of their water in the stream for ecological or

137. *See infra* Part II.

138. *See supra* text accompanying note 132.

cultural reasons, on one hand, or market their surplus on the other, they would be meeting the region's larger needs in either case. Rather than cultivating resentment of tribes for taking water away from non-Indians, just quantifications coupled with flexible options for application and marketing could allow other users to have the certainty they seek, as well as complement basin-wide efforts to ensure that there is enough water for a homeland for *all* of us moving forward.

IV. CONCLUSION

The U.S.' brand of settler colonialism has its own unique combination of harshness and promise. This is evident in the CRIT story, which includes decades of unilateral federal decision-making, ignorance of tribal cultures and tribal distinctiveness, and the overriding logic of concentrating as many Indians as possible on as little land as possible in order to maximize resources for others. Yet in 1908, in the midst of what was the most oppressive policy period for tribes and Indian people, the Supreme Court recognized a strong version of tribal reserved rights in *Winters*. Then again, on the heels of congressional efforts to terminate tribal status in the 1950s, the Court breathed new life into those reserved rights and upheld a quantification method that benefits tribes, at least in theory, in *Arizona v. California*. This is part of our history also, the brighter side in terms of equity and justice, even if these flickers of judicial enlightenment were quickly snuffed out by subsequent decisions.

The final unraveling of settler-colonialism, which would redeem both American Indian law and natural resources law, would be to unhook natural resources law from its Lockean (and Jeffersonian) assumptions. Instead of measuring tribal rights based on dated ideas about Western land use and arcane understandings of tribal governments, the better approach would be a hybrid that reaches back to a pre-colonial past while also incorporating ecological and economic realities of today. Such an approach would allow tribes, on the one hand, to use waters (and lands) as they did historically, but also to be contemporary economic actors. Their rights to those resources would not depend on claims to irrigate the desert, but instead would exist regardless of whether they chose to keep water in the stream or, moving in another direction, to market it to users with higher needs. Reversing settler colonialism in natural resources law, in other words, means both going back to tribal resource use patterns of the past, and going forward to recognize tribes as contemporary governments and economic actors today.