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I. INTRODUCTION

On March 14, 2003, the Navajo Nation filed a lawsuit against the U.S. Department of the Interior in an effort to resolve its potentially huge share of the Colorado River.[1] The suit focuses on the tribe's reserved water rights for the western half of its reservation, above Lake Mead in Arizona.[2] It should have come as no surprise.

Millions of people rely on Colorado River water for municipal and commercial purposes in the Lower Basin states of Arizona, California, and Nevada. Billions have been spent in the Southwest based on this reliance, fueling rapid growth and economic prosperity. Yet a heavy cloud of uncertainty hovered over all this development from the beginning. The policymakers who split up and consistently sparred over the river chose to look the other way, however, preferring to focus their eyes on a future full of dollars and dams. Those days are over.

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1. Navajo Nation Complaint against U.S. Dep't of the Interior at 1, 2, Navajo Nation v. U.S. Dep't of the Interior, 2007 WL 44005511 (D. Ariz. 2003) (on file with author).

2. *Id.* at 2–3.

"People have known for years that the Navajos have a potentially enormous claim on the Colorado," said David Getches, a water and Indian law expert who is currently dean of the University of Colorado Law School.[3] States simply developed in spite of this knowledge.[4]

Estimates for the tribe's reserved water rights to the Colorado vary wildly, but Stanley Pollack, assistant attorney general for the Navajo, places it around 300,000 acre-feet ("af") of water per year.[5] Some members of the Navajo Nation consider that number to be modest.[6] For a frame of reference, the 1928 Boulder Canyon Project Act ("BCPA") tentatively divided the Lower Basin's annual 7.5 million acre-feet ("maf") share of the Colorado as follows: California, 4.4 maf; Arizona, 2.8 maf; and Nevada, 0.3 maf. [7] If the Navajo's legal strategy is even moderately successful, the Colorado River allocation system, as it exists now, could be completely upended. This reality was not lost on the parties involved, who quickly agreed to stay the complaint and work on a settlement.[8] In fact, the seriousness of the situation is reflected by the names of the intervening parties: the state of Arizona, Arizona Power Authority, Imperial Irrigation District, Metropolitan Water District of Southern California, Southern Nevada Water Authority, and Coachella Valley Water District, to name a few.[9] The Navajo claim threatens those who have benefited most from the Colorado River.

This note's aim is to provide a historical sketch of how existing Lower Basin users undermined their own interests by neglecting to quantify what could be significant water rights to the Colorado River. The focus is on the Navajo, and specifically, on an unfortunate trend that plagued Colorado River management from the beginning: The Navajo, like other tribes, were never at the table while the Colorado was being divvied up. To this day, their senior water rights remain unsettled. As a result, Lower Basin uses of the Colorado River potentially rest on shaky ground.

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3. Matt Jenkins, *The Colorado River's Sleeping Giant Stirs*, HIGH COUNTRY NEWS, Apr. 28, 2003, at 2, *available at* http://www.hcn.org/issues/249/13923 [hereinafter *Sleeping Giant*].

4. *Id.*

5. Matt Jenkins, *Seeking the Water Jackpot*, HIGH COUNTRY NEWS, March 17, 2008, at 5, *available at* http://www.hcn.org/issues/366/17573 [hereinafter *Water Jackpot*].

6. *Id.* at 6, 9.

7. Boulder Canyon Project Act of 1928, 43 U.S.C. § 617c(a) (1928).

8. Navajo Nation v. U.S. Dep't of the Interior, 2007 WL 4400511 (D. Ariz. 2007) (joint status report).

9. *Id.* The other intervening parties are: the Salt River Project Agricultural Improvement and Power District, the Salt River Valley Water Users' Association, and the State of Nevada and its Colorado River Commission.

The first section of the note analyzes the "Law of the River," how Indian water rights fit into the current legal system, and the evolution of the Navajo claim. This analysis is limited to certain aspects of Colorado River management that are most relevant to the Navajo claim. The second section discusses the current settlement negotiations and lawsuit, including the legal landscape that may enable the Navajo to finally realize their rightful share of the Colorado. My hope is to draw attention to another chapter of Western history where poor decisions from the past have caught up to us, and help find a path forward for the people of the Southwest.

II. INDIANS AND THE LAW OF THE RIVER

The "Law of the River" is complex. It is a treaty, two interstate compacts, a federal statute, and a Supreme Court decision that all serve as guidelines for use and allocation of the Colorado River.[10] According to Marc Reisner, author of *Cadillac Desert*, the river is the "most legislated, most debated, and most litigated river in the entire world. It also has more people, more industry, and a more significant economy dependent on it than any comparable river in the world."[11]

This note, however, focuses on just one of the river's many management problems: how tribes were left out in the cold when the major allocation decisions were made. The reason for this course of action is difficult to comprehend, especially in the Navajo's case. After all, the reservation is impossible to miss on any map of the Colorado Plateau—or for that matter, any map of the Southwest. It spans three states, covers over 13 million acres, and is the largest Indian reservation in the United States.[12] More importantly, the mainstream of the Colorado and one of its largest tributaries *literally* flow through Navajo lands.

A. Navajo Treaty and Executive Orders

On June 1, 1868, the United States and the Navajo signed an agreement providing that war between the parties "shall for ever [sic] cease,"[13] and that lands were to be "set apart for the *use* and *occupation*

10. David H. Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution*, 68 U. COLO. L. REV. 573, 574–75 (1997).

11. MARC REISNER, CADILLAC DESERT 120 (rev. ed. 1993).

12. Navajo Compl., *supra* note 1, at 7.

13. Treaty Between United States and Navajo Tribe, art. I, June 1, 1868, 15 Stat. 667 [hereinafter Navajo Treaty].

of the Navajo tribe of Indians."[14] The treaty came four years after U.S. forces trapped the Navajo near Canyon De Chelly in Arizona, then marched them hundreds of miles to Fort Sumner, New Mexico, which is known as the "Long Walk of the Navajos."[15] The 1868 treaty guaranteed to the Navajo a return to their ancestral lands, which are surrounded by four mountain peaks the Navajo consider sacred.[16] In the ensuing years, the government significantly expanded the original reservation through executive orders.[17] The heart of the treaty—especially with regard to reserved water rights—is in Article XIII, which stipulates that the U.S. government and the Navajo agree that the land in question shall serve as the Navajo's "permanent home."[18] In the years to come, those two words would strengthen in meaning.

B. Winters v. United States

Over a century ago, in 1908, the U.S. Supreme Court laid the groundwork for the legal doctrine that serves as the backbone for the Navajo's current Colorado River claim. In a bold decision, the Court held that when the U.S. government created the Fort Belknap Indian Reservation in 1888, making it the Gros Ventre and Assiniboing's permanent home in Montana, it reserved water rights for their future use.[19] The water rights are exempt from state appropriation laws and reserved to give Indians the "power to change"[20] and control their own destiny. Reserved rights do not evaporate over time,[21] but retain their seniority status even if the tribes never put the water to beneficial use.[22] The Court reasoned that the "lands were arid, and, without irrigation, were practically valueless,"[23] so there was no way that the tribe would

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14. *Id.* at art. II (emphasis added).

15. CHARLES WILKINSON, FIRE ON THE PLATEAU, 287 (1999) [hereinafter FIRE ON THE PLATEAU].

16. Navajo Treaty, *supra* note 13, at art. II.; FIRE ON THE PLATEAU, *supra* note 15, at 58 (The peaks are: "Mount Taylor (*Tsoodzil*), outside of Grants, New Mexico. The San Francisco Peaks (*Dook' 'o' ooslid*) to the south, near Flagstaff. Hespersus Peak (*Dibé nitsaa*) to the west, above Cortez and Durango in the La Plata Mountains. Mount Blanca (*Sisnaajini*) to the north, across Colorado's San Luis Valley.").

17. Navajo Compl., *supra* note 1, at 7–9; *see also* FIRE ON THE PLATEAU, *supra* note 15, at 288.

18. Navajo Treaty, *supra* note 13, at art. XIII.

19. Winters v. United States, 207 U.S. 564, 565, 577 (1908).

20. *Id.* at 577.

21. *Id.*

22. BONNIE G. COLBY, JOHN E. THORSON, & SARAH BRITTON, NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST 10 (2005).

23. *Winters*, 207 U.S. at 576.

have voluntarily given up the one resource that made their lands valuable: water.[24]

Today, Indian reserved rights, based on *Winters* and its progeny, are arguably the most sturdy and valuable water rights in the West—at least on paper.[25] The problem, however, is that the *Winters* decision failed to explain how reserved rights were to be measured, or if there were built-in limitations to Indian water claims in the future.[26] But the Court did make one issue very clear: the United States reserved water for tribes "to fulfill the purposes for which the reservations were established."[27]

The Court's holding should have forced policymakers to apply caution when they decided to allocate the Colorado River among states, ushering in the "Big Buildup" that forever changed the West.[28] It did not.

C. 1922 Colorado River Compact

When the parties to the Colorado River Compact gathered at the swanky Bishop's Lodge in Santa Fe, New Mexico, to sort out a division of the river, the participants knew that they were setting precedent—nothing like this type of compact had ever been attempted before.[29] The goals were ambitious and twofold: first, ease controversies that were already brewing among the states with a clear agreement to solve problems associated with Colorado River management; and second, usher in the development of the Southwest by paving the way for massive engineering projects.[30]

Any visitor to the urban sprawls of Phoenix, Las Vegas, or Los Angeles, or the hundreds of thousands of irrigated acres in between these desert oases, knows that the drafters of the Compact were wildly successful in achieving one of their goals, which was to exploit the river for growth. However, that success has to be tempered by the complete failure of their other goal.[31] Instead of peace and clarity they created

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24. *Id.*

25. COLBY ET AL, *supra* note 22, at 10.

26. *See supra* text accompanying note 25.

27. COLBY ET AL., *supra* note 22, at 10–11.

28. FIRE ON THE PLATEAU, *supra* note 15, at 185.

29. NORIS HUNDLEY JR., WATER AND THE WEST: THE COLORADO RIVER COMPACT AND THE POLITICS OF WATER IN THE AMERICAN WEST 3 (2009).

30. Colorado River Compact of 1922, C.R.S. § 37-61-101, art. I; HUNDLEY, *supra* note 29, at 4.

31. HUNDLEY, *supra* note 29, at 5.

standoffs among states, resulting in distrust and legal claims that raged for decades.[32] In addition, the stream flow assumptions that were used to divide the river later proved to be unrepresentative of normal flows, complicating matters further.[33]

The negotiating parties also failed to adequately address the many shares to the river that Indians might feasibly claim as their own.[34] In fact, Indians were not even invited to the discussions, even though the Navajo lived just a short distance to the west. [35] Considering the federal government serves as trustee for Indians and therefore must act on their behalf, which is "one of the primary cornerstones of Indian law,"[36] the federal government—at least when it comes to Colorado River allocations—shirked its duties from the start.

The Compact's major practical accomplishment divided the river between the Upper Basin states (Colorado, New Mexico, Wyoming, and Utah) and the Lower Basin states (Arizona, California, and Nevada) at Lee Ferry.[37] Both Basins were awarded 7.5 maf annually, with the Upper Basin states assuming the burden of making that delivery, regardless if flows were lower than usual or if a drought gripped the region.[38] Further, in Article VIII the commissioners stipulated that "[p]resent perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact."[39] And, "[all] other rights to beneficial use of waters . . . shall be satisfied from the water apportioned to that Basin in which they situate."[40] Forty years later, "present perfected" rights would take on a whole new meaning[41] —one that is safe to say the commissioners did not see coming

Throughout the eleven articles, Indians are mentioned once, in Article VII.[42] It reads: "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian Tribes."[43] Twenty words, that is all.

According to the unearthed minutes of the meetings, including

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32. *Id.* at 4–5.

33. *Id.* at xiv.

34. *Id.* at 4, 211.

35. *See supra* text accompanying note 34.

36. FELIX. S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 221 (Rennard Strickland ed., rev. ed. 1982).

37. Colorado River Compact, C.R.S.A. § 37–61–101, art. II(c)–(d).

38. *See id.* at art. III.

39. *Id.* at art. VIII.

40. *Id.*

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

42. Colorado River Compact, C.R.S.A. § 37–61–101, art. VII.

43. *Id.*

those twenty words in the Compact was not a priority, but a mere afterthought if anything.[44] It was Herbert Hoover, commerce secretary at the time and chairman of the negotiations,[45] who suggested that the language be included.[46] Hoover held sway throughout the meetings, not only because he was acting on behalf of President Harding, but also because of his vast engineering experience and well-earned reputation as a problem solver.[47] Hoover felt it politically unwise to ignore the Indians completely in such a monumental agreement, because, "[y]ou always find some congressman . . . who will bop up and say, 'What is going to happen to the poor indian [sic]?' "[48] Article VII, in his mind, served to appease these soft-hearted lawmakers and their consciences.[49] Still, the words in Article VII are oddly vague, and no sincere effort was made to determine what tribes would be affected in the region, or what their current and future water needs might be.[50] The commissioners were all of the opinion that if there *were* Indian claims to the Colorado, they would be minor, and that Article VII was sufficient to settle any disputes.[51] The commissioners passed Hoover's suggestion quickly and unanimously.[52]

In hindsight, it is easy to attack the commissioners for their shortsightedness with Article VII. Still, these were smart men who surely must have realized, based on the recent *Winters* decision, that Indians now held cards when it came to water. Delph Carpenter, who served as Colorado's representative, was, according to one historian, perhaps the "shrewdest water-rights lawyer in the United States."[53] New Mexico's representative, Stephen B. Davis, Jr., entered the negotiations with his eyes set on the San Juan River, which gathers strength in northern New Mexico before veering west until it connects with the Colorado in southern Utah.[54] Davis must have known that the river cuts directly through Navajo lands, and considering the *Winters* reserved rights holding, that there was a good chance the tribe also had rights to

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44. *See* HUNDLEY, *supra* note 29, at 211–12.

45. *Id.* at 139.

46. *Id.* at 212.

47. *See id.* at 2.

48. *Id.* at 212 (Hundley pieced together this quote from minutes taken at a Nov. 19, 1922 Compact meeting. He conceded that he altered the quote "slightly," but "not the meaning.")

49. *Id.*

50. *Id.* at 211.

51. *Id.* at 211–12.

52. *Id.* at 212.

53. *Id.* at 139.

54. *Id.* at 142.

some of those flows. What is most striking is that in their efforts to protect their respective interests, the commissioners focused solely on the other states and neglected to consider the Indians, which posed a significant threat to their grand plans.

The Compact was not the final word on Colorado River management—not by a long shot—but it did create the broad allocation guidelines that are still enforced today, even though Arizona was much slower to approve the Compact than the other states.[55] Those guidelines purposely left out the Indians. The irony, of course, is that by including what appeared to be innocuous language in Article VII and Article VIII, the Compact framers inadvertently set the stage for the current Navajo water claim.

D. 1928 Boulder Canyon Project Act

Six years after the historic Compact, the Lower Basin states still had not reached agreement on how to apportion their 7.5 maf share of the river.[56] The controversy the drafters hoped to avoid now festered on the ground in the Southwest and throughout Washington D.C. hallways; something had to be done.[57] Congress took action with the Boulder Canyon Project Act, which approved the 1922 Compact, authorized the construction of what would later be called Hoover Dam, and *suggested* to Lower Basin states a way to divide the water among themselves annually.[58] The plan included 4.4 maf for California, 2.8 maf for Arizona, and Nevada, which at that time was a far cry from the glitz and games for which it is now known, received 0.3 maf.[59] The split first had to be approved by six of the seven states, but Congress included the numbers so the states could enter into an agreement that already had Congress's blessing, thus saving time.[60] By June 25, 1929, six of the seven states approved the split—enough for President Hoover to declare the statute binding law.[61]

Once again, a plan to ease controversy along the river did anything but. Neither Arizona nor California favored the numbers, so a

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55. *See* JOSEPH L. SAX, BARTON H. THOMPSON, JR., JOHN D. LESHY, & ROBERT H. ABRAMS, LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS 805 (4th ed. 2006).

56. HUNDLEY, *supra* note 29, at 269.

57. *See id.*

58. Boulder Canyon Project Act of 1928, 43 U.S.C. § 617c (2010).

59. *Id.* § 617c(a).

60. HUNDLEY, *supra* note 29, at 270.

61. *Id.* at 281.

détente proved elusive.[62] Instead, Arizona sued California four times over the next thirty years, as it sat and watched its neighbor state boom because of the Colorado water it was now able to put to use, thanks to the Hoover Dam and transportation systems approved in the 1928 law.[63]

Nothing in the legislation mentions Indians,[64] and no contingency or surplus plan was built in to safeguard Lower Basin states from new users who may have more senior rights than the Compact, pursuant to Article VII's "present perfected" clause. The BCPA continued the trend, started by the 1922 Compact, of excluding tribes from major management decisions. Furthermore, the BCPA opened up the federal government's purse to start developing massive engineering projects that greatly benefited non-Indian economies in the region, but did little if anything for the tribes along the Colorado. The Lower Basin states, especially California, were now free to grow rapidly, relying on their respective cuts of 7.5 maf. With the benefit of Colorado River water, plus federal subsidies and related projects ushered in by the BCPA, Lower Basin states now had the power to swiftly change into desert oases. However, this power to adapt and control one's destiny, which water makes a reality in the West, was denied to Indians again in 1928.

E. 1944 United States and Mexico Treaty

Although not invited to the 1922 Compact negotiations either, it is fair to say that Mexico was more on the minds of the commissioners than Indians.[65] For example, Mexico tried to gain access to the negotiations, but was rebuffed twice—first by the State Department, then by Hoover himself, on the grounds that the negotiations were to focus solely on "domestic matters."[66] Mexico, in Hoover's opinion, had little to fuss about, despite the fact that the Colorado River does not stop at the border, and any apportionment among the states certainly has international implications.[67] During negotiations, the commissioners delayed dealing with Mexico, just as they did with the Indians, inserting language in Article III that Mexico *might* have a "right to the use of any waters of the Colorado River System," should the United States approve

62. *See* SAX ET AL, *supra* note 55, at 806.

63. *Id.*

64. *See* Boulder Canyon Project Act, 43 U.S.C. § 617c (2010); *see also* Colorado River Compact, C.R.S.A. § 37-61-101, art. VII.

65. *See* HUNDLEY, *supra* note 29, at 175.

66. *Id.*

67. *Id.*

such a right at a later date.[68]

The date came in 1944, over twenty years later.[69] Treaty terms guaranteed Mexico an annual delivery of 1.5 maf,[70] and in "the event of extraordinary drought or serious accident [in the United States] . . . water allocated to Mexico . . . will be reduced in the same proportion as consumptive uses in the United States are reduced."[71] Carrying out this provision is rife with possible conflicts and administrative difficulties,[72] and many even considered the allocation far too generous.[73] By subtracting 1.5 maf from both Basins' share of the Colorado, pursuant to Article III(c) in the 1922 Compact,[74] policymakers placed a significant new strain on the river.[75] Furthermore, Mexico's allotment, considering its authority derived from a congressionally approved treaty, now became the new senior right on the river.[76]

Adding to these difficulties is the fact that Mexico likely needs more than 1.5 maf of freshwater from the river if the Colorado River Delta is ever going to thrive again.[77] The situation in the delta—once a diverse ecosystem in Northern Mexico—deteriorated significantly in the twentieth century as freshwater flows dropped nearly seventy-five percent, caused largely by construction of the Hoover and Glen Canyon dams north of the border.[78] Sadly, the delta is nothing like it was when Aldo Leopold and his brother explored the area by canoe in 1922.[79] During their stay, the wilderness area teemed with wildlife and lush vegetation.[80] Today, however, the "delta's physical appearance, hydrology, fish, and wildlife have changed markedly since the United

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68. Colorado River Compact, C.R.S.A. § 37–61–101, art. III(c).

69. Treaty Between the United States of America and Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S.-Mexico, Nov. 8, 1945 (effective date), 59 Stat. 1219.

70. *Id.* at art. 10(a).

71. *Id.* at art. 10(b).

72. *See* Charles J. Meyers, *The Colorado River: The Treaty with Mexico*, 19 STAN. L. REV. 367, 414–15 (1967).

73. HUNDLEY, *supra* note 29, at 296.

74. Colorado River Compact, C.R.S.A. § 37-61-101, art. III(c) ("the burden of such deficiency shall be equally borne by the Upper Basin and Lower Basin").

75. *See* HUNDLEY, *supra* note 29, at 296.

76. Rudy E. Verner, *Short Term Solutions, Interim Surplus Guidelines, and the Future of the Colorado River Delta*, 14 COLO. J. INT'L ENVTL. L. & POL'Y 241, 255 (2003).

77. *See id.* at 245.

78. *Id.* at 244.

79. ALDO LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE, 141 (Oxford Univ. Press rev. ed. 1987) (1949).

80. *See id.* at 141–45.

States asserted full control over the Colorado River"—a change for the worse.[81]

Hanging over the treaty between Mexico and the United States remained the issue of tribal water rights that had yet to be quantified. Mexico's 1.5 maf became the senior right, but a Supreme Court decision that had been in the making for decades would soon reinforce the Indians' reserved rights, placing further uncertainty on Colorado River allocations that states across the Southwest were already betting their entire economies on.

F. Arizona vs. California: "In the hands of the Secretary"

After years of resentment and lost court cases, Arizona finally joined the other six states and ratified the 1922 Compact in 1944.[82] Still, a truce between California and Arizona regarding their split of the 7.5 maf remained out of reach, with both states thoroughly dug into their respective positions.[83] Just over ten years prior, Arizona Governor Benjamin B. Moeur had ordered the state's national guard to its border with California to stop construction of the Parker Dam.[84] Clearly, Arizona was intent on preserving the largest share of the Colorado it could get its hands on, terrified of the prospect that California was in a much better position to put Colorado River water to beneficial use first, thus gaining a right to those flows under the prior appropriation doctrine.[85]

During the World War II era, Arizona still lacked sufficient infrastructure to transport surface water to its rapidly growing metropolitan areas and farmlands.[86] As result, it relied heavily on limited groundwater supplies.[87] This tenuous policy, which threatened the state's emerging economy, forced it to push proposals that would bring Colorado River water to the state at the earliest possible date.[88] Arizona pinned its hopes on the Central Arizona Project ("CAP"), a canal scheme to send water uphill toward the population centers, such as Phoenix and Tucson.[89] But Congress, aided by strong resistance from

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81. Getches, *supra* note 10, at 605.
82. *See* HUNDLEY, *supra* note 29, at 295.
83. *See generally id.*
84. *Id.* at 294.
85. *See* SAX ET AL, *supra* note 55, at 805.
86. *See* HUNDLEY, *supra* note 29, at 298.
87. *Id.*
88. *See id.*
89. *See id.* at 299–300.

California, refused to approve the billion-dollar project because Arizona's share of the Colorado remained undetermined.[90] A hesitant Congress was not going to fund a canal without assurance that water would actually hit the concrete.[91] Hoping to finally clear things up and receive the much-needed rubber stamp from Congress, Arizona appealed to the Supreme Court in 1952.[92] The Court agreed to take the case not only to settle Arizona and California's rift, but also to clarify another issue that was becoming tougher to ignore: Indian rights to the Colorado River.[93] The federal government, cognizant of the growing human rights movement and no longer blind to the gross inequities between the haves (Whites) and have-nots (Indians) on the river, urged the Court to take the case.[94]

Justice Hugo Black, a Southerner and key member of the Warren Court's liberal bloc, wrote the *Arizona v. California* opinion (*Arizona I*), handed down on June 3, 1963.[95] It is a lengthy opinion, based on a lengthy and costly case.[96] The decision served as victory for both Arizona and the Indians.[97] For Arizona, the Court held that it was entitled to the 2.8 maf recommended by Congress in the 1928 BCPA, which limited California to 4.4. maf.[98] Further, Arizona's tributaries that feed the Colorado, notably the Gila River, are not to be considered part of the state's 2.8 maf share.[99] And finally, the BCPA, not the law of prior appropriation, controls Colorado River apportionments.[100] In other words, just because California put more water to use at an earlier date than Arizona, that does not bestow seniority status and greater rights to the river.

Also of "far-reaching importance," the Court's decision greatly increased the Secretary of Interior's powers,[101] granting the office unprecedented authority to "allocate and distribute the waters of the mainstream of the Colorado River."[102] In times of shortages, no matter

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90. *Id.* at 300.

91. *Id.*

92. *Id.* at 302.

93. *Id.*

94. *Id.*

95. *Id.* at 303; *see generally* JAMES MACGREGOR BURNS, PACKING THE COURT 179–200 (2009).

96. HUNDLEY, *supra* note 29, at 302.

97. *Id.* at 303.

98. Arizona v. California, 373 U.S. at 565 (1963).

99. *Id.* at 567–68.

100. *Id.* at 585–86.

101. HUNDLEY, *supra* note 29, at 305.

102. Arizona v. California, 373 U.S. 546, 590 (1963).

how they should occur, the Secretary is not bound by the hard-fought formulas laid out in the 1922 Compact or BCPA.[103] The Secretary's methods must only be "reasonable," and honor the present-perfected rights that existed in 1928.[104] In other words, the Law of the River is now "in the hands of the Secretary."[105]

In a fiery dissent, Justice Harlan reasoned that such extraordinary consolidation of power in the Secretary's hands raises "the gravest constitutional doubts,"[106] considering the office is now "vested with absolute control, unrestrained by adequate standards, over the fate of a substantial segment of the life and economy of three States."[107] In a prescient statement, he argued that in time of shortages, the Secretary now assumes the unenviable duty of making a "political decision of the highest order," and the "pressures that will doubtless be brought to bear on the Secretary as a result of this decision are disturbing to contemplate."[108] For example, if existing users' water rights need to be curtailed in order to settle Indian claims.

In a strong affirmation of its earlier holding in *Winters*, the Court then reiterated that the "United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created."[109] The reservations were "not limited to land, but included waters as well."[110] For the Navajo, this means its reserved rights to the Colorado stretch back to 1868, over half a century before the original 1922 Compact. Their rights vested before the Compact, and should therefore be considered present-perfected pursuant to the language in Article VIII.[111] In sum, Navajo water rights are senior to non-Indian rights appropriated after 1868, even if they have yet to put the water to use.[112]

In terms of measuring Indians' water rights, the Court stated in blunt terms that Indians were not given the most "desirable" lands when the government created reservations.[113] Though referring to the Colorado River Indian Reservation, the language easily applies to the Navajo. The Court reasoned that there was no way, when creating the reservations, that the government was "unaware that most of the lands were of the

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103. *Id.* at 593.
104. *Id.* at 593–94.
105. *Id.*
106. *Id.* at 626 (Harlan, J., dissenting).
107. *Id.* at 603 (Harlan, J., dissenting).
108. *Id.* at 626 (Harlan, J., dissenting).
109. *Id.* at 600.
110. *Id.* at 598.
111. *See id.* at 600.
112. HUNDLEY, *supra* note 29, at 303.
113. Arizona v. California, 373 U.S. 546, 598 (1963).

desert kind . . . and that water from the river [the Colorado] would be essential to the life of the Indian people."[114]

The *Arizona I* decision also created a method of quantifying Indian reserved water rights.[115] Because the Court reasoned that reserved water rights "were intended to satisfy the future as well as the present needs of the Indian Reservations,"[116] reinforcing the "power to change" language in *Winters*,[117] it decided to calculate water rights based on how much water was needed to "irrigate all the practicably irrigable acreage on the reservations."[118] Thus, the Court created what is today known as the Practically Irrigable Acreage ("PIA") standard. In applying the standard, the Court calculated the water rights for five tribes located along the mainstream of the Colorado,[119] granting them around 0.9 maf.[120] However, the Court stopped short of quantifying the water rights for dozens of other reservations along the Colorado, including the Navajo.[121] The Court also failed to explore the idea of whether or not Indians may choose to use their water for functions other than agriculture,[122] though it did stress that reserved rights were intended to satisfy the "future as well as the present needs of the Indian Reservations."[123] After all, the "power to change"[124] rings hollow if it requires a sovereign nation to stick to one way of living and earning revenue.

The Court also failed to clarify whether the PIA standard applied to just the tribes along the Colorado River,[125] and whether Indians have to use all their Colorado River water or if they can sell or lease their water rights to other users.[126] However, the Court was clear on one point that could cause major problems for Lower Basin users: Indian reserved rights, depending on the reservation's geographic location, are to be

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114. *Id.* at 599.

115. *Id.* at 600.

116. *Id.*

117. Winters v. United States, 207 U.S. 564, 577 (1908).

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

119. HUNDLEY, *supra* note 29, at 303. The five reservations along the river are the Chemehuuevi, Cocopah, Yuma, Colorado River, and Fort Mohave.

120. Getches, *supra* note 10, at 592.

121. *See supra* text accompanying note 120.

122. HUNDLEY, *supra* note 29, at 330.

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

124. Winters v. United States, 207 U.S. 564, 577 (1908).

125. Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. COLO. L. REV. 683, 694 (1997) (draft majority and dissenting opinions reprinted as appendix).

126. *See* HUNDLEY, *supra* note 29, at 331.

borne out of that particular state's Compact share of the Colorado River.[127] For example, if the Navajo were to win water rights for the western half of its reservation in northern Arizona, above Lake Mead, where the Colorado runs along its western border, those water rights would come out of Arizona's 2.8 maf annual share.

If further strains on the river emerge—such as a prolonged drought, shortages associated with climate change, endangered species regulations, or Indian rights that significantly cut into states' shares—it is easy to contemplate the political and practical problems that might land swiftly on the Secretary of the Interior's lap, as Justice Harlan predicted in his dissent. One might think that if policymakers missed the warning flare in *Winters*, the *Arizona I* decision—which, after all, declared Indian water rights to the Colorado River superior to practically all other rights--might force them to reassess past water management decisions and look to remove the cloud of uncertainty on the river. But *Arizona I* did not.

G. 1968 Colorado River Basin Project Act

Five years after the landmark *Arizona I* decision, where the Court granted Indians considerably more bargaining power in Colorado River matters, policymakers saw no reason to rethink their trend of leaving Indians out of major management decisions regarding the Colorado. Again, they chose to ignore the growing Navajo silhouette lurking in the background.[128]

In 1968, Congress authorized Arizona's long sought-after Central Arizona Project,[129] yet approved it with several built-in limitations.[130] First, CAP users are junior to "holders of present perfected rights,"[131] which, according to the recent *Arizona I* decision, includes Indians.[132] Second, should the annual 7.5 maf be unavailable to Lower Basin states, California has a right to its 4.4 maf before any CAP water can flow toward Phoenix, Tucson, and Arizona farmers.[133] The project, which pumps water from Lake Havasu uphill 1,800 feet toward Phoenix then south toward Tucson, cost taxpayers $4.7 billion.[134] The power to transport CAP water over 300 miles would come from a massive coal

127. Arizona v. California, 373 U.S. 546, 601 (1963).
128. *See Water Jackpot*, *supra* note 5, at 2.
129. Colorado River Basin Project Act, 43 U.S.C. § 1521 (2006).
130. *Id.*
131. *Id.* § 1521(b).
132. Arizona v. California, 373 U.S. 546, 600 (1963).
133. *See* 43 U.S.C. § 1521(b).
134. SAX ET AL., *supra* note 55, at 807.

plant to be built on the Navajo Reservation in Page, Arizona, called the Navajo Generating Station.[135] Lured by promises of much-needed economic development on the reservation, the Navajo agreed to limit use of their Upper Basin Colorado River water rights to make the coal plant a reality.[136] Those promises did not live up to expectations.[137]

With passage of the Colorado River Basin Project Act, Arizona residents and its economy were now increasingly dependent on water that had a low—very low—priority in the Law of the River.

H. Building With Blinders On

Throughout the twentieth century, the stakes have only increased on the river. The federal government poured billions into projects to harness her flows, and states waged bruising battles against one another, fighting for the rights to every last drop—sometimes in court, sometimes in Congress, and sometimes in backrooms of posh resorts. Ironically, policymakers repeatedly based major allocation decision on the false assumption that there would always be 7.5 maf available for each basin.[138] However, since at least 1953, policymakers knew the stream flow estimates that the original compact were based on could be off by as much as 6 maf per year.[139] Furthermore, time and again policymakers neglected to account for Indian rights to the river and failed to contemplate what type of effect a Navajo claim could have on Lower Basin apportionments. Based on these shaky foundations, it is not hyperbole to suggest that panic should have set in across the Southwest long ago. But with blinders on, the magnitude of the situation often remained out of view.

For the Navajo, who have sat by and watched as the Southwest boomed around them, rights to the river may finally be within their grasp. But question marks still linger and some formidable hurdles remain in their way.

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135. FIRE ON THE PLATEAU, *supra* note 15, at 222.

136. David H. Getches, *Competing Demands for the Colorado River*, 56 U. COLO. L. REV. 413, 441 (1985) (The Navajos "agreed to confine their claims to the amount of Arizona's Upper Basin share of water under the Upper Basin Compact—50,000 acre-feet a year—for the life of the plant or for fifty years, whichever was earlier.").

137. *Id.*

138. REISNER, *supra* note 11, at 264.

139. *See Id.* at 262–64.

III. TIME TO ACT: THE NAVAJO TAKE STEPS TOWARD REALIZING THEIR RESERVED RIGHTS TO THE COLORADO RIVER

A. The Navajo Reservation

For a sovereign nation that holds possibly the best water rights in the West, forty percent of Navajo Nation members currently have no running water in their homes.[140] Considering the reservation spans three states (Arizona, New Mexico, and Utah), members must often drive considerable distances to fill up large drums of water to then haul back home.[141] Per capita income is around $8,000 per year, and over half of the Navajo living on the reservation are unemployed.[142] This translates into around 125,000 Navajo without jobs, considering the tribe's population is approximately 250,000.[143]

One of the largest economic drivers on the reservation is the Navajo Generating Station in Page, employing hundreds.[144] The large coal plant generates ninety-five percent of the power necessary to pump CAP water from Lake Havasu toward central and southern Arizona,[145] so non-Indians also rely on the coal plant to help sustain their economies.[146] Located just over ten miles from the Grand Canyon, the generating station also contributes to the air pollution in and around the national park.[147] Another large coal plant, in the works for years, remains on the drawing board for western New Mexico.[148] If constructed, it too would create more jobs on the reservation, and, like the Navajo Generating Station, serve as a much-needed source of revenue for the tribal

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140. *Sleeping Giant*, *supra* note 3, at 1.

141. *Water Jackpot*, *supra* note 5, at 1.

142. *See supra* text accompanying note 141.

143. *See* Navajo Compl., *supra* note 1, at 6.

144. Dennis Wagner, *Coal Plants, Power Plant Give Navajos Income, Controversy*, THE ARIZONA REPUBLIC, Nov. 2, 2009, *available at* http://www.azcentral.com/news/articles/2009/11/02/20091102navajo1102.html.

145. *Navajo Station Needs Emission Control Reprieve*, THE ARIZONA DAILY STAR, Oct. 25, 2009, (Editorial), *available at* http://azstarnet.com/news/opinion/editorial/article_3042114a-6a94-5b5a-941c-44155040f6d5.html.

146. *Id.*

147. *See id.*

148. Wagner, *supra* note 144.

government and its members.[149]

B. Clarity and Justice: The Navajo Claim and Settlement Negotiations

Starting in 1989, three developments occurred that brought existing Lower Basin users to the bargaining table and arguably improved the Navajo's chances for a large cut out of Arizona's Compact share of the Colorado River.

1. "Sensitivity Doctrine" Narrowly Averted

In 1989, the Supreme Court agreed to review a Wyoming Supreme Court decision that upheld the use of the PIA standard to quantify the Wind River Reservation's reserved water rights.[150] Curiously though, the Court did not release an opinion, but merely affirmed the lower court's decision in a four-four vote.[151] The split resulted from Justice O'Connor's recusal from the case, after argument, and just days before the Court released its decision.[152] Late in the game she discovered that her family's ranching business—in which she held a financial interest—was party to an ongoing stream adjudication involving Indian water rights.[153] For tribes, and especially for the Navajo, this translated into a fortuitous turn of events. Before she recused herself, the vote was five to four, with Justice O'Connor having written the majority opinion that significantly narrowed the PIA standard to the detriment of the tribes by requiring a new "sensitivity" analysis.[154]

Following the *Arizona I* case, which included just one paragraph on how to quantify Indian reserved water rights under the PIA doctrine,[155] the PIA standard evolved through court decisions to require a cost-benefit analysis when measuring Indian reserved water rights.[156] Essentially, "land will be classified as practicably irrigable if it can be shown not only that the land can support the growth of crops, but that

149. *See supra* text accompanying note 148.

150. Mergen & Liu, *supra* note 125, at 683.

151. *Id.*

152. *Id.* at 684–85.

153. *Id.*

154. *Id.* at 684. The late Justice Thurgood Marshall posthumously made his files available to the public, which included the draft opinions.

155. Arizona v. California, 373 U.S. 546, 600–01 (1963).

156. *See, e.g.*, In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 753 P.2d 76 (Wyo. 1988) (Big Horn I); New Mexico ex rel Martinez v. Lewis, 861 P.2d 235, 246 (N.M. Ct. App. 1993).

those crops can be grown economically."[157] This is a tall order and such a determination "can be easily misused," especially for tribes like the Navajo who do not have the greatest agricultural lands in northern Arizona or easy access to millions of dollars to build necessary reservoirs and related irrigation projects to make crops profitable.[158] Considering the massive sums of taxpayer dollars the United States spent on extremely questionable irrigation projects for non-Indians over the years, this requirement could certainly be seen as a double standard.[159] The difficulties inherent in a cost-benefit analysis for tribes is one thing; however, had Justice O'Connor not recused herself, the PIA standard would have become an even greater barrier to Indians seeking to win their reserved water rights.

Wyoming's argument against the Shoshone and Northern Arapaho Indians, who reside on the Wind River Reservation, advanced the position that the PIA standard should be abandoned for three reasons: (1) it gives tribes the chance to win excessive water rights, (2) those rights can in turn be problematic for existing users, and (3) the standard is rife with subjectivity because it is too difficult to prove what land is actually irrigable.[160] According to her draft opinion, made available to the public by the late Justice Thurgood Marshall, Justice O'Connor agreed with the second argument that "reserved water rights must entail sensitivity to the impact on state and private appropriators of scarce water under state law."[161] Although her opinion retained the PIA standard, the decision would have injected a pragmatic or "sensitivity" analysis into the doctrine, thus easing the blow on existing users.[162] Furthermore, courts would be required to assess the "reasonable likelihood that future irrigation projects . . . will actually be built," placing a considerably higher hurdle in front of Indians looking to claim reserved rights, with courts now in charge of deciding what appropriations might be passed by Congress in the years to come.[163]

Justice Marshall's papers also included a draft of Justice Brennan's strongly worded dissenting opinion. In his view, the sensitivity doctrine proposed by Justice O'Connor was nothing more than a "redistribution of rights at the expense of one of the most disadvantaged groups in American society."[164] According to Justice

157. Mergen & Liu, *supra* note 125, at 696.
158. *Id; see generally Martinez*, 861 P.2d at 246.
159. REISNER, *supra* note 11, at 135–36.
160. Mergen & Liu, *supra* note 125, at 732.
161. *Id.* at 706.
162. *Id.* at 738.
163. *Id.*
164. *Id.* at 742.

Brennan, a "reasonable likelihood" test is highly subjective, unworkable, and turns the PIA standard into the "*politically* irrigable acreage" standard.[165] Relying on *Winters* and *Arizona I*, Justice Brennan explained that Court precedent has continually denied an equitable balancing test concerning Indian reserved water rights.[166] Also, introducing "sensitivity" into the analysis in effect favors non-Indians over Indians, placing an "illegitimate thumb on the scales" when weighing what could be the most important decision for a tribe's future.[167] In closing, Justice Brennan laid it on the table: if the Court wants to overrule *Winters* or *Arizona I*, then say so; if not, "then let us stick to them [the decisions] even if it means the Indians get more water than we think they 'need.' "[168]

Of course, neither opinion saw the light of day because of Justice O'Connor's recusal. The existing PIA standard hung on. Barely. However, had this new rule been adopted, the Navajo's hand today might be significantly weaker. The residents and economies of Arizona, Nevada, and Southern California most likely could have garnered "sensitivity" from the new rule because of their heavy and historic dependence on the Colorado River, limiting the size of the Navajo water claim. But that is not how things played out. Instead of another setback, the legal tide changed for the Navajo.

2. The Gila Case

Stanley Pollack, assistant attorney general for the Navajo and lead counsel for the current Navajo claim against the Department of the Interior, took part in an important water rights case on behalf of the tribe in 2001, which ended up broadening the PIA standard to the advantage of tribes. The Arizona Supreme Court decision concerned a general stream adjudication for the Gila River,[169] which begins in the New Mexico Mountains and flows west through Arizona, just south of Phoenix. The Gila is south of the Navajo Reservation and the tribe was not seeking water rights to the river. Instead, it participated because of the key question that the court was asked to decide: How should Indian reserved water rights be quantified in Arizona?[170]

The court began by reinforcing the key rules from the *Winters*

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165. *Id.* at 745 (emphasis added).

166. *Id.* at 747.

167. *Id.* at 751.

168. *Id.* at 760.

169. In re Gen. Adjudication of all Rights to Use water in the Gila River Sys. & Source, 35 P.3d 68 (Ariz. 2001) (en banc).

170. *Id.* at 72.

decision, reasoning that "the government, in establishing Indian or other federal reservations, impliedly reserves enough water to fulfill the purpose of each reservation."[171] Indian reserved water rights usually trump other water rights in a prior appropriation system, the doctrine used for surface water in Arizona, because tribal water rights date back to the year of the reservation's creation (in the Navajo's case, 1868) and are therefore first in time, first in right.[172] Also, for Indians, priority is not determined by use[173] because the government reserved sufficient water to "fulfill the purpose of each reservation," now and into the future.[174] Further, the court reiterated its agreement with the *Winters* and *Arizona I* decisions, that reservations were created to provide Indians with a lasting home and a "livable" environment.[175]

The court then took a step beyond prior Supreme Court decisions. It declined to hold that the PIA standard, first created in *Arizona I,* should serve as the exclusive method for quantifying Indian reserved water rights.[176] The court reasoned that it is patently unfair to limit Indians' use of water to agriculture.[177] After all, other twenty-first-century water users are not forced to use water exactly as their ancestors did in the nineteenth century,[178] so "[n]othing should prevent tribes from diversifying their economies if they so choose."[179] The PIA standard punished those tribes "who fail to show either the engineering or economic feasibility of proposed irrigation projects,"[180] which could especially harm the Navajo considering the changing topography, broad distances, and arid characteristics of their lands in Northern Arizona. The court concluded that the inequity caused by the PIA standard "is unacceptable and inconsistent with the idea of a permanent homeland."[181] As discussed earlier, the 1868 Treaty stipulated that the Navajo Reservation is to serve as the tribe's "permanent home."[182]

The "power to change," outlined in *Winters*,[183] is no power at all if tribes are limited to an agrarian economy—especially in northern

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171. *Id.*
172. *Id.* at 71.
173. *Id.* at 72.
174. *Id.*
175. *Id.* at 74 (quoting Arizona v. California, 373 U.S. 546, 599 (1963)).
176. *Id.* at 79.
177. *Id.* at 76.
178. *Id.*
179. *Id.*
180. *Id.* at 78.
181. *Id.*
182. Navajo Treaty, *supra* note 13, at art. 13.
183. Winters v. United States, 207 U.S. 564, 577 (1908).

Arizona— and unable to innovate or modernize with the times. The PIA standard is inflexible, so the court created a new rule for how to quantify water rights that considers a tribe's history; its culture; the reservation's natural resources, topography, geography, and groundwater supplies; its economic base; the reservation's past water use; and a forecast of the tribe's future population.[184] In conclusion, the court reasoned that as long as the tribe's proposed uses for the water are "reasonably feasible" and "economically sound," its reserved rights should be measured accordingly.[185]

Although this decision came from the Arizona Supreme Court and is not binding precedent on other states or in federal court, it still marked a major departure from the traditional PIA standard. By significantly broadening how reserved water rights can be measured, tribes that historically or currently do not have fertile agricultural lands, or the funds to put the water to use, are not necessarily punished when reserved rights are being measured.

3. San Juan River Settlement

The Colorado is not the only river that flows through Navajo lands. The San Juan River flows from the east, straddling the Navajo Reservation in northern New Mexico, before it feeds into the Colorado via Lake Powell. The State of New Mexico filed the San Juan Adjudication in 1975, yet after twenty years, the adjudication languished, failing to quantify Navajo rights to the San Juan River.[186] Since the Navajo arguably held one of the most senior rights on the river, which could affect every other right in the basin, the "800 pound Gorilla" lumbered on.[187]

Fed up with the slow adjudication process, around 1996 the tribe shifted gears to a strategy of settlement, realizing that even if they successfully won every drop of the San Juan through a court decree, those rights would be "paper" rights and of little use for drinking or economic development purposes because they would not include the necessary funds to develop or transport the water.[188] Still, before the tribe entered negotiations, it was imperative that non-Indians drop the position that the Navajo waived all of their *Winters* claims to the San

184. In re Gen. Adjudication of all Rights to Use water in the Gila River Sys. & Source, 35 P.3d 68, 79–81 (Ariz. 2001) (en banc).

185. *Id.* at 81.

186. E-mail interview with Stanley Pollack, Assistant Attorney General for Navajo Nation, Sept. 3, 2010 (on file with the author).

187. *Id.*

188. *Id.*

Juan pursuant to the Navajo Indian Irrigation Project (NIIP),[189] approved by Congress in 1962.[190] In the end, considering the ineffectiveness of the stream adjudication, both New Mexico and the Navajo considered settlement discussions, with an eye on "wet" water rights and not theoretical claims, the most attractive route.[191] The Navajo could garner a fair share of the San Juan, along with the much-needed funding to transport the water to their lands, while New Mexico could clear the cloud of uncertainty hanging over the river, and avoid a costly court case that "may have the effect of unraveling compact allocations upon which western water development has been based."[192]

On April 19, 2005, while Arizona settlement negotiations were in their early stages, the Navajo reached an initial agreement with New Mexico over water rights in the San Juan River Basin.[193] The agreement included a large number of water rights and considerable funds to build related water supply projects.[194] In exchange, the Navajo agreed to forgo future claims to the river that could adversely impact the New Mexico economy and existing users.[195] However, before the deal could be finalized, Congress first had to give the settlement its stamp of approval. Legislative approval is a recommended course of action for reserved water rights settlements because of the government's trust responsibilities, its authority over interstate compacts, and its power to appropriate large sums of money to carry out complex agreements.[196]

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189. *Id.*; Stanley M. Pollack, Address at New Mexico Water Resources Institute: Integrated Water Resources Management in the San Juan Basin: The Navajo Perspective, 3 (Sept. 1996) (on file with the author).

190. Act of June 13, 1962, Pub. L. No. 87–4834 (codified at 43 U.S.C. 620-6200). Congress ostensibly approved NIIP to award the Navajo a considerable share of the San Juan River. Still, NIIP practically and legally did not solve Navajo reserved rights to either the San Juan or the Colorado. For a detailed discussion of NIIP and its shortcomings for the Navajo, including its notorious funding issues and unfinished nature, see CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN, 226–231 (1992). For a detailed discussion on why NIIP did not quantify the Navajo's *Winters* rights to the San Juan, see Judith E. Jacobsen, *The Navajo Indian Irrigation Project and Quantification of Navajo Winters Rights*, 32 Nat. Res. J. 825 (1992).

191. E-mail interview with Stanley Pollack, *supra* note 186.

192. *Id.*; Stanley M. Pollack, Address at New Mexico Water Resources Institute: Integrated Water Resources Management in the San Juan Basin: The Navajo Perspective, 3 (Sept. 1996) (on file with the author).

193. Executive Summary of the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement, New Mexico Office of the State Engineer (April 19, 2005), *available at* http://www.ose.state.nm.us/water-info/NavajoSettlement/NavajoExecutiveSummary.pdf.

194. *Id.*

195. *Id.*

196. PETER W. SLY, RESERVED WATER RIGHTS SETTLEMENT MANUAL 161–66

Joe Shirley Jr., former president of the Navajo Nation, urged lawmakers to approve the settlement, noting that the alternative for the tribe was to pursue a reserved water rights claim in court, which could expose New Mexico to "horrific liabilities even if the Navajo Nation were to obtain only modest water rights."[197] Congress approved the settlement in March, 2009.[198] The final deal handed water rights to the Navajo totaling approximately 600,000 af per year and included over $800 million in federal funds to build a pipeline that will send San Juan water to Gallup in western New Mexico, greatly increasing drinking water supplies for the eastern portion of the reservation.[199] Importantly, the settlement only dealt with Navajo rights to the San Juan in New Mexico (an Upper Basin state, pursuant to the Compact), not Navajo rights to the Colorado in Arizona.[200]

Though Congress and the president ratified the deal, increased drinking water is still not a reality for the New Mexico side of the reservation. Thus far, President Obama included $10 million in his 2010 budget to complete the necessary engineering analysis for the Navajo-Gallup pipeline project.[201] It remains to be seen whether additional appropriations will be included in future budgets.

C. Navajo Claim and Settlement Discussions

On March 14, 2003, the Navajo Nation filed a lawsuit against the U.S. Department of the Interior to force the government to quantify its reserved water rights to the Colorado River in Arizona. According to David Getches, the Navajo lawsuit is a "shot across the bow of the non-Indian water users in the Colorado River Basin" and is a "significant claim that has to be reckoned with."[202] For Pollack,

> [t]he premise of the case is that every decision the Secretary [of the Interior] makes respecting the management of the river assumes the nonexistence of a Navajo right. Each time the Secretary takes an action with respect to the management of the Colorado River without evaluating the impact on the tribe's unquantified water rights," the federal government "is more or less

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(1988).

197. *Water Jackpot*, *supra* note 5, at 6.

198. Staci Matlock, *Congress Approves Massive Public Lands Bill*, SANTA FE NEW MEXICAN, March 25, 2009, at 1, *available at* http://www.santafenewmexican.com/Local%20News/Congress-approves-massive-public-lands-bill.

199. *Id.*

200. *Id.*

201. Phone interview with Stanley Pollack, Assistant Attorney General for Navajo Nation (Mar. 8, 2010).

202. *Sleeping Giant*, *supra* note 3, at 1.

> institutionalizing the reliance on unquantified Navajo water by all of the other water users.[203]

In particular, the complaint alleges that, for example, continued CAP allocations, Arizona water banking, and past National Environmental Policy Act ("NEPA") compliance all failed to consider Navajo claims to Lower Basin Colorado River waters.[204] Thus, according to the claim, the federal government is violating its trust duties owed to the Navajo living on the western side of the reservation, above Lake Mead.[205]

After filing the lawsuit in 2003, the negotiating parties stayed the proceedings to work on a settlement. As of this writing, the settlement talks are still underway, and, according to Pollack, the discussions are increasingly complex.[206] But for the Navajo, the cards seem to be in their favor. First, they have the lawsuit, backed up by the *Winters*, *Arizona I*, and *Gila* decisions as leverage. Based on the reserved rights doctrine, which dates Navajo rights to the river at 1868, an enormous settlement—at least in terms of paper rights—is possible, one that could easily upend the Law of the River. This gives existing users a strong incentive to seek an agreement with the Navajo. It is a safer route for them.

Second, the New Mexico settlement also provides leverage for the Navajo. Congress recently approved legislation awarding the tribe 600,000 af and funds to transport the water. This leaves Arizona with possibly fewer options, considering the Navajo can argue that any settlement in Arizona must at least be in the ballpark of the New Mexico deal, although the circumstances are admittedly quite different. As discussed earlier, and pursuant to *Arizona I*, Navajo water rights would come out of Arizona's allotment of Colorado River water—that likely means CAP users, such as Phoenix-area residents and farmers, who hold junior priority rights on the river.

The goal of the settlement for the Navajo is to deliver adequate drinking water to the western half of the reservation and provide necessary supplies to sustain their "permanent homeland," including water for commercial purposes.[207] There are three principal reasons why

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203. *Navajo Sue U.S. to Protect Colorado River Rights*, U. OF ARIZ. C. OF AGRIC. & LIFE SCI. WATER RES. CTR., March–April 2003, *available at* http://cals.arizona.edu/azwater/awr/marapr03/feature2.html.

204. Navajo Compl. *supra* note 1, at 2.

205. *Id.* at 3.

206. Phone Interview with Stanley Pollack, *supra* note 201.

207. *Water Jackpot*, *supra* note 5, at 11–12; Phone interview with Stanley Pollack, *supra* note 201.

the settlement approach, compared to a traditional *Winters* claim, is preferable for tribes, and the Navajo in particular.

First, general stream adjudications that can determine Indian reserved water rights (like the Gila and San Juan adjudications discussed earlier), which occur in state courts pursuant to the McCarran Amendment, often take decades.[208] For the Navajo, where drinking water is in short supply, this route is too little too late. Plus, river adjudications are very expensive, due to the time involved.[209]

Second, a court decision may only deliver "paper" rights, or no reserved rights at all. It is a risky approach, considering once rights are quantified, that is it. The Navajo are very aware of the 1988 *Big Horn I* decision, where the Wyoming Supreme Court granted tribes 500,000 af of reserved water rights.[210] For perspective, this is 200,000 af more than Nevada's entire share out of the Colorado River Compact. The problem, however, is that the tribes had no way to put the paper rights to use after the decree.[211] Two decades have now elapsed since that decision, but the "victory" in court has yet to produce the economic benefits that the reservation had hoped for, thwarting the "power to change" rationale for reserved water rights, first envisioned in the *Winters* decision.[212] Court decrees may award tribes large water rights, but those decisions do not come with the millions of dollars needed to put the water to use. [213] On the other hand, settlements can deliver tangible assets to tribes that they otherwise cannot achieve through litigation, like funds to build transport systems in the San Juan River settlement.[214]

The final reason why settlement is arguably a better option for tribes is because of precedent. Congress has approved over a dozen settlements in the past two decades, including the Navajo's agreement with New Mexico regarding the San Juan.[215] In particular, Arizona is on the front lines trying to work out deals with tribes, where CAP water is used to "lubricate settlement discussions."[216] In fact, a settlement

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208. 43 U.S.C. § 666 (1970); *see* In re Gen. Adjudication of all Rights to Use water in the Gila River Sys. & Source, 35 P.3d 68, 79–81 (Ariz. 2001) (en banc); *see also* SAX ET AL, *supra* note 55, at 992–93.

209. *See* SAX ET AL, *supra* note 55, at 992–93.

210. In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 753 P.2d 76, 76 (Wyo. 1988).

211. SAX ET AL, *supra* note 55, at 993.

212. *Id.* at 992–93; Winters v. United States, 207 U.S. 564, 577 (1908).

213. SAX ET AL, *supra* note 55, at 993.

214. *Id.*

215. *Id.* at 995.

216. *Id.* at n. 6.

awarded just under 200,000 af of CAP water to Arizona tribes in 2004.[217] These are all good signs for the Navajo, showing the willingness of states to negotiate and reach deals.

D. Remaining Hurdles for the Navajo

Settlements are not free from danger, however. Many Indian settlements, though "final," are contingent on implementation factors that are far from certain for the parties that sign on the dotted line; the most glaring example is funding limitations.[218] Congressional budgets shift course rapidly. For example, during the Clinton years when Bruce Babbitt headed Interior, the administration made a conscious effort to include a separate line item in the budget solely for Indian water settlements.[219] The idea was to incentivize settlements and limit the siphoning of funds from other Indian accounts.[220] However, the funds never materialized in the budget at the levels originally sought.[221]

Moreover, there is a clash of opinion among administrations and federal agencies in Washington regarding the appropriate level of funding for Indian water settlements. Some believe settlement costs should equal the government's legal liability if a *Winters* claim were litigated, and no more, while others take a broader view of the government's trust duties toward tribes, favoring a water settlement that actually helps tribes succeed in the future, even if it is costly.[222]

For the Navajo, any settlement with Lower Basin interests for a share of the Colorado must include funds to help transport the water. In terms of geography, water must be pumped many miles, and in the Navajo's case, uphill as well.[223] However, the federal government is currently running a budget deficit of $1.3 trillion.[224] Thus, there is a

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217. Arizona Water Settlements Act, Pub. L. No. 108-451, § 104(a), (2004). The Gila River Indian Community received 102,000 af; the Tohono O'odham Nation received 28,200 af; and 67,300 af went to Arizona Indian Tribes.

218. Daniel McCool, *Indian Water Settlements: Negotiating Tribal Claims to Water*, 107 WATER RES. UPDATE: UNIV. COUNCIL ON WATER RES. 28, 29 (Spring 1997), *available at* http://www.ucowr.org/updates/107/index.html. Examples of Indian settlements that were not "settled" after the actual settlement, include: the San Luis Rey, Fort McDowell, Fort Peck, Yavapai-Prescott, the Southern Arizona Water Rights Settlement Act of 1982 (Tohono O'odham), Colorado Ute Settlement of 1988, Uintah and Ouray Reservation, and the Jicarilla Apache.

219. *Id.* at 29.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Sleeping Giant, supra* note 3, at 2.

224. *The Budget and Economic Outlook: An Update*, CONG. BUDGET OFFICE (Aug.

possibility that even if a successful settlement emerges from the talks, funding limitations could delay important provisions down the road. Further, large water projects, such as a pipeline, might run "headlong into environmental laws," such as NEPA and the Endangered Species Act.[225]

Another problem for the Navajo is that its entire legal strategy is built around the possibility of a large *Winters* claim to the Colorado River in Arizona. But litigation is never a sure thing. According to a former solicitor of the Department of Interior, the validity of a tribe's water rights claim, in terms of PIA, is the starting point for settlement discussions.[226] The goal is to find parameters for talks that include realistic volumes of water, taking into account the geography of the reservation and the risks to existing users and other tribes, as well as funding possibilities.[227] For example, the circumstances for the Navajo in Arizona are a lot different than they were in New Mexico.

Since no two settlements are the same, it is also tough to pinpoint what Interior's trust duties entail when it comes to tribal water rights, as every settlement has different parties, histories, locations, and waters at stake.[228] One can only imagine the complexities involved in the current Navajo settlement discussions, particularly for Interior, which has a trust responsibility to the Navajo, but is also charged by Congress to manage the river and comply with environmental laws.[229] These competing demands can and often do clash.[230]

Still, when weighing settlement negotiations versus a lawsuit, the

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2010), http://www.cbo.gov/doc.cfm?index=11705.

225. McCool, *supra* note 218, at 30.

226. Phone interview with John Leshy, Harry D. Sunderland Distinguished Professor of Real Property Law at the Univ. of California, Hastings C. of Law (Sept. 9, 2010). Mr. Leshy served as solicitor of the Department of the Interior throughout the Clinton Administration (notes on file with author).

227. *Id.*

228. *Id.*

229. Navajo Compl., *supra* note 1, at 13. For a detailed discussion of Interior's competing and often clashing duties when representing tribes, *see* Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest Representing Native American Tribes*, 37 GA. L. REV. 1307 (2003).

230. However, President Obama issued an executive order in 2009, re-affirming President Clinton's Executive Order 13175 of 2000, which charges departments and agencies "with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes." Presidential Memorandum (Nov. 5, 2009), *available at* http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president.

risks associated with litigation appear to outweigh the former. A settlement holds the possibility of wet water for a tribe, and by extension, more control over the direction it chooses to take in the future.[231] Water settlements, therefore, represent a "second treaty-making era."[232] The Navajo's 1868 treaty and subsequent executive orders concerned land but failed to address water. If the reservation is going to serve as the tribe's "permanent homeland," as stipulated in the treaty, it needs water as well as borders.[233]

IV. CONCLUSION: A LIVABLE RESERVATION

Indians have a right to control their own destiny. It follows then, that they have a right to sufficient water supplies to ensure that their lands are capable of serving as livable, permanent homes—both today and into the future.

From Mexico's Colorado River Delta and climate change, to drought conditions and endangered species, significant problems loom for future managers of the river in the Lower Basin states of California, Nevada, and Arizona. But perhaps the biggest source of uncertainty for policymakers—an uncertainty that exists entirely because of their own decisions—are the Navajo reserved water rights to the mainstream of the Colorado River in northern Arizona. For clarity's sake, but more importantly, for justice's sake, these rights need to be quantified fairly and as quickly as possible. It is the way forward.

231. McCool, *supra* note 218, at 31.

232. *Id.*

233. *Id.*